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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1631**

In re the Custody of: S. K. S.
Christian Schut, petitioner,
Respondent,

vs.

Cynthia Schut,
Appellant.

**Filed July 22, 2019
Affirmed
Worke, Judge**

Washington County District Court
File No. 82-FA-14-5994

Christian Schut, 64287 Darmstadt, Germany (pro se respondent)

Valerie Arnold, Micaela Wattenbarger, Arnold, Rodman & Kretchmer, PA, Bloomington,
Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Jesson, Judge; and Cochran,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

In this custody dispute, appellant-mother argues that the district court: (1) made
clearly erroneous findings of fact; (2) applied the incorrect statutory presumption regarding

legal custody; (3) should have granted mother's motion for a new trial; and (4) should have granted mother's motion to change venue. We affirm.

FACTS

While the parties were married and living in Germany, they had one joint child, S.K.S., born in October 2010. Appellant-mother Cynthia Schut had a child from a prior relationship (sister) who resided with the parties.

In March 2014, mother and respondent-father Christian Schut found S.K.S. crying and her genitals were red and swollen. Mother alleged that father sexually abused S.K.S. Father asserted that S.K.S. had a urinary tract infection (UTI). German child-protective services investigated and concluded that abuse could not be proven or ruled out with certainty.

Later that year, mother came to Minnesota with the children. Father attempted to visit, but mother prevented father from seeing the children based upon her prior allegation of sexual abuse. Local authorities closed their investigations into the sexual-abuse allegation after concluding that maltreatment did not occur.

In December 2014, father filed a petition seeking temporary sole legal custody of S.K.S. and an order requiring coordination with parallel proceedings initiated by father in Germany. Father also filed a Hague petition for return of S.K.S. to Germany. The district court denied father's Hague petition, and father appealed. This court affirmed the denial of father's Hague petition, but held that the district court erred in determining that the Uniform Child Custody Jurisdiction and Enforcement Act did not apply to custody disputes between domestic states and foreign countries, and remanded the jurisdictional issues for

further proceedings in the district court. See *In re the Custody of S.K.S.*, No. A15-1489 (Minn. App. May 9, 2016), *review denied* (Minn. July 19, 2016).

Mother filed a counterpetition for custody in May 2016. On November 27, 2017, following a court trial, the district court awarded mother sole physical custody and the parties joint legal custody of S.K.S. The district court also awarded father parenting time in either Germany or Minnesota during school breaks and on alternating weekends in Minnesota during the school year.

Both parties moved for amended findings and a new trial. Mother also moved for a new trial on the basis of newly discovered evidence, and for a change of venue. The district court denied all motions. This appeal followed.

D E C I S I O N

Findings of fact

Mother argues that several of the district court's findings are not supported by the record. This court will "set aside a district court's findings of fact only if clearly erroneous, giving deference to the district court's opportunity to evaluate witness credibility." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). "Findings of fact are clearly erroneous where an appellate court is left with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted). "When determining whether findings are clearly erroneous, the 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).

When reviewing whether the record on appeal supports a district court's findings, an appellate court need not recite all of the evidence in the record which supports each challenged finding. See *Wilson v. Moline*, 47 N.W.2d 865, 870 (Minn. 1951). In denying mother's motion for amended findings, the district court reviewed all of the contested findings and concluded that they were either adequately supported by the record, or that mother's proposed amendments were improper in a motion for amended findings.

Domestic abuse

The district court made two separate findings that no domestic abuse occurred. In its analysis of the fourth best-interests factor, Minn. Stat. § 518.17, subd. 1(a)(4) (2018), the district court found:

The [c]ourt makes no finding of domestic abuse or sexual misconduct. Albeit, [m]other contends that there are numerous instances of abuse both physical and sexual, the [c]ourt does not find that these contentions support a finding of domestic abuse under this factor. Father also contends that [m]other abused him; and similarly, the [c]ourt does not find that these contentions support a finding of domestic abuse under this factor.

The district court also made a separate finding, distinct from its best-interests analysis, wherein it noted, "the [c]ourt makes these specific findings with emphasis: (b) [t]he [c]ourt finds that no sexual impropriety has occurred."

In denying mother's motion to amend the finding that domestic abuse did not occur, the district court¹ held that the district court "weighed conflicting evidence and judged the

¹ The trial judge retired prior to the motions for amended findings, which were heard by another judge of the district court.

credibility of the witnesses in making this [f]inding. This [c]ourt finds that [it] is not clearly erroneous.”

Domestic abuse includes the following acts when committed against family or household members: “(1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic threats . . . [or] criminal sexual conduct.” Minn. Stat. § 518B.01, subd. 2(a) (2018).

Mother alleged 11 incidents of physical abuse. Mother provided evidence from other individuals, including sister, who allegedly observed incidents of physical abuse. But father testified that he never physically abused mother or the children. Father testified in more detail regarding three of mother’s allegations, claiming that he was twice the victim.

The evidence of physical abuse mainly consisted of the conflicting testimony provided by father and mother. Upon this record, the district court, as trier of fact, had to base its findings upon credibility determinations of the witnesses’ conflicting testimony. “[A]ppellate courts defer to trial court credibility determinations.” *Vangness*, 607 N.W.2d at 472. The district court did not find either party’s testimony regarding the existence of domestic abuse credible. Therefore, the finding that father did not commit domestic abuse in the form of physical harm is not clearly erroneous.

Mother relies on the unpublished decision *In re Custody of A.J.O.* for the proposition that “mutual acts of domestic abuse do not support a finding of no abuse for purposes of a custody determination.” No. A15-0353, 2015 WL 8548953, at *4 (Minn. App. Dec. 14, 2015). As an unpublished opinion, *A.J.O.* lacks precedential authority. See Minn. Stat. § 480A.08, subd. 3(c) (2018). Furthermore, *A.J.O.* is distinguishable. In *A.J.O.*, the father

never specifically denied physically abusing the mother, and the district court made the clearly erroneous finding that the mother received an order for protection days after the father initiated custody proceedings, which was not true. *Id.* This court noted that the district court found that the mother “was also an aggressor, indicating that there was indeed abuse.” *Id.* Here, father specifically denied the allegations, and the district court did not find that either party was the aggressor; instead, holding that neither party committed domestic abuse.

Mother also argues that the district court clearly erred in finding that domestic abuse did not occur because she testified that father sexually abused both S.K.S. and sister. Sister was interviewed by child-protective services in both Germany and Minnesota regarding the incident. She testified to mother’s rendition of the incident during her in camera interview.

Further, the allegation regarding S.K.S. was investigated in both Germany and Minnesota. No investigation found that maltreatment occurred. Based upon the Lake County investigation concluding that maltreatment did not occur, and the German investigation concluding that endangerment was unlikely, but could not be disproven, the district court’s finding that sexual abuse did not occur is supported by the record. Therefore, the finding that domestic abuse did not occur is not clearly erroneous.

Bad faith

Mother argues that the district court clearly erred in finding that neither party argued in bad faith. Mother bases her argument, in part, on her allegation that father committed domestic abuse, and also upon the district court’s findings that father had been “very

inconsistent with his stated income,” and that his statements regarding his monthly income were not “realistic or believable.” While the district court did not find father’s income evidence credible, this is not tantamount to a finding of bad faith.

Whether a party acts in good faith is a credibility question, and we defer to the district court’s credibility determinations. *See Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985) (stating that whether a party acted in good faith is, essentially, a credibility determination); *see also Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to district court credibility determinations); *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 241 (Minn. App. 2003) (stating that “[q]uestions of . . . whether a party acts in good faith are questions on which appellate courts defer to the district court”), *review denied* (Minn. Nov. 25, 2003). Here, while the district court did not accept father’s averments regarding his monthly income, the district court did not find that his representations rose to the level of bad faith. Therefore, this finding is not clearly erroneous.

Good will/S.K.S.’s special medical and mental-health needs

Mother asserts that the district court’s finding that there is good will between the parties regarding S.K.S. is clearly erroneous. Mother argues that father does not have good will because he disagrees with mother’s insistence on therapy, has not cooperated in enrolling S.K.S. in a Minnesota kindergarten, and downplays the importance of her UTIs. As an initial matter, father testified, in response to the question: “it’s your belief that moving forward, once there’s a final order from the court, that that could help facilitate or make your conversations with [mother] about [S.K.S.] easier; is that correct?” with the

answer: “Yes, I hope she wants that, too”; which directly supports the district court’s finding of good will.

Mother argues that the district court’s findings regarding S.K.S.’s special medical and mental-health needs are clearly erroneous. Mother asserts that the record demonstrates that father does not support S.K.S.’s need for therapy, and that he does not consider her UTIs to be “a big thing.” In context, regarding the UTIs, father testified: “I know there was an infection that was there. But it’s not a big thing.” Earlier, father testified that “[s]he is a healthy child. I just saw her six year checkup was fine. So it’s fine.” Furthermore, the district court specifically found that “[t]here is no argument over the need for medical attention regarding the UTI’s.”

While father argued there was no need for therapy, the district court found that “the therapeutic needs of [S.K.S.] continue.” The district court also found that “[b]ecause . . . [m]other is the facilitator of those medical appointments, this factor resolves favoring [m]other having sole physical custody.” Therefore, despite mother’s contentions regarding father’s underlying beliefs, the district court’s findings on the good will between the parties and S.K.S.’s special medical and mental-health needs are not clearly erroneous.

S.K.S.’s cultural needs/allowing parenting time in Germany

Mother argues that the district court’s finding that S.K.S.’s cultural needs establish “a need for the child to visit and be a part of the German culture with her [f]ather” is clearly erroneous. Mother bases her argument on a portion of father’s testimony wherein he stated: “No, there is not much difference” in response to the question: “Is there anything different . . . about her experiencing her culture if she was in Germany as opposed to just

experiencing her culture through [food, language, and reading]?” However, mother again ignores the surrounding context in which this testimony was provided.

Father testified that “it is very important to know where you come from . . . your history . . . your surroundings. It’s the same here in the U.S. I mean, both sides of the world the children should know. It would enrich their life later on to know.” Father also answered the question: “there are certain parts of that heritage that [S.K.S.] could only experience if she was in Germany, correct?” by stating: “Yes, of course. You need to see your family, also. Her grandmother and family from my father’s side.” The district court’s finding that S.K.S. needs to visit and be a part of German culture is supported by the record, and therefore is not clearly erroneous.

Mother also argues that the district court erred by not imposing conditions to prevent the abduction of S.K.S. when awarding father parenting time in Germany. It is unclear on what basis mother assigns this alleged error. Mother relies on *Tischendorf v. Tischendorf*, 321 N.W.2d 405 (Minn. 1982), for the proposition that an appellate court has the authority to review the conditions imposed in an order for parenting time. *Tischendorf* is distinguishable. In that case, the mother moved the district court for an order to modify the father’s visitation rights out of fear that the child would be physically or emotionally harmed by allowing the father to exercise parenting time in Germany pursuant to Minn. Stat. § 518.175, subd. 5 (1980). *Tischendorf*, 321 N.W.2d at 409-10.

Here, mother essentially argues that the district court’s finding granting father expansive parenting time in Germany without imposing conditions to prevent abduction was clearly erroneous. As pointed out by the district court in its order denying mother’s

motion for amended findings, mother's proposed amendment relied primarily on evidence that was not admitted at trial. "When considering a motion for amended findings, a district court must apply the evidence as submitted during the trial of the case and may neither go outside the record, nor consider new evidence." *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Nov. 14, 2006). On this basis, the finding that father is entitled to visitation in Germany is not clearly erroneous.

Interrelated/conclusory findings

Finally, mother argues that the district court erred by interconnecting its analysis of the best-interests factors, and that one of its best-interests analyses was impermissibly conclusory. To the extent that mother's challenge requires us to interpret the best-interests statute, our review is de novo. *See In re Welfare of Children of R.W.*, 678 N.W.2d 49, 54 (Minn. 2004). First, the relevant statute specifically provides that analysis of the best-interests factors may be interrelated. *See* Minn. Stat. § 518.17, subd. 1(b)(1) (2018) ("The [district] court may not use one factor to the exclusion of all others, and the [district] court shall consider that the factors may be interrelated."). Therefore, there is no basis to mother's assertion that the district court erred by interrelating factors in its best-interests analysis.

Mother argues that the district court's finding addressing the tenth best-interests factor, the benefit to the child in maximizing parenting time with both parents, is impermissibly conclusory. *See id.*, subd. 1(a)(10) (2018). The district court found:

[M]aximizing parenting time with both parents should be done where possible. The [c]ourt acknowledges that there is a detriment to having one parent only have contact with [S.K.S.]

while the other does not. Accordingly, parenting time or custody arrangements should not be construed to prevent either party from being in contact with [S.K.S.]. This factor favors an expansive parenting time schedule for . . . [f]ather.

The statutory scheme provides that “[t]he [district] court shall 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) (2018). Also, as stated above, the statute acknowledges that consideration of the best-interests factors may be interrelated.

While the finding at issue is not particularly detailed, the preceding findings recite that “[b]oth parents have expressed an ongoing willingness to participate in providing [S.K.S.’s] care”; S.K.S.’s “home is . . . now in Minnesota. Changing the home, school, and community would likely be detrimental to [S.K.S.’s] well-being and development,” but “facilitating a total end to [S.K.S.’s] relationship with Germany and her [f]ather would be detrimental to [S.K.S.’s] well-being and development as well.” Therefore, the district court’s finding that maximizing parenting time with both parents is in S.K.S.’s best interest is not clearly erroneous.

Rebuttable statutory presumption in favor of joint legal custody

Mother argues that the district court’s domestic-abuse finding was clearly erroneous, and thus the district court applied the incorrect statutory presumption regarding joint legal custody. “Interpretation of a statute involves a question of law, which is subject to de novo review.” *R.W.*, 678 N.W.2d at 54.

The [district] court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody

is in the best interests of the child. However, the court shall use a rebuttable presumption that joint legal custody or joint physical custody is not in the best interests of the child if domestic abuse . . . has occurred between the parents.

Minn. Stat. § 518.17, subd. 1(b)(9) (2018). As set forth above, because the district court did not clearly err in finding that neither party committed domestic abuse, the district court did not err by not invoking the rebuttable presumption against joint legal custody.

Because none of the findings identified by mother are clearly erroneous, there is no basis to her argument that the decree awarding the parties joint legal custody and awarding father expansive parenting time in Germany should be reversed.

Motion for a new trial

Mother argues that the district court should have granted her motion for a new trial pursuant to Minn. R. Civ. P. 59.01(d), which allows a district court to grant a new trial on the basis of newly discovered material evidence. This court reviews a district court's decision to deny a new trial for an abuse of discretion. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018).

Mother bases her argument for a new trial on an alleged instance of sexual abuse that occurred shortly after trial concluded. But father received a letter informing him that investigators “did not find that sexual abuse happened.” This conclusion was reached after investigators interviewed S.K.S. and reviewed medical and individual therapy records. Therefore, the district court did not abuse its discretion in denying mother's motion for a new trial based on this new allegation.

Motion to change venue

Mother argues that the district court erred in denying her motion to change venue. “We review a district court’s denial of a motion for a change of venue in a family law case under an abuse-of-discretion standard.” *Toughill v. Toughill*, 609 N.W.2d 634, 642 (Minn. App. 2000).

Mother argues that Lake County would be a more convenient venue for her, as she no longer resides in Washington County, and father resides in Germany. The district court noted that, despite mother residing in Lake County since December 2014, she never sought to change venue during the three-year period in which this matter was pending in district court. In opposing the motion, father argued that mother may be forum shopping, as she proposed that if the change-of-venue motion were granted, the posttrial motions should be heard in the new venue.

While Lake County would seemingly be a more convenient venue for all parties, the district court did not abuse its discretion in denying mother’s motion to change venue on the basis that the Washington County District Court has heard the entirety of this case from inception through posttrial motions.

Father’s failure to appeal

In his responsive brief father makes several requests of this court. Because father neither filed a separate appeal, nor filed a notice of related appeal, none of these issues are presently before this court. See Minn. R. Civ. App. P. 106 (addressing notices of related appeal); *Arndt v. Am. Fam. Ins. Co.*, 394 N.W.2d 791, 794 (Minn. 1986) (noting that a

respondent is barred from raising questions on appeal unless the respondent has filed a notice of related appeal).

Affirmed.