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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1379**

In re the Marriage of:
Varvara Viktorovna Tishchenko, petitioner,
Respondent,

vs.

Joseph Monroe Cmiel,
Appellant.

**Filed July 6, 2021
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge**

Ramsey County District Court
File No. 62-FA-18-1139

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Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and
Reyes, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges the judgment dissolving his marriage, arguing that (1) the district court abused its discretion by denying his request for joint physical custody and equal parenting time, (2) the district court erred in determining his income for child-support purposes, (3) the district court abused its discretion by denying his request to alternate tax-

dependency exemptions, (4) the record does not support the district court's determination that judgments against him are his nonmarital debt, and (5) the district court abused its discretion in allocating the parties' personal property. Because the record does not support the allocation of marital personal property, we reverse in part and remand. But we affirm in all other respects.

FACTS

Appellant-father Joseph Cmiel and respondent-mother Varvara Tishchenko were married in 2007 and have one child, born in 2009. On March 19, 2018, mother moved out of the marital home, taking the child with her. Shortly thereafter, she obtained an ex parte order for protection (OFP) excluding father from the home. Mother and the child returned to the home, and father moved in with his parents nearby. On May 10, mother petitioned to dissolve the marriage. While the matter was pending, the parties agreed to a temporary arrangement with mother retaining custody of the child (staying in the marital home) and father receiving parenting time one weekday evening, one weekday overnight, and every other weekend. They also agreed to dismiss the OFP.

Before trial, the parties agreed to joint legal custody and to the disposition of certain real estate. But they disputed numerous other issues, including physical custody and parenting time, their incomes for purposes of child support, and the status and allocation of their marital property. After a two-day trial, the district court awarded mother sole physical custody, continued the existing parenting-time schedule, ordered father to pay child support, and divided the parties' property. Both parties moved for amended findings;

the court denied father's motion but granted mother's motion, modifying its decision regarding the parties' marital personal property. Father appeals.

DECISION

I. The district court did not abuse its discretion by denying father's request for joint physical custody and equal parenting time.

A district court has broad discretion in determining custody and parenting time. *Goldman v. Greenwood*, 748 N.W.2d 279, 282 (Minn. 2008) (custody); *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017) (parenting time). We review factual findings for clear error, giving particular deference to the court's assessment of credibility. *Thornton v. Bosquez*, 933 N.W.2d 781, 790 (Minn. 2019). We will reverse only if we are "left with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted).

When deciding which custody and parenting-time arrangement will serve a child's best interests, the district court must "consider and evaluate all relevant factors," including each parent's history of providing care for the child, each parent's willingness and ability to provide ongoing care, the effect of the proposed arrangements on the child's well-being and relationships, and whether domestic abuse has occurred within the family. Minn. Stat. § 518.17, subd. 1(a) (2020) (listing 12 factors). The court is required to make "detailed findings" explaining "how each factor led to its conclusions and to the determination of custody and parenting time." *Id.*, subd. 1(b)(1) (2020). When domestic abuse has occurred between the parents, the court "shall use a rebuttable presumption" that joint custody is not in the child's best interests. *Id.*, subd. 1(b)(9) (2020).

The district court made extensive and thoughtful findings weighing the statutory best-interests factors. It found that six of them are neutral, one favors father's proposal, and five favor mother's request for sole physical custody and continuation of the existing parenting-time schedule. In particular, the court noted that mother has been the child's almost exclusive caretaker throughout his life, and her central role in fostering the child's emotional and academic development and connection to the child's Russian cultural heritage. The court acknowledged that father has spent more time with the child in the last two years. But because mother continues to be the child's primary caretaker, the court reasoned that equalizing the parties' custody and parenting time would disrupt that arrangement and negatively affect the child. And the court found that father committed domestic abuse against mother, which warrants continuation of a no-contact order.

Father asserts several challenges to the district court's custody and parenting-time decisions. First, he argues that three of the court's factual findings—that the child needs to know extended family on both sides; the child has a stable, attached relationship with both parents and sets of grandparents; and the parties agreed to joint legal custody—favor his request for joint physical custody and equal parenting time. This argument is unavailing. Father does not dispute the numerous findings detailing mother's past and ongoing role as the child's primary caretaker and the importance of maintaining continuity for the child. But he urges us to ignore those findings and focus instead on the three findings stated above—in short, to reweigh the statutory factors. It is not our role to do so. *Vangsness v. Vangsness*, 607 N.W.2d 468, 475 (Minn. App. 2000) (rejecting argument that mother “should have been given more credit” in balancing of best-interests factors).

Second, father argues that the district court erred by weighing his history of domestic abuse in mother's favor, pointing to the court's finding that "[m]any of the reasons for the court to consider domestic abuse in this case have been addressed." We agree with father that this finding means that his past abuse of mother does not, in and of itself, preclude joint physical custody. Indeed, the district court determined that the statutory presumption against joint custody was overcome. But the court carefully contextualized that history, finding that a no-contact order between the parties is still warranted. And the district court explained that it awarded mother sole physical custody not because of the history of domestic abuse but because mother has demonstrated her commitment to providing for the child's "routine daily care and control." We discern no abuse of discretion in the district court's consideration of the domestic-abuse factor.

Father next asserts that the district court erred by faulting him for not taking a more active role in caring for the child. He emphasizes the financial support he has provided over the years and asserts that he has been more involved in the child's life since an injury in 2017 reduced his work schedule. We are satisfied that the district court appropriately accounted for father's work. It rejected as "disingenuous" father's contention that mother somehow forced him to work as much as he did. And while the court recognized father's increased involvement with the child in recent years, it found that mother continues to be the child's primary caregiver. This finding is borne out by the parties' testimony, the

child's reading log from December 2017 to March 2018,¹ and evidence that father's work schedule continues to be demanding and irregular.

Finally, father characterizes the district court's parenting-time decision as the difference between Monday evenings and Monday overnights, suggesting that the court abused its discretion by denying him the minimal additional time with the child. But he proposed a 5-2-2-5 schedule, which called for frequent switching of the child's overnight placement and significantly more time away from mother than the child is accustomed to. On this record, the district court did not clearly err by finding that disruption is not in the child's best interests.

II. The district court did not clearly err in determining father's income for child-support purposes.

Gross income for child-support purposes includes self-employment income. Minn. Stat. § 518A.29(a) (2020). Self-employment income is "gross receipts minus costs of goods sold minus ordinary and necessary expenses." Minn. Stat. § 518A.30 (2020). The party seeking to deduct an expense "has the burden of proving, if challenged, that the expense is ordinary and necessary." *Id.* And the court may exclude any expenses that it determines to be "inappropriate or excessive." *Id.* We will not disturb a district court's finding on net self-employment income unless it is clearly erroneous. *Schisel v. Schisel*, 762 N.W.2d 265, 272 (Minn. App. 2009).

¹ Father contends it was improper for the district court to rely on the reading log because it includes late March 2018, after the parties separated and he did not have access to the child. We discern no error, since 14 of the 19 entries predate the parties' separation.

Father argues that the district court clearly erred by finding that his self-employment yields him gross monthly income of \$9,688. He contends he earns gross income of \$3,619, which is the monthly average of the net profit he reported on his 2017 and 2018 income tax returns. Mother disputed the claim that he received only \$42,520 in net profit in 2018 and requested documentation of the \$85,304 he claimed in “car and truck” expenses during discovery. In response, father provided his American Express credit-card statements, which mother presented at trial as evidence that he substantiated only \$22,567 in expenses. Since he reported gross receipts of \$168,269, she asserted that his gross monthly income is actually \$9,688. The district court accepted mother’s analysis.

Father contends and testified that this calculation is “selective” because he produced other credit-card and bank statements that mother did not include in her court submissions. Mother testified that father did not disclose the other financial statements as business expenses. The record supports mother’s testimony. At trial, father presented only two charts that he and his attorney prepared; he submitted no underlying documentation of his claimed business expenses. And the only other credit-card and bank statements in the record do not readily identify any business expenses. For example, one bank statement includes a \$4,000 payment to husband’s attorney. Nor did father present the statements as evidence of expenses he incurred in the course of his self-employment. Indeed, in both his testimony and proposed findings, he characterized them as evidence of marital debt.

In short, the record reflects that, if father actually incurred additional business expenses beyond those reflected in his American Express statements, he did not meet his burden of providing the necessary documentation of those expenses to the district court.

Accordingly, the district court did not clearly err by finding that father earns \$9,688 in gross monthly income for child-support purposes.

III. The district court did not abuse its discretion by denying father’s request to alternate tax-dependency exemptions.

Under the Internal Revenue Code, a minor child’s primary custodian is entitled to claim the child as a dependent for income tax purposes. 26 U.S.C. § 152(c)(1), (e)(1) (2018). But a district court may order otherwise. Minn. Stat. § 518A.38, subd. 7(a) (2020). We review the allocation of a tax-dependency exemption for an abuse of discretion. *Hansen v. Todnem*, 891 N.W.2d 51, 63 (Minn. App. 2017), *aff’d on other grounds*, 908 N.W.2d 592 (Minn. 2018).

Father argues that the district court abused its discretion by denying his request to be awarded the child’s tax dependency exemption for 2019 and 2020 and alternating years thereafter. He contends this allocation is appropriate because mother claimed the exemption in 2017 and 2018. We are not persuaded. A court’s allocation decision is forward-looking, based on (1) “the financial resources of each party,” (2) whether not awarding one party the exemption “negatively impacts” that party’s “ability to provide for the needs of the child,” and (3) whether “only one party or both parties would receive a tax benefit from the dependency exemption.” Minn. Stat. § 518A.38, subd. 7(b) (2020).² The

² A district court also must consider a fourth factor regarding the impact of the exemption on the parties’ ability to claim a health-care-related tax credit. Minn. Stat. § 518A.38, subd. 7(b)(4). Nothing in father’s arguments or the record suggests this factor is relevant here.

district court's findings show that these criteria do not favor deviating from the default rule that awards the exemption to mother.

First, the record supports the court's finding that father earns gross monthly income of \$9,688 (plus fluctuating rental income that the district court did not include in setting child support), and father does not dispute that mother earns gross monthly income of \$8,022. Since father's financial resources exceed mother's, this factor weighs against awarding him the exemption. Second, the evidence of father's substantial income indicates that he has sufficient resources to pay child support even without the dependency exemption. Third, the record suggests that mother benefits from claiming the dependency exemption, but it does not clearly show that father would benefit from doing so. To the contrary, he complains that the district court did not consider "the negative impact of not granting [his] request given that [he] as self-employed parent is always required to pay small business tax" but identifies no evidence that the dependency exemption would alleviate this burden. Having failed to present such evidence, he "cannot complain" about the court's failure to rule in his favor. *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003).

IV. The record supports the district court's determination that judgments against father are his nonmarital debt.

Whether property is marital or nonmarital is a question of law that we review de novo. *Kerr v. Kerr*, 770 N.W.2d 567, 569 (Minn. App. 2009). But we will not disturb the district court's underlying factual findings unless they are clearly erroneous. *Id.* We

view evidence in the light most favorable to the district court's findings and defer to its credibility determinations. *Prahl v. Prahl*, 627 N.W.2d 698, 702 (Minn. App. 2001).

Father asserts that the \$79,117 in outstanding judgments against him are marital debt because they were entered during the marriage. We disagree. It is undisputed that the judgments were entered between March 2008 and July 2010, after the parties' September 2007 marriage. But the parties offered conflicting evidence as to when father incurred the underlying credit-card debt. Father testified that he incurred the debt early in the marriage to support the household, purchase a car and jewelry for mother, and fund multiple vacations. Mother testified that father incurred the debt before the marriage, explaining that she learned shortly after they married that he had significant credit-card debt and that they did not make any major credit-card purchases early in their marriage.

The district court found that father's testimony on this issue was not credible and observed that "[t]here is little indication that the creditors are even attempting to collect the bills." We see no clear error by the district court in determining that the judgments are father's nonmarital debt.

V. The district court abused its discretion in allocating the parties' marital personal property.

Upon dissolution of marriage, the district court "shall make a just and equitable division" of the parties' marital property. Minn. Stat. § 518.58, subd 1 (2020). The court may award the household goods and furniture to either party, "whether or not acquired during the marriage." *Id.* The district court has broad discretion in dividing the parties'

marital property. *Reed v. Albaaj*, 723 N.W.2d 50, 57-58 (Minn. App. 2006). We will not disturb the division unless it is against logic and the facts on the record. *Id.* at 58.

Father asserts that the district court abused its discretion by initially awarding him certain personal property and later amending its findings to award each party the items in his or her possession. This argument has some merit.

At trial, both parties requested items of personal property from the marital home. Mother proposed that she would keep “everything that is currently located inside” the home while father “could take everything that is in the garage, all that property. . . . I would keep the jewelry and he would keep all of the tools. And if there are any tools left in the garage he’s more than welcome to take it including the lawnmower.” Father requested various items listed in Exhibit 82, including furniture and jewelry from inside the home and tools and a lawnmower from the garage.

Initially, the district court found that father has furnishings in a Forest Lake rental property and awarded them to him. The court also found that “the parties agreed Father would be awarded the tools and property described in Exhibit 82 and Mother would be awarded the jewelry located in the [marital home],” and approved the division. Because Exhibit 82 includes more than the personal property located in the garage, mother moved to amend the findings and corresponding conclusion of law, proposing the following:

[Mother] testified that she would agree that she keep all jewelry and household goods in her possession, and that [father] keep all vehicles and tools in his possession, but she did not agree to [father] being awarded the items on Exhibit 82. Since there has been no detailed inventory and/or appraisal of personal property items, it is reasonable that each party retain those items currently in his or her respective possession.

The district court granted mother's motion.

Father argues that this amendment was improper in two respects. He first contends it is unfair to deny him any of the furniture in the marital home because there is no furniture in the Forest Lake property. But mother testified that they left furniture when they moved out of the Forest Lake property, and father presented no evidence refuting this testimony. Nor did father ask the court to amend that aspect of its decision. Father's challenge to the furniture allocation is unavailing.

Father's second challenge is more persuasive. He contends the record does not support the district court's decision to allocate all of the personal property in the marital home to mother, including the tools and other items in the garage of the marital home. We agree. Father requested the items in the garage, and mother testified that he could have them. The district court's contrary finding lacks support in the record. Accordingly, we reverse that aspect of the district court's decision and remand for the district court to award father the tools and other items in the garage of the marital home, as the parties agreed.

Affirmed in part, reversed in part, and remanded.