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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0456**

In re the Marriage of:

Tracy Marie Desmond, petitioner,
Appellant,

vs.

Michael Frederick Desmond,
Respondent.

**Filed January 6, 2025
Affirmed and remanded; motions granted
Halbrooks, Judge***

Carver County District Court
File No. 10-FA-22-251

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Considered and decided by Johnson, Presiding Judge; Schmidt, Judge; and
Halbrooks, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

In this child-custody dispute, appellant argues that the district court (1) abused its discretion in awarding the parties joint physical and joint legal custody of their minor children; (2) made findings of fact that are unsupported by the record and internally inconsistent; (3) should not have conditioned the children's ability to travel internationally on the consent of the nontraveling parent; and (4) erred in ordering the parties to mediate future parenting disputes in light of the finding that domestic abuse had occurred. We affirm, but remand to the district court to clarify the mediation requirement for any potential future parenting disputes. Both parties' motions to strike are granted.

FACTS

Appellant-mother Tracy Marie Desmond and respondent-father Michael Fredrick Desmond married in July 2017 and share three minor children: M.B.D., born August 2017; M.A.D.,¹ born June 2018; and V.M.D., born January 2019. The parties separated in May 2022, at which time mother obtained an ex parte order for protection (OFP) against father. Father subsequently agreed to the issuance of an OFP without a specific finding that domestic abuse had occurred.

It is undisputed that father's conduct during the time period leading up to and immediately following the parties' separation and the issuance of the OFP was extremely volatile and included acts of domestic abuse. The parties' relationship deteriorated rapidly

¹ M.A.D. is mother's biological nephew; he was adopted by the parties during the marriage.

in fall 2021, and mother ultimately expressed her desire for a divorce. In text messages exchanged between the parties during the relevant time period, father frequently accused mother of cheating on him, used derogatory language, implied that he would end his own life if she did not take him back, and stated that he would not agree to a divorce unless mother agreed to certain conditions first.

The disagreement culminated on May 8, 2022, when father became upset after questioning mother about who she was text messaging with, and mother responded that it did not matter because the parties were getting divorced. Father yelled at mother, threatened to chop her fingers off, kicked the dishwasher, threw a chair, and berated her after she called her parents to come to the house. The children witnessed father's behavior, became very emotional, and questioned how mother would be able to cook them dinner without fingers. Mother's father came to the house and ultimately persuaded father to leave for the night.

The parties separated, and mother obtained an OFP shortly after this incident. Mother formally petitioned for dissolution of marriage a few months later. The OFP prohibited father from contacting mother except as it related to the health and welfare of the children, the care of the dog, or emergencies involving the children. The OFP further restricted such communications to text and email, established guidelines for parenting-time exchanges and school functions, and prohibited father from going to mother's house with the exception of going to collect his belongings with a police escort.

Father subsequently violated the OFP on several occasions, which resulted in two criminal convictions. The violations included father contacting mother about a topic

outside the scope of permissible communications established in the OFP and an incident in which father went to mother's house at night, threw rocks at a window, and attempted to enter the house through the laundry room. Mother reported these incidents to law enforcement, and father was arrested on both June 11 and 25, 2022. During his interactions with law enforcement, father was defiant and verbally aggressive. Father subsequently complied with all the requirements of his criminal cases and did not receive any probation violations.

Due to father's behavior and the restrictions established in the OFP, the parties used a supervisor for parenting-time exchanges and a parenting consultant to resolve disagreements between the parties concerning the children during the pendency of the marriage dissolution. According to two supervisors and the director of the supervision center, exchanges frequently occurred later than scheduled because father did not have the children ready on time. And during exchanges father would occasionally look out the windows and at mother, despite being instructed not to do so. The director suspended and ultimately terminated services in July 2023 based on nonpayment and father's continued insistence that it was not his fault that the rules were not being followed.

Between March and August 2023, the parenting consultant issued nine decisions in response to disputes between the parties.² The disputes concerned vacation, the use of disparaging language by the parties about the other parent, and father's requests for

² The parenting consultant indicated that five of the decisions were extensive written decisions, two were shorter decisions made over email, and two were "more clarifications" than separate decisions.

unsupervised and increased parenting time. Despite the continued hostility between the parties, the parenting consultant granted father's request for unsupervised parenting time and gradually increased his parenting time.

As part of the dissolution proceedings, mother requested that she be granted sole physical and sole legal custody of the children. She argued that she should be granted sole custody based on father's inappropriate and abusive behavior and the parties' inability to cooperate and reach mutual decisions regarding the children. The district court ordered a custody evaluation, and the evaluator ultimately recommended that mother be awarded sole physical and sole legal custody of the children. However, the custody evaluator felt that "it was a close call" and opined that he "was not entirely comfortable with either decision" between sole custody to mother or joint custody to the parties. Specifically, the custody evaluator expressed concern that if mother were awarded sole custody, "the risk is that [father's] relationship with the children could be more limited than would be ideal for them."

Father acknowledged that his behavior in the summer of 2022 had been inappropriate. At the dissolution trial in August 2023, he testified that he "regret[s] it every single day" and wishes he "could go back and do it all over again because this has been a disaster." He indicated that he had a wake-up call after his second arrest for an OFP violation and started therapy and began to take medication for his mental health shortly thereafter. Father expressed his belief that he was a different person than he was in the summer of 2022 and capable of better regulating his emotions.

Father's therapist testified that father had worked diligently to address the concerns identified in therapy. Father's therapist also testified that he did not have any concerns over father's ability to parent the children or achieve the goals he set in therapy. In addition to therapy, father completed a 20-week domestic-violence program. The leader of that program testified that father was an active participant, took the program seriously, and appeared to get a lot out of participation in the program. Father also completed a program geared toward resolving parental conflict and was attempting to sign up for additional parental coaching classes at the time of trial.

Following trial, the district court awarded the parties joint physical and joint legal custody of the children. The district court found that domestic abuse had occurred and therefore the presumption against joint physical and joint legal custody established in Minn. Stat. § 518.17, subd. 1(b)(9) (2022) applied, but determined that the presumption had been rebutted. Specifically, the district court explained that it was "swayed by what seems to be a sea [of] change in [father's] behavior since the summer of 2022." Father was awarded five out of every fourteen overnights, and mother was designated as the children's primary residence. Relevant to this appeal, the district court ordered the parties to engage in mediation prior to bringing any future disputes before the district court and that prior written approval from the other parent must be obtained before the children can travel internationally. Mother appeals.³

³ Following the conclusion of briefing for this appeal, both parties moved to strike portions of the other party's brief. Father's brief asserts that, following the district court's custody decision, mother took the children to California without his permission and ultimately had to be ordered by the district court to return the children to Minnesota. His brief also

DECISION

I. The district court did not abuse its discretion in awarding the parties joint physical and joint legal custody of the children.

We review custody determinations for an abuse of discretion. *Thornton v. Bosquez*, 933 N.W.2d 781, 793-94 (Minn. 2019). “A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or delivering a decision that is against logic and the facts on record.” *Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022) (quotation omitted). We review the district court’s findings of fact for clear error, “giving deference to the district court’s opportunity to evaluate witness credibility,” and we will reverse only when “left with the definite and firm conviction that a mistake has been made.” *Thornton*, 933 N.W.2d at 790 (quotation omitted). This court will not reweigh the evidence on appeal. *Bayer v. Bayer*, 979 N.W.2d 507, 513 (Minn. App. 2022).

The best interests of the children are the district court’s “guiding principle” and “paramount commitment” when making child-custody decisions. *Thornton*, 933 N.W.2d

generally states that recent parenting-time exchanges have gone well. Mother responded to father’s allegation that she impermissibly took the children to California in her reply brief and referenced a dispute over whether the children should attend church that arose after the district court’s decision as evidence that the parties continue to have issues coparenting. The appellate record is limited to “documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any.” Minn. R. Civ. App. P. 110.01. Generally, “[a]n appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.” *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). The above-referenced incidents occurred after the district court issued its decision now on appeal and were not taken into consideration by the district court when making its decision. The incidents are therefore outside the record. Accordingly, we grant both parties’ motions to strike.

at 789 (quotations omitted). “In considering the child[ren]’s best interests, a district court must consider and evaluate all relevant factors, including 12 factors set forth by statute.” *Id.* (quotation omitted). If either or both parties request joint custody, the district court applies a rebuttable presumption that joint custody is in the best interests of the child. Minn. Stat. § 518.17, subd. 1(b)(9). However, “if domestic abuse, as defined in section 518B.01, has occurred between the parents,” then the district court applies a rebuttable presumption that joint legal or joint physical custody is not in the best interests of the child. *Id.*

Here, the district court applied the presumption against joint physical and joint legal custody because domestic abuse had occurred, but determined that father rebutted the presumption.⁴ As part of its analysis, the district court made detailed findings on each of the statutory best-interests factors. Mother acknowledges that the district court correctly determined that the presumption against joint custody applied and did a full best-interests analysis, but argues that the record does not support the district court’s decision to award the parties joint physical and joint legal custody.

“In determining whether the presumption [against joint custody] is rebutted, the court shall consider the nature and context of the domestic abuse and the implications of

⁴ Minnesota Statutes section 518.17, subdivision 1(b)(9), “does not assign a burden of production or persuasion to rebut the presumption to any particular party.” *Thornton*, 933 N.W.2d at 793. The district court’s order does not explicitly state that the district court placed the burden to rebut the presumption on father, and we therefore construe the district court’s statement that father rebutted the presumption as an indication that in this particular case the district court relied on the evidence submitted by father in determining that the presumption had been rebutted.

the domestic abuse for parenting and for the child’s safety, well-being, and developmental needs.” *Id.* The district court recounted the history of misconduct by father, made an explicit determination that domestic abuse occurred, and went as far as to characterize father’s behavior in the summer of 2022 as “deplorable.” But the district court further found that father “ha[d] been earnest in his efforts to change and rehabilitate” and had undergone a “sea [of] change in [his] behavior since the summer of 2022.” The district court noted that, although there was testimony that father continued to be hostile toward mother, that hostility was “not in the sense of an Order of Protection—more akin to a generalized manner.” The district court also considered the implications of the domestic abuse on the children, acknowledging that it impacted the children, but ultimately found that “the prior domestic abuse as it relates to parenting and the safety of the children are minimal; particularly in light of [father’s] ability and willingness to participate in therapy, domestic violence programming, parent education and coaching.”

The record supports these determinations. As previously noted, father’s therapist testified that he did not have any concerns over father’s ability to parent the children. Father’s former therapist also believed that father’s conduct during the summer of 2022 was in response to the trauma and stress he was experiencing at the time, and that such behavior is unlikely to continue in the future based on the skills father has learned to regulate his emotions.⁵ The custody evaluator did not express any concerns over father’s

⁵ Father changed therapists in late 2022 because he anticipated that his parenting time would be increasing and he wanted a therapist with child expertise. His former therapist did not testify, but did submit a treatment plan and summary as part of the custody evaluation.

ability to parent the children in light of the history of domestic abuse, but acknowledged that the decision between sole custody to mother and joint custody was a close one. Further, the district court noted the children's lack of fear and clear excitement when interacting with father, which suggests that, although the domestic abuse clearly impacted them in some capacity, they are not fearful of father as a result.

Mother argues that the district court abused its discretion in awarding joint legal and physical custody because the parties have been unable to coparent due to the high level of hostility between them. The district court expressly recognized this hostility, and explained:

The issue before the Court is a determination as to the harm that will result to the children if [mother] is awarded sole custody and the possibility [mother] will negatively minimize [father's] role in the children's lives as [mother] maintains her hostility toward [father], versus the harm of potential conflict and continued animosity between the parties with an award of joint custody between the parties.

These competing harms were also the reason the custody evaluator "was not entirely comfortable with either decision" between sole custody to mother or joint custody to the parties. The district court ultimately determined that "in this case, it is not in the best interests of the children to give one parent all the 'power' to make decisions about the children." The district court was thus faced with a close decision between granting joint custody to parents with a hostile relationship or sole custody to a parent who may use sole custody to limit the other parent's relationship with the children, and determined that the children's best interests would be better served by ensuring that the children continued to have a relationship with both parents.

On this record, we discern no abuse of discretion by the district court. The district court properly applied the presumption against joint custody and thoroughly analyzed the relevant factors in determining whether the presumption had been rebutted. Mother's argument that the district court erred in its analysis essentially asks this court to reweigh the evidence, which we cannot do on appeal. *Bayer*, 979 N.W.2d at 513. Additionally, the district court's determination that the presumption was rebutted was based in large part on its findings that father had undergone a "sea [of] change in his behavior" and "been earnest in his efforts to change and rehabilitate." We defer to the district court's credibility determinations. *Eisenchenk v. Eisenchenk*, 668 N.W.2d 235, 241 (Minn. App. 2003), *rev. denied* (Minn. Nov. 25, 2003).

II. The record supports the district court's factual findings.

Mother also challenges various findings made by the district court. A district court's findings of fact are not set aside unless they are clearly erroneous. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). The clear-error standard of review "is a review of the record to confirm that evidence exists to support the decision." *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 222 (Minn. 2021); *see Ewald v. Nedrebo*, 999 N.W.2d 546, 552 (Minn. App. 2023) (applying *Kenney* in a family-law appeal), *rev. denied* (Minn. Feb. 28, 2024). "When the record reasonably supports the findings at issue on appeal, it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary." *Kenney*, 963 N.W.2d at 223 (quotation omitted). When applying the clear-error standard of review, appellate courts (1) view the evidence in the light most favorable to the findings; (2) do not reweigh the evidence; (3) do not find their own facts;

and (4) do not reconcile conflicting evidence. *Id.* at 221-22. Thus, this court need not engage in extended discussion of the evidence that supports the district court's decision, but rather must only fairly consider all the evidence and determine that the evidence reasonably supports the decision. *Id.* at 222.

Mother contends that the record does not support the district court's assessment that father is a changed man. Although there is clearly evidence of ongoing hostility on the part of father, the district court determined that it was more akin to generalized hostility, rather than his previous conduct that amounted to domestic abuse. The record supports that determination. Father, his therapist, and the leader of his men's group all testified that father had worked to address his behavior and gained a lot of skills and insight through therapy and the programming he participated in, and the district court had the authority to credit that testimony. As previously noted, we defer to the district court's credibility determinations. *Eisenchenk*, 668 N.W.2d at 241.

Mother also argues that the district court made inconsistent findings relating to whether father's domestic abuse impacted the children and improperly considered the children's custody preferences despite their young ages. *See* Minn. Stat. § 518.17, subd. 1(3) (noting that the district court may consider a child's reasonable custody preference "if the court deems the child to be of sufficient . . . age" to express a preference). However, the district court explicitly stated that the children were too young to express a custody preference and that their preferences were not factored into the custody determination. Notably, none of the children expressed a specific preference about custody; the district court merely observed that it was clear the children had some desire to

spend time with their father. The district court did consider the children's desire to see their father and clear excitement at spending time with him when evaluating the impact that the domestic abuse had on the children and considering parenting time. Moreover, the district court's findings regarding how the domestic abuse impacted the children are not inconsistent. The district court determined that the domestic abuse impacted the children when it occurred, but did not present a danger or hinder father's ability to parent the children in the future.

Finally, mother argues that the district court erred in determining that father is willing to follow court orders and in determining that father had not violated the rules of the supervised parenting-time exchanges. As father notes, it does not appear that there was an explicit determination that father is willing to follow court orders, although it could be read as implied in the decision to grant joint legal custody. Regardless, the record demonstrates that father has been largely compliant with court orders since his second arrest for an OFP violation. Father complied with all the requirements of his criminal cases, did not receive any probation violations, and was cooperative when completing the court-ordered custody evaluation. The custody evaluations and collateral information suggest that he was forthcoming and honest in his responses. And as has been stated, the district court credited father's assertions that he had changed in the time between his arrests and trial.

There is conflicting evidence regarding whether father followed the rules of the parenting-time exchanges. Mother and the exchange supervisors testified that exchanges frequently occurred later than scheduled because father did not have the children ready on

time,⁶ and that father would look out the windows at mother or the children, despite being instructed not to do so. Father denied most of these allegations, but acknowledged that at least one exchange had occurred approximately five minutes later than scheduled. The assertions that father glared at mother during exchanges go to father's continued hostility toward mother, which was explicitly recognized by the district court in making its custody decision. And although it appears that father technically violated the exchange rules by not having the children ready on time for at least one exchange, we are not persuaded that this undermines the district court's overall custody determination.

III. The district court did not abuse its discretion in conditioning the children's international travel on the consent of the non-traveling parent.

Mother challenges the district court's requirement that each parent obtain the consent of the non-traveling parent for the children to travel internationally. She cites to a nonprecedential opinion of this court holding that it was not an abuse of discretion for the district court to condition international travel on the written approval of the non-traveling parent, but argues that, under the facts here, it is an abuse of discretion to require mother to obtain father's permission for the children to travel internationally because it "allows for ongoing abuse and control to occur." *See Tori v. Tori*, No. A03-1124, 2004 WL 1444944, at *4 (Minn. App. June 29, 2004), *rev. denied* (Minn. Sept. 21, 2004). We disagree.

⁶ Specifically, most of the parenting-time exchanges were scheduled to occur at 7:00 p.m., and the supervisors expected father to have the children ready to leave his house at 7:00 p.m. According to the supervisors, father would not start to put the children's shoes on and get them ready to leave until 7:00 p.m., which delayed the exchanges. The longest delay alleged—which father disputed with video evidence—was 14 minutes.

As a practical matter, decisions such as whether a child should get a passport fall within the ambit of legal custody, and, here, the parties were awarded joint legal custody. Because the district court specified that “approval by the non-traveling parent shall not be unreasonably withheld,” mother has a recourse to challenge father’s refusal to give consent if she feels it is being unreasonably withheld. On this record, we discern no abuse of discretion by the district court.

IV. We remand to the district court to clarify the mediation requirement.

Finally, mother argues that the district court erred in ordering the parties to engage in mediation for any future legal-custody disputes before bringing the disputes to court. She argues that the mediation requirement is impermissible in light of the determination that domestic abuse occurred. Pursuant to Minn. Stat. § 518.619, subd. 2 (2022):

If the court determines that there is probable cause that one of the parties, or a child of a party, has been physically or sexually abused by the other party, the court shall not require or refer the parties to mediation or any other process that requires parties to meet and confer without counsel, if any, present.

Similarly, Minn. R. Gen. P. 310.01(b) provides:

The court shall not require parties to participate in any facilitative process where one of the parties claims to be the victim of domestic abuse by the other party or where 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 where 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 district court made an explicit finding that domestic abuse had occurred in the relationship, and the district court's summary description of the abuse includes "physical violence toward" and "extreme intimidation of" mother by father. Accordingly, the restrictions established in Minn. Stat. § 51.619, subd. 2, and rule 310.01(b) apply in this case.

As father notes, the district court's condition that the parties engage in mediation before bringing future disputes to the district court does not necessarily require that the parties engage in face-to-face meetings without counsel present. The parties have previously engaged in mediation with counsel present, and the parenting consultant used in the six months preceding trial indicated that she made some of her decisions through email and solicited information for other decisions through separate communications. However, the district court's order does not expressly require that the restrictions established in Minn. Stat. § 518.619, subd. 2, or rule 310.01(b) be observed. Because the parties are required to engage in mediation before bringing future disputes to court, we believe it is necessary to remand this issue to the district court to clarify the parameters of the mediation requirement for the parties and potential mediators in light of Minn. Stat. § 518.619, subd. 2, and rule 310.01(b). Accordingly, we affirm the decision of the district court, but remand on the narrow issue of clarifying the mediation requirement in light of the applicable statute and rule.

Affirmed and remanded; motions to strike granted.