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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1223**

Paul Thomas Hesse, petitioner,
Appellant,

vs.

Toni Renee Wingrove,
Respondent.

**Filed April 23, 2018
Affirmed
Jesson, Judge**

Mille Lacs County District Court
File No. 48-FA-16-2092

John T. Burns, Jr., Burns Law Office, Burnsville, Minnesota (for appellant)

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Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

JESSON, Judge

After years of conflict, respondent Toni Renee Wingrove left appellant Paul Thomas Hesse and moved to Pennsylvania with the couple's child. Both parents sought custody of the child and the case went to trial. Father appeals the district court order granting sole physical custody of the child to mother, requiring father to pay \$50 a month in child support

and for half of child's transportation costs, granting father 75 days of parenting time each year, and the court's refusal to grant a new trial. We affirm.

FACTS

Appellant Paul Thomas Hesse and respondent Toni Renee Wingrove were never married, but in a romantic relationship for multiple years before a child was born in January 2015. Their relationship was marred with conflict, including domestic abuse by father toward mother, and mother's drug use.

During the first year and a half of the child's life, the couple lived together in a home in Minnesota. Neither parent worked immediately prior to, or after, the child was born. Father's parents paid for many of the family's expenses. The family also received some public assistance and items from local charities. In October 2016, mother decided to leave the family home with the child and moved to Pennsylvania. Father did not consent to the child's move to Pennsylvania and he filed a motion for emergency relief, which was granted, and the court returned the child to father's custody. Father then filed a petition for permanent custody. The case went to trial for a custody determination in January 2017. Mother and father testified about who provided primary care for the child, mother's drug use, and domestic abuse in the relationship.

Mother testified that she was the parent who provided the majority of the child's care. For the first three months of the child's life, mother breastfed the child exclusively, and then breastfed 50% of the time for the next three months. It was mother who bathed the child and cared for him when he woke up during the night. Mother testified that she was the only parent who regularly changed the child's diaper.

Mother recounted repeated abuse by father. The abuse began after the first year of their relationship, mother said, but became most severe in spring 2016. Father would punch mother, sit on her, restrain her, corner her in the house and deflate the tires of her car to keep her from leaving. One time, mother testified that father sprayed mother with tiki oil and threatened to set her on fire. Another time, mother stated that father ran his car into mother's car, while the child was in his car, and then broke windows and cut seats of two other cars nearby, taking a phone from one of those cars. Father was later charged with felony damage to property and misdemeanor theft.

Due to this intensified abuse, mother explained that she began spending time outside the home, both voluntarily and involuntarily. She would sometimes choose to leave after fights with father, and sometimes father would lock her out of the house and refuse to let her back in. At times, mother had to sleep in her car at gas stations, local rest stops, and even in the driveway of her home, where she could see her child playing in the window of the house she was not allowed to enter.

After an incident where both father and the child's paternal grandfather were yelling at mother and caused the child to vomit, mother testified that she left the home for good. Police arrived at the scene and allowed mother to leave with the child. The two went to Pennsylvania, where the child's maternal grandmother lives. Mother continues to reside with her mother in Pennsylvania.

Mother explained her drug use to the court, stating that she was prescribed Percocet for a mouth infection in spring 2015 and found it hard to stop taking the medication. She saw a medical professional who ultimately prescribed Suboxone, to assist in weaning off

the Percocet. And mother attended Narcotics Anonymous. Mother acknowledged that she smoked marijuana twice in the 12 months prior to trial, both times when the child was away at father's parents' cabin. One of those times, the marijuana was laced with cocaine and a drug test conducted in September 2016 showed that cocaine use. A hair follicle test conducted in December 2016 showed no traces of drugs in mother's system. Mother does not believe her drug use ever impaired her ability to parent her child.

Father's testimony stood in stark contrast to mother's explanations. Father testified that mother spent extensive time out of the home starting in the summer of 2015. He entered into evidence a calendar he kept on his phone of dates she was gone—many of which mother contested. Father explained that he had to provide for all of the child's needs when mother was gone. This included getting the child up in the morning, preparing meals, and putting him to bed at night. Father stated that mother was not present at the home when the child successfully used the bathroom by himself for the first time, and that she did not come to the hospital when father took the child to the emergency room because the child had hives.

Mother spent extensive time outside the home because of her drug use, according to father. He described multiple arguments he had with mother about her drug use, and entered copies of text messages from mother's phone that appear to show discussions of how to obtain drugs. Father testified that he sometimes hid the Suboxone medication from mother and gave it to her only when she needed it, because he was worried she was selling the medication to obtain money for buying other drugs. Even though mother submitted the

December 2016 drug test, father believed mother continued to use drugs. He also testified that the signature on that drug test did not look like mother's signature.

Although father denied at trial that he abused mother, he does not contest on appeal the district court's factual finding of domestic abuse. In his testimony, father admitted to hitting mother once during the course of their relationship, but explained that he did so only in self-defense. Father discussed the regular verbal conflict in their relationship but blamed that conflict on mother's drug use. Father did admit to deflating mother's car tires on occasion.

After a two-day trial, the district court awarded the parties joint legal custody of the child, with sole physical custody awarded to mother. The court ordered father to pay \$50 in basic child support each month¹ and for half of the transportation costs of moving the child between Pennsylvania and Minnesota for parenting time. It provided father with approximately 75 days of parenting time each year.

The factual findings the district court made to support its decision demonstrate that the court credited much of mother's testimony over that of father's.² For instance, the district court determined "[t]here is nothing in the record that convinces this Court that the Respondent Mother continues to use controlled substances illegally," based on mother's testimony and her most recent drug test results. The district court also concluded that father

¹ In the court's initial order, it required father to pay \$192 per month in support. This was a clerical error that the court corrected to reflect the accurate \$50 per month amount.

² The original court order specifically stated that mother is more credible. In the amended order, this is not explicitly stated but implied since much of the court's findings of fact are based on mother's testimony, even when it was contradicted by testimony from father.

“committed acts of domestic abuse towards” mother, again based on mother’s testimony. The district court determined that abuse is “likely to have a devastating impact on parenting and [the child]’s safety, well-being, and developmental needs.”

Following the district court’s order, father filed a motion for amended findings of fact and for a new trial. Father argued for a new trial based on information from friends that mother was using drugs again and in a relationship with an individual in Pennsylvania who had an extensive criminal history. In response to father’s motions, the district court issued amended findings, and altered one case outcome, awarding legal custody solely to mother, instead of jointly to both parents.³ The district court denied father’s motion for a new trial.

Father appeals.

D E C I S I O N

I. The district court did not abuse its discretion by awarding sole physical custody of child to mother.

Father argues that the district court abused its discretion in ordering sole physical custody of the child to mother. He asserts that three of the district court’s factual findings—mother’s drug use, child’s involvement in father’s abusive acts towards mother, and the adverse effect father’s abuse of mother has on child—are not supported by the record. Father also asserts the district court improperly used its domestic abuse findings as a decisive factor in its best interest determination.

³ Father does not contest this change on appeal.

Appellate review of custody determinations is limited to whether the district court abused its discretion by improperly applying the law or by making findings unsupported by the evidence. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). A district court's findings of fact will be sustained unless they are clearly erroneous. *Id.*; *see also* Minn. R. Civ. P. 52.01 (stating that findings of fact are not set aside unless clearly erroneous).

In determining custody, a district court must make detailed findings on what is in the child's best interest. Minn. Stat. § 518.17, subd. 1(b)(1) (2016). To do so, a court must consider and evaluate all relevant factors, including twelve delineated statutory factors. Minn. Stat. § 518.17, subd. 1(a)(1)-(12) (2016). In the district court's order here, it made detailed findings for each of those twelve factors. And it supported its findings with citations to evidence in the record, including testimony and exhibits, and used its twelve-factor analysis to come to its ultimate determination on custody.

Father challenges only the facts and application of two of the twelve factors. First, he claims that mother continues to use illegal drugs and therefore challenges the court's finding under the best interest factor that requires the court to consider "any physical, mental, or chemical health issue of a parent that affects the child's safety or developmental needs." Minn. Stat. § 518.17, subd. 1(a)(5). For this factor, the district court explained:

The Respondent Mother has a history of illegally using controlled substances, including marijuana, cocaine, and suboxone. However, a drug screening test administered in December, 2016 shows there were no drugs in the Respondent Mother's system at that time. Exh. 6. The Respondent Mother also testified that she has not illegally use [sic] controlled substances since her move to Pennsylvania. . . . There is nothing in the record that convinces this Court that the

Respondent Mother continues to use controlled substances illegally.

There is evidence in the record to support the district court's determination. Mother testified that she is no longer using drugs, that she did take the December drug test, and that the results from that test show no drugs in mother's system. Father's testimony contradicts this finding, but "[w]hen evidence relevant to a factual issue consists of conflicting testimony, the district court's decision is necessarily based on a determination of witness credibility, which we accord great deference on appeal." *Alam v. Chowdhury*, 764 N.W.2d 86, 89 (Minn. App. 2009); see *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to district court credibility determinations). The district court's factual finding, based on mother's testimony that she no longer uses drugs, is not clearly erroneous.

Second, father challenges the district court finding relating to the factor that requires the district court to consider "whether domestic abuse . . . 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." Minn. Stat. § 518.17, subd. 1(a)(4). For this factor, the district court noted that it is "concerned with the implications of the Petitioner Father's domestic abuse on the Minor Child," noting that father caused the child to vomit, that the child witnessed abusive acts toward mother, and father intentionally drove his vehicle with the child inside into mother's car. It found that "incidents like these are likely to have a devastating impact on parenting and the Minor Child's safety, well-being, and

developmental needs.” Father disputes that child was in the car for the driving incident and that it was his conduct that made child vomit.

But here too, the district court’s findings are supported by the record. Mother testified that child was in father’s car when he hit mother’s car. And mother testified that father’s yelling caused child to vomit. The district court found mother’s testimony credible, in the face of contradictions from father. These findings are not clearly erroneous.

Father disputes the district court’s findings that his “situational conflict” with mother impacts child. After describing the two instances above—father driving into mother’s car with the child in his car and his yelling at mother causing the child to vomit—the district court stated “incidents like these are likely to have a devastating impact on parenting and the Minor Child’s safety, well-being, and developmental needs.” Because the above facts are supported by the record and support the court’s determination that father’s abuse of mother is likely to impact the child, this finding too is not clearly erroneous.

Father argues the court used its findings on the domestic abuse factor as the decisive factor in determining custody. But while the district court made detailed findings on this factor, it did the same for each of the twelve best-interest factors. Consideration of the domestic abuse factor was appropriate and father’s assertion that this factor was used decisively is not persuasive.

The district court did not abuse its discretion in ordering sole physical custody of the child to mother.⁴

II. The district court did not abuse its discretion by ordering father to pay \$50 in basic child support and transportation costs.

Father challenges the district court's order requiring him to pay \$50 a month in basic child support and to pay for half of the cost of transportation for the child between Pennsylvania and Minnesota. The district court has broad discretion to provide for the support of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). A district court abuses its discretion when it sets support in a manner that is against logic and the facts on record or it misapplies the law. *Id.*; *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. App. 1998) (addressing an improper application of law).

Minnesota Statutes section 518A.42, subdivision 2 (2016), provides that the minimum basic support obligation is \$50 per month for one child. This basic support obligation applies when the "obligor's income available for support . . . is equal to or less

⁴ Because mother had relocated by the time of trial to Pennsylvania and planned to live there with the child, the district court also applied relocation factors contained in Minnesota Statutes section 518.175, subdivision 3 (2016). Father argues that the district court misapplied the relocation factor that requires courts to consider "the nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the nonrelocating person, siblings, and other significant persons in the child's life," arguing the court failed to adequately consider the child's relationship with his paternal grandparents. *See* Minn. Stat. § 518.175, subd. 3(b)(1) (2016). But the court did consider this relationship. The court stated the child's "paternal grandparents reside in the State of Minnesota and saw the Minor Child regularly. The Petitioner Father's parents both testified that they often visited the Minor Child on weekend trips to and from their cabin" and "[c]onsidering the Minor Child's age and time spent in Minnesota, these facts lead this Court to the conclusion that the Minor Child had more contact with his paternal grandparents than his maternal grandparents since birth." The district court appropriately applied this relocation factor.

than the minimum support amount.” Minn. Stat. § 518.42, subd. 1(d) (2016). Since father has no current income, it is this \$50 minimum basic support obligation that the district court ordered father to pay. This complies with Minnesota law. With regard to transportation costs, which are inevitable when parents live a significant distance from each other, the district court’s decision that the parents share the cost of that transportation is reasonable.

But father argues the district court should have used its discretion to either order the support, or the transportation costs, but not both, because he has no income and no prospect of earning an income in the immediate future. We are not persuaded. Neither parent has an income, and the costs at issue are inevitable ones essential to parenting their joint child. Additionally, the district court determined that father’s unemployment “is temporary and will ultimately lead to an increase in income.” The court then calculated father’s potential income to be \$930 per month, by multiplying the minimum wage by thirty hours per week. This finding is supported by the record as father testified he is building a taxidermy business, and refutes father’s assertion that he does not have the ability to earn income in the immediate future.

The district court did not abuse its discretion by ordering father to pay \$50 per month in support, and for half of the child’s transportation costs.

III. The district court did not abuse its discretion by granting father approximately 75 days of parenting time each year.

Father argues the district court abused its discretion by granting him approximately 75 days of parenting time, less than the presumed 25 percent each parent is entitled to via

Minnesota Statutes section 518.175, subdivision 1(g) (2016). We review this parenting-time question in light of the district court’s broad discretion and will not reverse absent an abuse of discretion. *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017).

Minnesota Statutes section 518.175, subdivision 1(g), states “[i]n the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive a minimum of 25 percent of the parenting time for the child.” Here, father was granted approximately 21 percent of the parenting time.⁵ We have previously held that a district court generally must demonstrate some awareness of this presumption in its findings if properly raised by a party. *Dahl v. Dahl*, 765 N.W.2d 118, 124 (Minn. App. 2009). But when a court fails to do so, but supports its decision overwhelmingly in other ways, the failure could be harmless error that does not warrant reversal. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *see also Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985) (declining to remand the case to the district court when the district court would undoubtedly make findings that satisfy the statutory language and reach the same result).

We acknowledge that father raised the presumed 25 percent parenting time in his motion for amended findings and that the district court failed to explicitly address that presumption in its findings. But we determine that this failure, in light of the circumstances of the case—of serious domestic abuse and its likely devastating impact on the child—was, at most, harmless error. Given the district court’s careful analysis and application of

⁵ This calculation is made based on a 365-day calendar year.

appropriate custody determination factors, we conclude that the court implicitly addressed this issue. The district court stated that the domestic violence in this case meant the separate living arrangements for parents were appropriate. The court determined mother's relocation was necessary to allow mother and the child to live in a more stable environment, without fear of abuse. And while the court acknowledged the distance detrimentally impacted father's parenting time, it found under these circumstances that the separation was reasonable. And it gave father 21 percent of the parenting time, close to the 25 percent presumption. The district court's failure to explicitly address the 25 percent presumption for parenting time does not, on this record, provide grounds for reversal.

This said, we urge district courts to explicitly address this statutory presumption for 25 percent parenting time. It is only because of the unique circumstances presented here—domestic abuse, its impact on the child, the significant distance between the parents' homes, and an award of parenting time close to 25 percent—that we do not remand the case for explicit consideration of that presumption.

IV. The district court did not abuse its discretion in denying father's motion for a new trial based on new evidence.

Generally, appellate courts “defer to the trial court's broad discretion in deciding whether to grant a new trial.” *Vangness v. Vangness*, 607 N.W.2d 468, 472 (Minn. App. 2000). Father brought his motion for a new trial under Minnesota Rule of Civil Procedure 59.01(d), which allows for a new trial if there is “[m]aterial evidence newly discovered, which with reasonable diligence could not have been found and produced at the trial.” But

a court's decision to grant a new trial through this rule is entirely discretionary. *Peller v. Harris*, 464 N.W.2d 590, 593 (Minn. App. 1991).

Father submitted an affidavit which explained that he had spoken to friends who knew mother was "involved" with an individual in Pennsylvania who had an extensive criminal history, including drug-related offenses. With this affidavit, father submitted a photo printed from Facebook, showing this individual with mother and the child, and expressed his belief that mother was cohabitating with this individual. Father also noted the child has been pulling spoons from the drawers and saying "mommy's spanking stick," causing him concern. Mother submitted her own affidavit in response, stating she is not in a romantic relationship with this individual, does not live with this individual, and does not spank the child.

The district court found father's new evidence does nothing more than diminish mother's credibility at best, and thus the new evidence is insufficient to support a new trial. Father argues this is more than impeachment evidence, and asserts that it tends to show mother continues to use drugs. This argument is unpersuasive. Father makes a dramatic leap from a posted photo and information from unidentified friends, to his conclusion that mother is using drugs. The court acted fully within its discretion when it determined the evidence was insufficient to support granting a new trial. *See Peller*, 464 N.W.2d at 593 ("[A] trial court's decision on a motion for a new trial based on newly discovered evidence is a matter for the trial court's discretion.") (internal quotation omitted).

The district court made detailed findings in this case that were supported by the record. Its decisions to award sole physical custody to mother, to require father to pay

support and half of the child's transportation costs, to provide father with less than 25 percent parenting time, and to deny father's motion for a new trial, were not an abuse of discretion.

Affirmed.