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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1623**

In re the Marriage of: Mohammad Ali Danish Rizvi, petitioner,  
Appellant,

vs.

Batool Haider Rizvi,  
Respondent,  
and Gerald O. Williams,  
Intervenor.

**Filed May 4, 2010  
Affirmed; motions denied.  
Stoneburner, Judge**

Ramsey County District Court  
File Nos. 62F107000239; 62C107100079;  
62F0063000926; 62F905300123

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Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and  
Ross, Judge.

**UNPUBLISHED OPINION**

**STONEBURNER**, Judge

Appellant father challenges the district court's dissolution judgment, arguing that  
the district court abused its discretion by: (1) finding that respondent mother met her

burden of proving that he transferred marital assets without her consent and in contemplation of the dissolution of marriage; (2) awarding the parties joint legal and physical custody of their three minor children; (3) awarding maintenance in excess of respondent's reasonable needs; (4) excluding the testimony of appellant's proposed rebuttal witness; (5) ordering him to pay respondent's attorney fees; and (6) striking all but 35 pages of his 179-page memorandum in support of his posttrial motions. Because we conclude that the district court did not abuse its broad discretion in any of the matters asserted by appellant, we affirm.

## **FACTS**

The marriage of appellant Mohammad Ali Danish Rizvi (father) and respondent Batool Haider Rizvi (mother) was dissolved after an acrimonious ten-day trial that resulted in a 73-page Amended<sup>1</sup> Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree (first amended judgment).

Mother and father were born in Pakistan. Urdu is the first language of both parties, but both are fluent in English, the language in which they were educated. Father, who has lived in the United States since 1989, is a cardiologist employed by HealthPartners Medical Group and an Associate Professor of Medicine at the University of Minnesota Medical School. He met mother in Pakistan in 1996 and she moved to the United States shortly thereafter. Their marriage was arranged, according to Pakistani custom, in June 1997. Also pursuant to Pakistani custom, father has been the sole source

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<sup>1</sup> The district court originally filed what it later discovered was a draft opinion on January 2, 2009, and sua sponte filed amended document which was entered on January 5, 2009.

of support for his mother, Rashida Bano, since she was widowed in 1994, and Bano continued to live with the parties after their marriage—a circumstance that led to significant conflict between the parties and between mother and Bano. Mother and Bano accused each other of verbal and physical abuse, but each denied abusing the other.

The parties have three children: M.F.R., born in 1997, Mun.R., born in 1999, and Muk.R., born in 2004. Until the dissolution, mother was a traditional homemaker, whose priority, consistent with Pakistani culture, was her marriage and family.

Mother consulted a lawyer for undisclosed reasons in 2004. Father visited the same lawyer shortly thereafter, but the lawyer would not speak with father, explaining that he had spoken with mother. The same day or the next day, father opened a new bank account in his name alone and had his paychecks deposited into that account and the bank statements sent to a post-office box in his name. Father also began transferring large sums of money to Bano.

Police were called to the Rizvi home in January 2005 due to a reported altercation between mother and Bano. Mother left the home with the children and obtained an Order for Protection (OFP) against Bano. Father and Bano subsequently vacated the homestead so that mother and the children could return. The OFP was eventually dismissed, father and Bano returned to the homestead, and mother and father reconciled.

After the January 2005 incident, father transferred additional marital funds to Bano. At the time of the trial, father had transferred a total of \$591,670 to Bano. The funds came, in part, from a home-equity line of credit against the homestead.

In August 2006, the police were again called to the Rizvi home due to a reported altercation between mother and Bano. Both father and Bano were arrested and removed from the home. All three were charged, but the charges against father were dismissed. Mother's and Bano's charges were continued for dismissal and eventually dismissed. Mother and father separated after this incident. Father and Bano moved out of the homestead but continue to share a residence. Mother begged father to return to the family and was so persistent that father obtained a Harassment Restraining Order (HRO) in February 2007. Shortly thereafter, he petitioned for dissolution of marriage. Mother was awarded temporary sole physical custody of the children, but the children spent a significant amount of time with father pending the dissolution. The children are well adjusted and close to both parents despite the acrimony between the parents.

At trial, the testimony focused on maintenance, custody, and the nature of father's transfers of marital funds.

### **Transfer of funds**

Father claimed that money transferred to Bano was a gift suggested by mother to make amends for her behavior toward Bano and to give Bano the option to move out of the parties' home. He asserted that mother was aware of every transfer. He produced papers for the home-equity loan and 2005 gift tax returns, all signed by mother. Mother denied knowing about the transfers and denied wanting to gift marital funds to Bano. Mother said that she signed the gift tax returns and the papers for the home-equity line of credit without reading them because father asked her to, and culturally, she was expected to do everything that father told her to do. She asserted that father had placed school

tuition papers on top of the mortgage papers. She also testified that father and Bano pressured her to sign. In the first amended judgment, the district court found that father transferred all of the funds to Bano in contemplation of dissolution proceedings and without mother's consent, and, therefore, determined that the funds—totaling \$591,670—were marital assets.

### **Custody**

Licensed psychologist Mindy Mitnick, Ed.M., M.A., was appointed by the court to conduct a neutral custody evaluation. The district court ordered father to pay for the evaluation. Mitnick appointed Denise Wilder, M. Eq., L.P., to conduct psychological evaluations of each party. Neither Mitnick nor Wilder is knowledgeable about Pakistani cultural and religious values other than from reading popular literature. Wilder concluded that father has no mental-health issues but that mother's emotional volatility, as reported by father and Bano, is consistent with a diagnosis of Personality Disorder NOS. Mitnick, relying in part on the psychological evaluations, recommended that mother and father be granted joint legal custody and that father be granted sole physical custody of the children.

Mother offered the reports and testimony of three mental-health experts to counter Wilder's diagnosis and Mitnick's recommendations. Hena Siddiqui, Psy.D., performed a psychological evaluation of mother. Siddiqui opined that mother's relationship with the children, views about right and wrong, and financial dependence on father are all consistent with mother's cultural and religious values and are not evidence of mental illness. Mother's treating therapist Zehra Ansari, who has a master's degree in

psychology and is a licensed psychologist, is familiar with mother's cultural and religious values. Ansari testified that mother does not have a cognitive or social impairment required for the diagnosis of Personality Disorder NOS and diagnosed mother with Adjustment Disorder NOS. Urdu-speaking psychiatrist Onaiza Ansar, M.D., who is also Pakistani, evaluated mother. She also disagreed with Wilder's diagnosis of Personality Disorder NOS and diagnosed mother with a partner-relation problem, noting "mainly transient stressors" and a "normal reaction to [them]."

Father attempted to call a previously undisclosed witness, his niece, to testify about one episode of mother's rageful behavior. The district court disallowed the witness because the witness had not been previously disclosed, and the trial schedule did not allow mother an opportunity to conduct any discovery about this witness. The district court also concluded that the proffered testimony would be cumulative because father and Bano had both testified about the incident.

In considering the statutory factors for custody evaluations, the district court found Wilder's diagnosis of mother and Mitnick's report and recommendations not credible, and found mother's mental-health experts credible. The district court noted that Wilder and Mitnick relied extensively on father's and Bano's characterizations of mother's behavior. The district court, based in part on how well the children were adjusted to the shared-parenting schedule established during pendency of the dissolution, concluded that joint legal and joint physical custody with a detailed parenting schedule is in the children's best interest.

## **Spousal maintenance**

Mother presented evidence of before-tax monthly expenses of \$7,979, and the district court adopted this figure without adjusting for expenses that, after the district court's other decisions, mother did not actually have. The district court awarded six years of maintenance at \$8,270 per month, the amount of maintenance proposed by father's expert witness. But that proposal was also based on expenses that mother ultimately did not have.

The district court denied father's posttrial motion to reduce mother's maintenance to reflect her actual need. The district court explained that the amount awarded was reasonable given the parties' standard of living, mother's need for funds for further education, mother's need for funds for international travel, and to allow mother to acquire capital assets.

## **Attorney fees**

Over the course of the dissolution proceedings, the district court ordered father to pay approximately \$180,000 of mother's attorney fees and evaluation fees.

## **Posttrial motion**

Father moved for amended findings of fact and conclusions of law or a new trial, supported with a 179-page memorandum of law. Mother also moved for amended findings to correct numerous errors in the amended judgment. The district court issued a 29-page Second Amended Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree (second amended judgment), setting out as findings of fact the district court's reasoning and explanation of some challenged portions of the first

amended judgment, striking all but 35 pages of father’s posttrial memorandum, disregarding mother’s posttrial filings as untimely, reaffirming some portions of the first amended judgment, and, only by reference, amending and correcting some portions of the first amended judgment.<sup>2</sup> This appeal follows.

## D E C I S I O N

### I. Standard and scope of review

The parties agree that all of the issues raised by father are reviewed under an abuse-of-discretion standard. A district court abuses its discretion when it makes findings unsupported by the evidence or when it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). “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). “That the record might support findings other than those made by the [district] court does not show that the court’s findings are defective.” *Id.* at 474. In order to successfully challenge a district court’s findings of fact, “the party challenging the findings must show that despite viewing that evidence in the light most favorable to the [district] court’s findings . . . , the record still requires the definite and firm conviction

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<sup>2</sup> The resulting documents made review of this matter extremely difficult because many inconsistent statements and uncorrected references remain in the purported findings of fact and conclusions of law. We take this opportunity to remind the district court that descriptions of the evidence are not findings of fact. *See Dean v. Pelton*, 437 N.W.2d 762, 764 (Minn. App. 1989). Likewise, statements explaining the district court’s reasoning are not findings of fact, and lengthy reviews of case law are not conclusions of law. The parties and reviewing courts are better served by clear and concise findings and conclusions. Reasoning is appropriate in an incorporated memorandum of law.

that a mistake was made.” *Id.* And an appellate court defers to a district court’s credibility determinations. *Id.*

## **II. Transfer of funds**

A party to a marriage dissolution proceeding owes a fiduciary duty to the other party

for any profit or loss derived by the party, without the consent of the other, from a transaction or from any use by the party of the marital assets. If the [district] court finds that a party to a marriage, without consent of the other party, has in contemplation of commencing . . . the current dissolution . . . proceeding, transferred, encumbered, concealed, or disposed of marital assets except in the usual course of business or for the necessities of life, the [district] court shall compensate the other party by placing both parties in the same position that they would have been in had the transfer, encumbrance, concealment, or disposal not occurred.

Minn. Stat. § 518.58, subd. 1a (2008). The party claiming improper disposition of a marital asset carries the burden of proving improper disposition. *Id.*

Father argues that the district court’s findings that mother did not consent to the transfers of marital assets to Bano and that the transfers were made in contemplation of marital dissolution are clearly erroneous. We disagree.

### **A. Consent**

Father asserts that the district court erred by making inconsistent findings that mother’s consent to the \$591,670 in transfers was either (1) conditioned upon Bano moving from the homestead *or* (2) conditioned upon mother and children being allowed to return to the homestead. But the district court implicitly addressed this argument in the second amended judgment by explaining that any consent by mother was conditioned on

Bano leaving the home and getting her own residence. At oral argument, father noted that this finding is inconsistent with mother's testimony that she was unaware of the transfers. But the district court did not find either party's testimony wholly credible on the issue of the transfers.

Father argues that there is "no evidence in the record that supports the court's finding of conditional consent." But father testified that mother wanted Bano to have money to find herself a home and that, after the parties reconciled in 2005, mother immediately looked for a townhouse for Bano. This evidence, though scant, is sufficient to support the district court's finding, even though we might have found otherwise if we had the fact-finding function. *See Grant v. Malkerson Sales, Inc.*, 259 Minn. 419, 424–25, 108 N.W.2d 347, 351 (1961) ("While the record here confronts us with much conflicting evidence, it is well settled that findings of fact based on conflicting evidence will not be disturbed on appeal unless manifestly and palpably contrary to the evidence as a whole, even though we might find the facts to be different if we had the fact-finding function.").

Father argues that the district court clearly erred by characterizing mother's consent as compelled by "duress." We agree that, in the legal sense, the evidence does not support a finding of duress: there is no credible evidence in the record that mother was threatened. But the record supports a finding that for cultural and economic reasons mother felt compelled to sign the refinancing papers and gift tax returns. To "compel" is "[t]o exert a strong, irresistible force on." *American Heritage Dictionary* 385 (3d ed. 1992). But "consent"—which would remove this case from the purview of Minn. Stat.

§ 518.58—requires “[a]greement, approval, or permission as to some act or purpose, *esp. given voluntarily.*” Black’s Law Dictionary 301 (7th ed. 1999) (emphasis added).

Though father criticizes the district court’s use of the term “duress,” the record supports the district court’s finding that mother did not voluntarily consent to unconditionally gift marital funds to Bano.

Father asserts that, even if mother was compelled to consent, he is entitled to rely on her manifested apparent consent. But father does not cite legal authority or anything in the record to support his argument. Therefore, it is waived. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (declining to address allegations unsupported by legal analysis or citation).

Father argues that the district court erred when it found his testimony regarding mother’s consent not credible, contending that the district court relied on testimony from father’s initial deposition when he did not recall details and failed to consider that mother’s attorney acknowledged that father later provided the information in a subsequent deposition. But the district court stated that its credibility determination was based on “*all of the evidence that was introduced,*” therefore, even if the district court’s partial reliance on father’s first deposition does not support the district court’s credibility determination, there is other evidence in the record sufficient to support the district court’s credibility determination to which we give great deference.

#### **B. Contemplation of dissolution**

Father also argues briefly that the record does not support a finding that the transfers to Bano were made “in contemplation” of the dissolution due to the fact that

transfers took place between 44 months and 22 months prior to the commencement of the dissolution proceeding. But Minn. Stat. § 518.58, subd. 1a, does not impose any timelines. And there is evidence in the record that father's establishment of a bank account in his name and the beginning of the transfers of funds to Bano occurred very shortly after he learned that mother had consulted an attorney. His actions support a reasonable inference that father believed mother consulted an attorney regarding the marital issues and that the transfers were made in contemplation of a possible dissolution of marriage action.

We agree with father that the district court engaged in unsupported and unwarranted speculation about father's continued access to funds transferred to Bano. But that speculation is irrelevant to the finding that father improperly transferred marital funds without mother's voluntary consent in contemplation of a dissolution of marriage. Therefore, we conclude that the unwarranted speculation is not prejudicial to father and does not entitle father to relief on appeal. *See Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that to prevail on appeal, an appellant must show both error and prejudice resulting from the error).

On this record, we conclude that the district court did not clearly err by finding that father transferred marital assets without mother's consent in contemplation of dissolution.<sup>3</sup>

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<sup>3</sup> Father makes no argument that the transfers were made in the usual course of business or for necessities of life.

### III. Award of joint custody

Father argues that he should have been awarded sole legal and physical custody of the parties' three minor children and that the district court abused its discretion by awarding mother and father joint legal and physical custody of the children.

A district court has broad discretion to provide for the custody of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). "Appellate review of custody determinations is limited to whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). "Custody determinations must be based on the best interests of the child. The court must consider the factors contained in Minn. Stat. § 518.17, subd. 1, and when joint custody is contemplated, the court must consider the additional factors contained in Minn. Stat. § 518.17, subd. 2." *Peterson v. Peterson*, 393 N.W.2d 503, 505 (Minn. App. 1986) (citation omitted). But "[t]he court need not make specific findings concerning each of these factors if the findings as a whole reflect that the [district] court has taken the relevant statutory factors into consideration in reaching its decision." *Id.* And the law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Vangness*, 607 N.W.2d at 477.

District courts may order custody investigations and reports. Minn. Stat. § 518.167, subd. 1 (2008). But, if the district court rejects the resulting recommendation, it must provide explicit reasons for rejecting the recommendation or make detailed findings that examine the statutory factors considered by the evaluator. *Rogge v. Rogge*,

509 N.W.2d 163, 166 (Minn. App. 1993), *review denied* (Minn. Jan. 28, 1994). “The weight to be given any testimony, including expert testimony, is ultimately the province of the fact-finder.” *In re Welfare of Children of J.B.*, 698 N.W.2d 160, 167 (Minn. App. 2005).

The district court based its rejection of Mitnick’s recommendation on three findings: (1) “her demeanor on the witness stand”; (2) her incorrect statement that mother experienced learning difficulties; and (3) her lack of understanding about Pakistani culture. Because all three findings are based upon evidence in the record, we cannot conclude that they are clearly erroneous.

The district court found that Mitnick’s custody evaluation “may have been influenced by her personal bias in favor of [father’s] demeanor which is similar to the evaluator’s own.” This is a credibility assessment made by a factfinder who had the opportunity to view the witnesses. In response to father’s posttrial challenge to its credibility finding about Mitnick’s report and recommendations, the district court noted that Mitnick relied on what the district court determined to be “erroneous information” proved to be erroneous, in part, by evidence that mother sought counseling for her adjustment disorder, returned to school and did well, and secured and held part-time employment while attending school, parenting, and proceeding with the dissolution. Father quibbles with the district court’s rejection of Mitnick’s conclusion that mother has learning difficulties, citing mother’s having been placed on academic probation during one semester at Century Community College (Century) for earning a low grade point average as evidence of her learning difficulties. But the record supports only mother’s

low grades on that occasion, not that she has “learning difficulties.” The district court noted mother’s bachelor’s degree from St. Joseph’s Catholic College for Women in Pakistan as well as her success in a class at Century. The record also reflects mother’s voluntary participation in an independent study course at Century regarding divorce, and successful application of what she learned to her own circumstances.

Father also challenges the district court’s finding that Mitnick lacked an understanding of mother’s Pakistani culture as clearly erroneous. But Mitnick admitted her lack of background in Pakistani culture, and the record plainly reflects that mother’s mental-health experts had such background and found cultural and religious issues significant in assessing mother’s actions in relation to her mental health. We conclude that the district court did not base its rejection of Mitnick’s recommendation on clearly erroneous findings.

Father argues that the court’s acceptance of the testimony of mother’s mental-health witnesses over Mitnick’s neutral custody evaluation constituted an abuse of discretion because mother’s witnesses undertook their custody analyses without meeting with father or the children and without considering the statutory “best interests of the child” factors. The only support father cites for his argument is Minn. Stat. § 518.17, subd. 1(a) (2008). But the statute requires that the *district court* consider and make detailed findings on all relevant factors, including thirteen specific statutory factors. *Id.* And the district court did consider each “best-interests” factor in this case.

Father focuses his argument on the mental-health factor, arguing that mother’s mental-health witnesses were less credible than Mitnick. But no single best-interests

factor is determinative. *Lemcke v. Lemcke*, 623 N.W.2d 916, 920 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). Even if the mental- and physical-health factor favored father as he argues, the district court's overall determination that joint custody is in the best interests of the children is not rendered clearly erroneous. And, as the district court noted, despite father's expressed concerns about mother's mental health at trial, he has willingly left the children in mother's care and has never sought supervised parenting time for mother.

Father appropriately challenged the district court's erroneous references to statutes, standards, and cases involving involuntary termination of parental rights (TPR), and to mother not being an "unfit parent." The district court stated in the second amended judgment that TPR statutes, standards, and cases were erroneously included in the first amended judgment. The district court corrected some of these errors but some remain in the second amended judgment. Despite these errors, the record adequately reflects that the district court considered the factors relevant to custody determinations in dissolution-of-marriage cases and applied the appropriate legal standard in awarding joint custody to the parties.

We conclude that the district court did not abuse its discretion in awarding the parents joint custody of their children. The parents have done a commendable job in addressing their children's needs despite the parents' own difficulties. The parenting schedule allows the children to continue to receive the benefit of each parent's care.

#### IV. Maintenance

Father does not dispute a six-year award of maintenance to mother and does not dispute that he is able to pay the amount of maintenance awarded, but he argues that the amount of the district court's award to mother is based on clearly erroneous facts and exceeds her actual need. The amount and duration of maintenance is determined by what a district court "deems just" after considering the factors listed in Minn. Stat. § 518.552, subd. 2 (2008). Each case must be decided on its own facts, with no single statutory factor being dispositive. *Broms v. Broms*, 353 N.W.2d 135, 138 (Minn. 1984).

Appellate courts review a district court's maintenance award under an abuse-of-discretion standard. *Dobrin*, 569 N.W.2d at 202. A district court abuses its discretion in a maintenance determination if its findings of fact are unsupported by the record or if it improperly applies the law. *Id.* (citing *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)). "This court will not find an abuse of discretion unless the district court's resolution of the matter is against logic and the facts on record." *Schallinger v. Schallinger*, 699 N.W.2d 15, 22 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. Sept. 28, 2005). "Findings of fact concerning spousal maintenance must be upheld unless they are clearly erroneous." *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992); *see* Minn. R. Civ. P. 52.01.

At trial, mother asserted monthly living expenses of \$7,979, not including taxes, medical insurance, or the cost of the education she intended to pursue. Based on father's financial expert's calculation of mother's tax obligation as 19%, mother requested an award of maintenance in the amount of \$9,333 per month and that father be ordered to

pay for her medical insurance and the cost of tuition at a community college for three years. Father's financial expert's report opined that maintenance in the amount of \$8,270 per month would allow mother to meet all of her monthly expenses.

Both mother's proposed budget and father's expert's recommendation were based, in part, on assumptions that mother would be purchasing a new home and would have expenses that the district court ultimately ordered father to pay. The district court, nonetheless, awarded the amount recommended by father's financial expert (\$8,270) for mother's living expenses and the cost of tuition. The district court addressed the statutory factors in arriving at the amount of maintenance in the first amended judgment. In its second amended judgment, the district court found that, despite the fact that some items in father's financial expert's calculations of mother's need were reduced, in light of the marital standard of living, father's expert's recommendation of \$8,270 in monthly spousal maintenance was still reasonable. The district court noted that this amount will allow mother to finance additional college coursework to become self-supporting, to travel internationally,<sup>4</sup> and to have an opportunity to acquire future assets consistent with the marital standard of living, in addition to covering her monthly living expenses. The district court has reexamined the award in light of father's posttrial challenges and reaffirmed that the amount is just in this case, and we cannot conclude that the district

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<sup>4</sup> Father argues that mother's budget adopted by the district court already included travel expenses and that mother sought education at a community college where tuition is only \$361 per month. But it is not apparent in the record that mother's budget item of \$800 per month for "recreation, entertainment and travel" includes international travel that the parties enjoyed during the marriage, and there is evidence in the record that mother was exploring educational options other than community college even though she expressed a preference to attend community college.

court has abused its discretion. *See Kampf v. Kampf*, 732 N.W.2d 630, 634 (Minn. App. 2007) (holding that the district court did not abuse its discretion by including savings expenses in a maintenance award where the record showed that the parties accumulated substantial savings and retirement accounts during the marriage), *review denied* (Minn. Aug. 21, 2007).

#### **V. Exclusion of un-noticed witness**

Father argues that the district court abused its discretion by excluding the testimony of a proposed rebuttal witness, his niece, Zehra Alijah, who would have testified about one incident of mother's rageful behavior, which was the primary basis of father's request for sole custody. The question of proper rebuttal testimony "rests almost wholly in the discretion of the [district] court" and will not be reversed absent an abuse of discretion. *Briggs v. Chicago Great W. Ry. Co.*, 248 Minn. 418, 427, 80 N.W.2d 625, 633 (1957).

Generally, "[r]ebuttal evidence is that which explains, contradicts, or refutes the defendant's evidence." *Molkenbur v. Hart*, 411 N.W.2d 249, 252 (Minn. App. 1987), *review denied* (Minn. Oct. 30, 1987). Rebuttal evidence "does not permit mere repetition of evidence in chief . . . , nor simple confirmation of the original case, the purpose being to cut down the case on the part of the defense and not to confirm that of the prosecution." *Mathews v. Chicago & N.W. Ry. Co.*, 162 Minn. 313, 318, 202 N.W. 896, 898–99 (1925) (quotations omitted). The district court excluded the witness (who father at first proposed to call in his case in chief) because she had not been previously disclosed, there was not sufficient time for mother to conduct discovery or obtain

evidence to rebut the testimony, and her testimony was cumulative to the testimony of father and Bano, both of whom testified about the incident that the proposed witness would have testified about.

Father argues that the proposed evidence was not cumulative and its value outweighed any prejudice to mother because “credibility of the parties [on the issue of whether mother experienced “irrational rages”] in this matter is a vital issue that bears directly on the reliability of the neutral experts’ [custody] reports,” outweighing any danger of prejudice to mother. Father relies on *State v. Randall*, 143 Minn. 203, 210, 173 N.W. 425, 428 (1919) (reversing the district court for limiting defendant to the testimony of 12 of defendant’s 27 proposed witnesses), but in that case, defendant’s counsel represented to the court that the 27 witnesses would testify “partly to the same facts and partly to an entirely different set of facts.” *Id.* at 206, 173 N.W.2d at 426. In this case, the record does not demonstrate that father asserted that this witness would testify to anything other than the same facts to which father and Bano testified. Furthermore, father does not explain why the district court would have found his niece to be a more credible witness than father or Bano on this issue. We cannot conclude that the district court abused its broad discretion by excluding this witness.

Even if the district court could be said to have abused its discretion, father would not be entitled to a new trial. “A new trial will be granted because of an improper evidentiary ruling only if the complaining party demonstrates prejudicial error.” *In re Child of Simon*, 662 N.W.2d 155, 160 (Minn. App. 2003). Here, father has failed to demonstrate that he was prejudiced by the district court’s evidentiary ruling. The district

court stated that it “does not doubt that . . . [mother] may have exhibited anger and a foul temperament at various times during the course of the marriage,” and found that even if Alijah’s proffered testimony that she observed mother fly into a rage was true, it would not show that mother is an unfit<sup>5</sup> parent who should not have legal or physical custody of the children.

## **VI. Attorney fees and neutral custody evaluator’s fees**

Father asserts that the district court abused its discretion by ordering him to pay need-based attorney fees to mother and to pay the neutral custody evaluator’s fees. We disagree.

“The standard of review for an appellate court examining an award of attorney fees is whether the district court abused its discretion.” *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). *But cf. Holmberg v. Holmberg*, 588 N.W.2d 720, 727 (Minn. 1999) (stating that Minn. Stat. § 518.14, subd. 1 “requires the court to award attorney fees if the fees are necessary to allow a party to continue an action brought in good faith, the party from whom fees are requested has the means to pay the fees, and the party seeking fees cannot pay the fees”). *See generally Geske v. Marcolina*, 624 N.W.2d 813, 817–18 (Minn. App. 2001) (addressing 1990 amendments to Minn. Stat. § 518.14, as well as recovery of attorney fees under Minn. Stat. § 518.14, subd. 1, in both district court and appellate court). But, “[o]n appeal, a [district] court’s findings of fact are given great deference, and shall not be set aside unless clearly erroneous. . . . If there is reasonable

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<sup>5</sup> This is an example of the district court’s failure to remove references to TPR standards from the judgment despite its agreement that such references should be removed.

evidence to support the [district] court’s findings of fact, a reviewing court should not disturb those findings.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

“Conclusory findings on the statutory factors do not adequately support a fee award.” *Geske*, 624 N.W.2d at 817. But a lack of specific findings on the statutory factors for a need-based fee is not fatal to an award if review of the district court’s order “reasonably implies” that the court considered the relevant factors and when the district court “was familiar with the history of the case” and “had access to the parties’ financial records.” *Id.* (quoting *Gully*, 599 N.W.2d at 825–26).

[T]he court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds:

(1) that the fees are necessary for the good faith assertion of the party’s rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;

(2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and

(3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Minn. Stat. § 518.14, subd. 1 (2008).

Father argues that he was ordered to pay 100% of mother’s attorney fees and asserts that because mother was awarded substantial assets, she has the ability to contribute to payment of her attorney fees.<sup>6</sup> But father does not challenge the district court’s findings about his income and expenses that result in a surplus, after payment of

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<sup>6</sup> Mother disputes that father was required to pay 100% of her fees.

child support and maintenance, of more than \$4,000 per month. Father controlled the parties' bank accounts and financial resources during the dissolution and paid his own attorney substantial amounts in this extended litigation. Mother earned an average gross monthly income of only \$234, with expenses estimated by father to be \$6,729 and found by the court to be \$7,979. Father did not fund the entire shortfall while the dissolution was pending. The record supports the district court's finding that mother does not have the ability to pay the approximately \$181,000 in attorney fees and the neutral custody evaluator fees incurred in this dissolution without liquidating marital assets. Because this record reasonably implies that the district court found the statutory factors for an award of need-based attorney fees to be satisfied, the district court did not abuse its discretion by failing to require mother to liquidate her share of the marital estate to pay attorney fees.

Father also argues that the district court's finding that father can afford to pay the fees is "conclusory." We disagree. The finding is supported by examination of the parties' income tax returns and supporting financial records, as well as father's own testimony about his monthly expenses.

## **VII. Striking portion of father's posttrial memorandum**

The district court struck everything after the 35th page of father's 179-page posttrial "Memorandum in Support of Motion for Amended Findings of Fact and Conclusions of Law or for a New Trial," citing Minn. R. Gen. Prac. 115.05, which states that "[n]o memorandum of law submitted in connection with either a dispositive or nondispositive motion shall exceed 35 pages, exclusive of the recital of facts required by

Minn. Gen. R. Prac. 115.03(d)(3), except with permission of the court.” Father, who did not seek the district court’s permission to file a longer memorandum, argues that the district court abused its discretion by enforcing the rule.

Father first claims that his memorandum of law is not subject to the page limitations set forth in Rule 115.05 because it is actually a motion rather than a memorandum of law. This argument lacks merit. Father titled the document “Memorandum in Support of Motion for Amended Findings of Fact and Conclusions of Law or for a New Trial.” And, although, as father argues, the motion states that it is “based upon the Memorandum in Support of Motion for Amended Findings and Conclusions of Law or for a New Trial *which is incorporated herein by reference,*” this does not make the entire incorporated memorandum a motion. (Emphasis added). A motion is “a written or oral application requesting a court to make a specified ruling or order.” Black’s Law Dictionary 1031 (7th ed. 1999) Father acknowledges that the document he sought to incorporate as a part of his motion includes legal arguments in support of his requests, in addition to the requests themselves and the recital of facts. *See* Minn. R. Gen. Prac. 115.05 (excluding from the 35-page limit the “recital of facts”). The 179-page document is a memorandum of law subject to Rule 115.05.

Father asserts that it would have been “impossible to segregate which portion [of the memorandum] is ‘exclusive of the recital of facts’ . . . because each finding, conclusion of law or order for judgment sought to be amended is recited, followed by an explanation of the request for amendment, and finally followed by the proposed amended finding.” This is a circular argument and is unpersuasive. Father fails to explain why he

did not request leave of the court to exceed the allotted 35-page limit and instead simply stated at the beginning of his memorandum that he “acknowledges and regrets [its] extraordinary length.”

Father asserts that imposing a page-length limitation on his “motion” would “deprive him of his right under Minn. R. Civ. P. 52.05 to request the court to amend its findings, and of his right to appeal said findings, conclusions of law and orders for judgment” (i.e. the error), but he has not explained how the outcome of his posttrial motion would have been different had the district court not imposed the limitation (i.e., the prejudice resulting from the error). To prevail on appeal, an appellant must show both error and prejudice resulting from the error. *Midway*, 306 Minn. at 356, 237 N.W.2d at 78; *see Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993) (stating that the appellant bears the burden of demonstrating that error is prejudicial), *review denied* (Minn. June 28, 1993). We conclude that the district court did not abuse its discretion by requiring father to follow the rules.

### **VIII. Motions on appeal**

Mother moved to strike father’s appellate reply brief. Father opposed the motion and moved for attorney fees related to the motion to strike. We deny the motion to strike as moot and we deny the motion for attorneys fees related to the motion to strike.

**Affirmed; motions denied.**