

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-342**

In re the Matter of:
John Andrew Bergstrom,
petitioner,
Respondent,

vs.

Breana Michelle McKinnon,
Appellant.

**Filed October 24, 2011
Affirmed
Harten, Judge***

Wright County District Court
File No. 86-FA-09-8461

John A. Bergstrom, Maplewood, Minnesota (pro se respondent)

Brian M. Olsen, Cokato, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Harten,
Judge.

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

UNPUBLISHED OPINION

HARTEN, Judge

Appellant, the mother of C., challenges the grant of physical custody to respondent, C.'s father. Because we see no abuse of discretion in the custody award, we affirm.¹

FACTS

Appellant Breanna McKinnon and respondent John Bergstrom are the parents of a daughter, C., born January 4, 2008. When C. was ten months old, respondent pleaded guilty to possession of methamphetamine. Respondent's sentence was stayed, and he was placed on probation for five years. He violated probation by using drugs in December 2009, in September 2010, and twice in December 2010; his probation was then revoked, and he was committed to the Ramsey County Correctional Facility for 365 days.

After C.'s birth, which occurred when both parties were 18, they lived together for about 14 months, much of which they spent with respondent's parents. In March 2009, the parties separated; appellant and C. moved in with appellant's parents. C. spent a week or two with respondent every month until about November 2009, when appellant refused him access to C. and accused him of sexually abusing C. Appellant sought an order for protection; no evidence was found of any abuse of C. by respondent.

Respondent then brought an action for custody and parenting time. Although a recognition of his paternity had been signed at the time of C.'s birth, appellant claimed

¹Because respondent has taken no part in this appeal, the matter has proceeded according to Minn. R. Civ. App. P. 128.02, subd. 2.

respondent was not C.'s father. After genetic testing, respondent was adjudicated the father of C., but appellant continued to deny him access to the child.

Respondent was represented by counsel at the trial on his custody motion in June 2010; appellant appeared pro se. Based on the testimony of the parties and other witnesses, the district court awarded custody to respondent and asked respondent's attorney to prepare findings. Appellant was given the opportunity to make objections to the findings, but did not do so.

In August 2010, respondent was granted sole physical custody of C., and parenting time was arranged for appellant. Appellant moved for amended findings or a new trial. At the November 2010 hearing on this motion, appellant was represented by an attorney and respondent did not appear. Appellant's motion was denied, and she appeals, challenging the grant of sole physical custody to respondent.²

D E C I S I O N

“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). The law “leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations.” *Vangness v. Vangness*, 607 N.W.2d 468, 477 (Minn. App. 2000).

² In her brief, appellant also challenged the denial of her motion for a new trial. At oral argument, appellant's attorney indicated that he was no longer contesting this issue.

Of the 13 best-interest factors set out in Minn. Stat. § 518.17, subd. 1 (2010), the district court found that five factors—the parents’ wishes (factor 1); the child’s preference (factor 2); the child’s adjustment to home, school and community (factor 6); cultural background (factor 11); and abuse (factor 12)—favored neither party,³ while the other eight factors favored respondent.

Of these eight, the district court identified four as “significant” or “important” to its decision to grant custody to respondent: (A) the child’s primary caretaker (factor 3); (B) the interaction or interrelationship of the child with the parents (factor 5); (C) the capacity to give the child love, affection, and guidance (factor 10); and (D) the likelihood that a party would encourage a relationship with the other parent (factor 13). The record supports the district court’s findings on these factors.

1. Primary Caretaker

The district court found that, during the first year of C.’s life, she lived with the parties and respondent’s parents and “[her] primary day to day care was the responsibility of [respondent]” and that “[he] was prevented from being able to care for [C.] from December 2009 up to June 2010 due to a series of legal maneuvers brought on by [appellant].” Respondent testified that he cared for C. during her first months while appellant was in school. His mother testified that, from March 2008 until March 2009, respondent cared for C.: “he got up with her right away in the morning, he’d be up with

³ In regard to appellant’s claim that respondent sexually abused C., the district court noted that “there was no competent or believable evidence presented . . . that any such abuse occurred” and that “the persistence of [appellant’s] claim . . . indicates that [she] intends to use an inappropriate claim of domestic abuse to secure an advantage in custody litigation.”

her through the night if she woke up for any reason, he cared, tended to her when she was sick, he fed her breakfast, every day, lunch, dinner, changed the diapers, bathed her, took her outside to play.” She also testified that, while appellant liked to get C. dressed up and show her off, appellant “didn’t really like to tend to the necessary things; she’d always require [respondent] to help her out.” Respondent testified that, after the parties separated in March 2009, C. spent a week or two weeks with him every month until November 2009, when appellant refused to let C. visit and asserted that respondent was not C.’s father. The finding that respondent was C.’s primary caregiver when not denied access by appellant is supported by the evidence.

2. Interaction or Interrelationship of the Child with the Parents

The district court found that, although at the time of trial in June 2010 C. was “more attuned to the cares and demands of [appellant]” because “[appellant had] denied [respondent] meaningful contact with the child since the fall of 2009,” C. had a better relationship with respondent. Witnesses testified to appellant’s “untreated anger management problem and [her] use of inappropriate physical discipline techniques with the child,” and appellant’s “episodic use of alcohol to excess has the potential to endanger the child.” Although appellant said in an affidavit that she had not used alcohol between 12 May 2009 and 12 May 2010, she was arrested for and pleaded guilty to underage alcohol consumption in October 2009; during that year, she was also cited for underage alcohol consumption in Wisconsin, ordered to go to an alcohol awareness program, and did not attend. The district court noted that, although appellant, and an uncle who had pleaded guilty to domestic assault of appellant, had been told to have no

contact with each other, appellant testified that she takes C. to visit the uncle and sometimes stays overnight with him. The district court noted that respondent “has planned for the child’s future needs [and] testified to his selection of a school, educational goals, and eventual future; [appellant] has not.” Respondent testified that he voluntarily put himself into a treatment program that he would complete in July, that he then planned to live with C. at his mother’s home, where C. has her own bedroom, and that he planned to enroll her in school. Appellant’s testimony on her own future plans was inconsistent; she said she planned to move to St. Paul, with C., and attend school there, but support herself with a job elsewhere, and her testimony on what funds she would have available to herself and C. made little sense. The evidence supports the finding that this factor favors respondent.

3. The Capacity to Give the Child Love, Affection, and Guidance

The district court found that to respondent “parenting his daughter is a foremost concern. He uses appropriate parenting techniques which are not harmful to the child, as was established by the testimony of [respondent] and [respondent’s] mother. [Appellant] uses inappropriate discipline [and] is resistant to coaching as to the disciplinary techniques.” Respondent testified that appellant “would spank [C.], smack her wrists, smack her thigh . . . there was a time she [C.] had a biting problem and [appellant] would pinch her[,]” that C. was “[a]bout a year and a half” when this was going on, and that appellant had said “don’t tell me how to raise my kid” when respondent objected. Respondent’s sister-in-law testified that she had seen appellant “put [C.] on time-outs, but

then it started escalating to where she would pinch [C.], bite her, slap her.” This testimony supports the district court’s finding.

4. The Tendency to Encourage Continuing Contact by the Other Parent

The district court found that

[respondent] is not a threat to his daughter’s welfare. There is no need for [respondent’s] contact to be supervised. . . . In denying parenting time to [respondent], since the fall of 2009, and . . . [then] failing to produce the child [for parenting time as agreed in arrangements made through counsel, appellant] has established that she has no respect for [respondent’s] right to have contact with his child. Likewise, in persisting in her claim that [respondent] somehow sexually abused the child when she can produce no direct evidence, and previously lost a contested Order for Protection hearing, [appellant] establishes her unwillingness to facilitate the child’s relationship with her father. [Respondent] is willing . . . to permit [appellant] contact and suggests no inappropriate limits on that contact.

Appellant testified that respondent should have only supervised visitation until C. is “maybe five . . . where she understands what’s going on.”⁴ Respondent testified that, although he was worried about appellant having parenting time, “Every parent should have parenting time, I feel.” Respondent did not say appellant’s parenting time should be supervised. Again, this finding is supported.

5. Remaining Factors

Finally, the district court found that the remaining four factors—the parent/child relationships (factor 4); the child’s environment (factor 7); the permanence of the

⁴ When respondent’s attorney asked appellant, “Did you originally say to me that [respondent] should have supervised visitation until [C.] was 18?”, appellant answered, “That was over the phone. That’s irrelevant.”

proposed custodial home (factor 8); and the mental and physical health of the parents (factor 9) also favored custody with respondent. The evidence supports those findings.

The district court balanced the best-interest factors and based its decision on those factors. There is no basis for reversing that decision.

Affirmed.