

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0506**

In re the Marriage of:
Charles Michael Auspos, petitioner,
Respondent,

vs.

Susan Lynn Auspos,
Appellant.

**Filed August 12, 2008
Reversed and remanded
Stoneburner, Judge**

Hennepin County District Court
File No. 27FA0640

Susan M. Lach, Debra Yerigan, Messerli & Kramer, P.A., 1800 Fifth Street Towers, 150
South Fifth Street, Minneapolis, MN 55402-4218 (for respondent)

David D. Himlie, 340 Parkdale Plaza, 1660 South Highway 100, St. Louis Park, MN
55416; and

Eric Lilly, 4210 Vincent Avenue North, Minneapolis, MN 55412 (for appellant)

Considered and decided by Worke, Presiding Judge; Lansing, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

In this dissolution action, appellant mother challenges the award of sole physical
custody to respondent father, arguing that the district court failed to make adequate

findings and that the record does not support the findings made. Mother also argues that the district court erred by failing to use the *Hortis/Valento* formula to determine child support. Because the district court's award of sole physical custody to father is not supported by adequate findings and appears to be based on a misapplication of law, we reverse in part and remand for additional findings, consideration of applicable law concerning the labeling of the parties' parenting time, and recalculation of child support that may be necessitated by a change of the label from sole to joint physical custody.

FACTS

Appellant Susan Lynn Auspos (mother) and respondent Charles Michael Auspos (father) were married in December 1995. Their children were nine, seven, and four years old at the time of the trial on the dissolution of the parties' marriage.

While the dissolution action was pending, father remained in the homestead in Andover. Mother moved into the parties' previous residence in Minneapolis, and they shared parenting time. Initially, they each had the children 50% of the time, but later father had the children 60% of the time. The parties cooperated with a parenting consultant. The parties agreed to share legal custody of the children. Initially, they agreed to have joint physical custody, but at trial, father sought sole physical custody.

Hennepin County Court Services completed a custody/parenting time evaluation during the time that the parties were contemplating joint physical custody. The evaluator recommended that the parties be granted joint physical custody with father having the children from Sunday afternoon through after school on Thursday during the school year and the children spending alternating weeks with the parties during the summer. Mother

requested that the summer parenting-time schedule remain the same as the school-year schedule and the parties implemented this schedule before trial. At trial, the only dispute over parenting time was the children's Thursday overnights with mother. Father wanted to eliminate Thursday overnights with mother, asserting that the children were often tardy or absent from school on Fridays. The parties also disputed the calculation of child support and whether the parenting-time schedule should be labeled joint physical custody or sole physical custody with father.

After trial, the district court awarded the parties joint legal custody and eliminated mother's Thursday-overnight parenting time during the school year. Based on its finding that the division of parenting time is consistent with "a basically traditional" schedule, the district court awarded sole physical custody to father and calculated child support pursuant to the applicable child-support guidelines.¹

Mother moved for amended findings or a new trial seeking restoration of her Thursday-overnight parenting time, the label of joint physical custody, and calculation of child support under the *Hortis/Valento* formula. The district court denied mother's motion in its entirety. The district court stated that "the schedule as agreed upon (with or without the overnight on Thursdays) constitute[s] a sole physical custody schedule in favor of Respondent." This appeal followed.

¹ Provisions in the 2006 amendments to the child-support guidelines for calculating parties' support obligations apply to actions filed after January 1, 2007. 2006 Minn. Laws Ch. 280, § 44 at 1145. The motions in this action were filed in January 2006, therefore the pre-2006 amendment guidelines apply.

DECISION

I. Findings

“The district court has broad discretion in determining custody” and this court’s role in reviewing custody decisions “is limited to determining whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law.” *Lemcke v. Lemcke*, 623 N.W.2d 916, 919 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). “[A district court’s] findings of fact will not be disturbed unless they are clearly erroneous.” *In re Child of Evenson*, 729 N.W.2d 632, 635 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). A district court’s findings of fact are clearly erroneous “if the reviewing court is left with the definite and firm conviction that a mistake has been made.” *LaChapelle v. Mitten*, 607 N.W.2d 151, 160 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). An appellate court reviews the record in the light most favorable to the district court’s findings. *Id.*

The controlling principle in a child-custody determination is the child’s best interest. *Pikula v. Pikula*, 374 N.W.2d 705, 711 (Minn. 1985). Custody decisions are made based on an analysis of the best-interest factors set forth in Minn. Stat. § 518.17, subd. 1 (2006), and require detailed findings. While the district court may not rely solely on one factor to the exclusion of all others, the district court need not make specific findings for each factor, *see* Minn. Stat. § 518.17, subd. 1, so long as “the findings as a whole reflect that the trial court has taken the relevant statutory factors into consideration in reaching its decision.” *Peterson v. Peterson*, 393 N.W.2d 503, 505 (Minn. App. 1986).

a. Thursday-overnight parenting time

Mother argued that the district court did not make adequate findings on the statutory best-interest factors to support its finding that it was in the children’s best interests to eliminate her Thursday-overnight parenting time. But at oral argument on appeal, counsel for mother conceded that the district court had discretion to eliminate the overnight parenting time, mother could not support an argument that the district court abused its discretion, and mother was not challenging that decision on appeal. We note that the district court’s decision on the Thursday-overnight parenting time constituted a determination of parenting time rather than custody, and the district court plainly stated that this issue was not a factor in determining whether the parenting-time schedule would be labeled “sole” or “joint” physical custody.

b. Custody label

Mother asserts that the district court’s finding that the parenting schedule does not fit with a joint-physical-custody label is clearly erroneous. “‘Joint physical custody’ means that the routine daily care and control and the residence of the child is structured between the parties.” Minn. Stat. § 518.003, subd. 3(d) (2006). “There is neither a statutory presumption disfavoring joint physical custody, nor is there a preference against joint physical custody if the district court finds that it is in the best interest of the child and the four joint custody factors support such a determination.” *Schallinger v. Schallinger*, 699 N.W.2d 15, 19 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005); *see also Wopata v. Wopata*, 498 N.W.2d 478, 482 (Minn. App. 1993) (stating that “[j]oint physical custody . . . is not a preferred arrangement”). Joint physical custody

does not require an equal division of time; it is only necessary that physical custody of the child be the parties' shared responsibility. *Lutzi v. Lutzi*, 485 N.W.2d 311, 314 (Minn. App. 1992) (stating that “trial courts may unequally divide physical custody but still label the arrangement as joint”); see *Blonigen v. Blonigen*, 621 N.W.2d 276, 283 (Minn. App. 2001) (Crippen, J., dissenting) (noting that “joint physical custody” merely requires that the routine daily care and control of the child be structured between the parties and that “[n]othing in the law precludes a 90%/10% care-sharing arrangement [from being given] the label “‘joint’”), *review denied* (Minn. Mar. 13, 2001).

At the time of the custody evaluation, both parties indicated that they wanted joint physical custody. However, at trial, father requested sole physical custody and mother requested joint physical custody. The district court did not make any findings as to whether joint physical custody or sole physical custody is in the children's best interests and labeled the arrangement based solely on its conclusion that the parenting-time schedule is “traditional” and “does not fit with a joint physical custody schedule.” Because caselaw plainly states that an unequal division of parenting time does not preclude a joint-physical-custody label, the district court misapplied the law. We therefore reverse the district court's award of sole physical custody to father and remand for reconsideration of the appropriate label supported by adequate findings and legal authority. By remanding, we do not intend to indicate the outcome.

II. Rejection of evaluator's recommendation for joint physical custody

The district court has discretion in whether or not to follow a custody recommendation. *Rutanen v. Olson*, 475 N.W.2d 100, 104 (Minn. App. 1991). But when

a district court diverges from a custody recommendation, this court has required that the district court “either (a) express its reasons for rejecting the custody recommendation, or (b) provide detailed findings that examine the same factors the custody study raised.” *Rogge v. Rogge*, 509 N.W.2d 163, 166 (Minn. App. 1993), *review denied* (Minn. Jan. 28, 1994). If the order does not fulfill one of these requirements, remand is necessary. *Id.*

In this case, the custody evaluator’s report summarized her observations of father and mother and her opinion of their individual interactions with the children. The custody evaluator applied her observations to the 13 best-interest factors contained in Minn. Stat. § 518.17, subd. 1(a), and the four joint-physical-custody factors contained in Minn. Stat. § 518.17, subd. 2 (2006), and recommended that the district court grant joint physical custody. The recommendation was based on the parties’ preference for joint custody at the time of the evaluation, the parties’ demonstrated ability to negotiate a joint parenting schedule, and the use of a parenting consultant to resolve parenting disputes. The district court rejected the custody evaluator’s recommendation for joint physical custody without expressing its reasons for doing so or providing detailed findings as required by *Rogge*. On remand, if the district court awards sole physical custody to father, the findings must comply with the *Rogge* requirements.

III. Child support

Mother does not dispute that the *Hortis/Valento* formula, which bases support on the parenting time as well as the income of each parent, is the applicable presumptive child-support calculation only if the parents are awarded joint physical custody. *Valento v. Valento*, 385 N.W.2d 860, 862 (Minn. App. 1986) (stating that absent specific reasons

for a guidelines departure, the “method” set out in *Hortis v. Hortis*, 367 N.W.2d 633, 636 (Minn. App. 1985), both in calculating a reduced obligation of each party and offsetting one with the other, “should be used in all joint custody situations”), *review denied* (Minn. June 30, 1986).

On remand, the *Hortis/Valento* formula will be presumptively applicable if the label of the parties’ parenting schedule is changed to joint physical custody. But, if supported by adequate findings, the district court is not precluded from deviating from the presumptive guideline support. *See Schlichting v. Paulus*, 632 N.W.2d 790, 793-94 (Minn. App. 2001) (approving departure from the *Hortis/Valento* formula presumptively applied in cases of joint physical custody based on a district court’s finding that the parents’ “physical custody arrangement is similar to a traditional custody/visitation arrangement rather than a true joint custody arrangement”).

Reversed and remanded.