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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-1103**

In re the Matter of:

Gregory J. Waltz, petitioner,  
Appellant,

vs.

Jaci Jo Marie Soupir,  
Respondent.

**Filed February 5, 2008  
Affirmed  
Randall, Judge**

Yellow Medicine County District Court  
File No. 87-FA-06-13

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Considered and decided by Kalitowski, Presiding Judge; Randall, Judge; and  
Hudson, Judge.

**UNPUBLISHED OPINION**

**RANDALL, Judge**

On appeal from the district court's award of sole legal and physical custody to  
respondent-mother, appellant-father argues (a) he should have been awarded sole legal

custody claiming mother does not provide adequate medical, educational, or religious care for the child; (b) the record does not support the district court's findings of fact on the physical-custody factors; and (c) the district court abused its discretion by admitting as evidence a recording of a phone call where the probative value of the recording was outweighed by the prejudice it caused, there was inadequate foundation for the admission, and the content of the recording was not trustworthy. We affirm.

## **FACTS**

Appellant Gregory Waltz and respondent Jaci Soupir are the parents of L.J.W., born December 1, 2004. Although never married, the parties began living together in Canby, Minnesota, prior to L.J.W.'s birth. In June 2005, the parties' romantic relationship ended and appellant moved out of the parties' home and in with his father. Following the parties' break-up, L.J.W. remained in respondent's care, while appellant saw his son on a regular basis pursuant to an informal visitation schedule.

In March 2006, respondent informed appellant that she was moving to Balaton, Minnesota, to live with her boyfriend. Appellant objected to the move and, after failing to reach an agreement with respondent, he petitioned the district court for temporary relief. The district court issued an order on April 5, 2006, allowing respondent to move L.J.W. to Balaton. The order also set forth a parenting time schedule.

In November 2006, the district court issued findings of fact and conclusions of law. The district court found that the "parties have no current ability to cooperate in child-rearing" and awarded respondent sole legal custody of L.J.W. The court also awarded respondent sole physical custody of L.J.W., subject to appellant's liberal

parenting time. Appellant subsequently filed a motion for a new trial and amended findings of fact, conclusions of law, and order for judgment. After a hearing, the district court reaffirmed the admission of a tape recorded conversation between the parties, amended the prior order as it related to child support, confirmed the remaining conclusions of law from the original order, and denied appellant's motion for a new trial. This appeal followed.

## **DECISION**

### **I.**

Appellant argues that the district court abused its discretion by awarding sole legal and physical custody of the parties' minor child to respondent. A district court has broad discretion to provide for the custody of the parties' children. *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989). "[A]ppellate 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." *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996) (quotation omitted). A district court's findings will not be set aside unless clearly erroneous, and due regard shall be given to the district court's opportunity to judge the credibility of the witnesses. Minn. R. Civ. P. 52.01.

When making child-custody determinations, the district court must base its decision on the best interests of the child. Minn. Stat. § 518.17, subd. 3(a)(3) (2006). To that end, the district court must consider and balance the relevant statutory best-interests factors. *Id.*, subd. 1(a) (2006). In considering the factors, "[t]he court must make detailed findings on each of the factors and explain how the factors led to its conclusions

and to the determination of the best interests of the child.” *Id.*, subd.1(a). These factors may not be used to the exclusion of all others. *Id.*

A. *Legal custody*

Legal custody is defined as “the right to determine the child’s upbringing, including education, health care, and religious training.” Minn. Stat. § 518.003, subd. 3(a) (2006). Joint legal custody is presumed to be in a child’s best interest, but it should be granted only when “parents can cooperatively deal with parenting decisions.” *Rosenfeld v. Rosenfeld*, 529 N.W.2d 724, 726 (Minn. App. 1995) (quotation omitted).

Appellant concedes that joint legal custody is not appropriate and that both parties want “all or nothing” with respect to legal custody because the parties do not agree on where the child should attend school and in what religion the child should be raised. Appellant argues that the district court abused its discretion in making the custody decision because the court disregarded evidence demonstrating that appellant should have been awarded sole legal custody. To support his claim, appellant points to the custody evaluator’s testimony that he is the more stable parent. Appellant further claims that he should be granted sole legal custody because respondent does not provide adequate medical, educational, or religious care for the child.

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).

Here, the record reflects that the custody evaluator recommended joint legal custody. The district court did not adopt the custody evaluator's recommendation, and explained that the recommendations were made when both parties wanted joint legal custody. Both parties agree that was the case, but is not the case now. The court found that all of the custody evaluator's "conclusions and opinions are not necessarily adopted by the Court" because the "parties have no current ability to cooperate in child-rearing." The district court addressed the custody evaluator's concerns regarding respondent's temper and concluded that the report does not take into account appellant's temper. The case is close, but we conclude, the district court weighed and considered the custody evaluator's recommendation.

Appellant also argues that he should be awarded sole legal custody because respondent does not provide adequate medical care for the child. Specifically, appellant references an incident when the child suffered a severe burn on his finger. Appellant claims that respondent acted inappropriately by treating the injury at home. Conversely, appellant asserts that when he discovered the burn, he immediately took the child to the emergency room. The district court, in addressing the issue, found that "both parties acted appropriately." This finding is supported by the record.

Finally, appellant claims that he should be awarded sole legal custody because he is the more stable parent and he, rather than respondent, provides adequate educational and religious care for the child. We disagree. The district court specifically addressed

appellant's position and expressed concern about appellant's ability to provide a stable residence and environment for the child. The court based this finding on evidence that appellant has been financially irresponsible by allowing the home that was to be the residence of L.J.W. to go into foreclosure by intentionally disregarding a court order to make the payments on that residence. The district court also addressed the parties' religions and found that the child was baptized Catholic and respondent is Methodist. But the court found that "[n]either parent attends church weekly, nor appears to be fully committed to his or her professed faith." And the record reflects that appellant told the court that if the nearest Catholic Church was 20 miles away, he would consider changing religions. Thus, the court found that "[a]bsent agreement by the parents concerning the child's religious upbringing, the child would do equally well if raised under either one of their faiths."

The district court made detailed findings and addressed evidence that weighed in favor of awarding appellant sole legal custody. There is evidence supporting an award of sole legal custody to appellant; there is also evidence supporting the district court's findings and conclusion to award legal custody to respondent. A district court's decision on custody issues that is supported by the record should be upheld even if there is also evidence in the record supporting the opposing point of view. *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). We conclude that the district court did not abuse its discretion in awarding respondent sole legal custody.

*B. Physical custody*

Appellant argues that the district court abused its discretion by awarding sole physical custody of the parties' minor son to respondent. The "[p]hysical custody and residence" of a child is defined as "the routine daily care and control and the residence of the child." Minn. Stat. § 518.003, subd. 3(c) (2006). When determining custody, a district court must evaluate the child's best interests by considering "all relevant factors," including the 13 factors listed in Minn. Stat. § 518.17, subd. 1(a).

Of the 13 factors, the district court found ten of the factors to be neutral or not in favor of either party. The remaining three factors were found to favor respondent. Appellant argues that based on the evidence presented, the district court should have found in his favor on at least the following three factors: (1) the length of time the child has lived in a stable environment and the desirability of maintaining continuity; (2) the parties' abilities to give the child love, affection, and guidance, and to educate and raise the child in the child's culture and religion; and (3) the ability of each parent to encourage contact between the other parent and the child. Appellant asserts that if the district court found for appellant on these three factors, and found for respondent on the child's primary caretaker factor, there would have been three factors favoring appellant and only one factor favoring respondent. Thus, appellant argues that the district court abused its discretion in granting respondent sole physical custody of the minor child.

**1. Length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.**

Appellant claims that this factor favors him because he has a stable job and he has lived in the same community and is active in that community. Appellant asserts that conversely, respondent has lived at four different places within the last five years, all in different communities.

The district court made detailed findings on this factor and concluded that the factor weighs in favor of respondent. The district court expressed concern about whether respondent would continue to live with her boyfriend, but the court found that some of that concern is alleviated by talk that respondent and her boyfriend may get married. The court also expressed concern about respondent's boyfriend's prior alcohol related offenses, but concluded that there was no evidence that this has affected the child. In addressing the instability in appellant's living situation, the district court referenced appellant's financial irresponsibility. The district court expressed concern about appellant's ability to maintain a stable residence. Although the district court found that "[b]oth parties have some instability regarding their residences," the court found that respondent "has taken greater steps to provide a regular schedule for the child and engage in the day-to-day care of the child, including when the child is with his daycare provider." The district court's findings on this factor are supported by the record. The court did not abuse its discretion when it determined that this factor favors respondent.

2. The parties' abilities to give the child love, affection, and guidance, and educate and raise the child in the child's culture and religion.

Appellant argues that the district court abused its discretion in finding that this factor did not weigh in favor of either party. Appellant argues that this factor weighs in his favor because he is the parent that would continue to raise the child Catholic. We disagree. The district court addressed the issue and concluded that the child would do equally well if raised either Catholic or Methodist, the two religions practiced by each party respectively. Although appellant makes much of the fact that he is Catholic, and that the child should be raised Catholic, the record reflects that appellant's attendance at church is sporadic. In fact, in response to a question inquiring as to whether he was a practicing Catholic, appellant testified: "100%, no." The district court found that both parties do not appear to be "fully committed to his or her professed faith." This finding is supported by the record. The district court did not abuse its discretion in addressing this factor.

3. The ability of each parent to encourage contact between the other parent and the child.

Appellant claims that the district court abused its discretion in finding that the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child weighed in favor of respondent. To support his claim, appellant references his testimony that he would encourage and allow frequent contact between L.J.W. and respondent. Appellant also focuses on a few instances where his requests for time with his child were denied.

In addressing the instances where appellant claimed that respondent denied his requests to see his son, the district court found:

There was conflicting testimony about visitation on Father's Day. [Appellant] asserted that [respondent] had agreed that the child would be with [appellant] starting at 11 a.m. and would spend the night with [appellant], but [respondent] later tried to limit the time. [Respondent] testified that it was her weekend to have the child, but she agreed to [appellant] and child spending time together. [Respondent] testified that [appellant] had visitation starting at approximately 11 a.m. on Father's Day through the night. The Court adopts this testimony and concludes that [respondent] allowed visitation on Father's Day from 11 a.m. through the night.

On her own, prior to any order of the Court, [respondent] allowed visitation two nights during the week (not overnight) and every other weekend. The Court adopts [respondent's] testimony that she has asked [appellant] to be with the child when she had to work, and that she offered to have [appellant] and child go trick-or-treating together last Halloween if [appellant's] schedule permitted, but [appellant] had to work. The Court adopts [appellant's] testimony that [respondent] has not let him be with the child, on her nights, while she plays volleyball for approximately one hour. The Court finds that [respondent] has allowed regular visitation, and initiated visitation on several instances, including those instances stated above.

The district court's findings on this factor are primarily based on credibility and we defer to the district court's credibility determinations. *See Vangsness*, 607 N.W.2d at 474 (stating that appellate courts defer to a district court's credibility determinations). Although the record reflects that appellant would encourage and allow frequent contact between L.J.W. and respondent, the record also reflects that respondent has encouraged and initiated frequent contact between appellant and L.J.W. The district court's findings

are supported by evidence in the record and are not clearly erroneous or otherwise defective. *See id.* (“That the record might support findings other than those made by the trial court does not show that the court’s findings are defective.”). Accordingly, the district court did not abuse its discretion in awarding respondent sole physical custody of the parties’ minor child.

## II.

Appellant argues that the district court abused its discretion by admitting as evidence a recording of a phone call between the parties because (1) the probative value of the recording was outweighed by the prejudice it caused, (2) there was inadequate foundation for the admission, and (3) the content of the recording was not trustworthy. This court will not reverse a district court’s evidentiary ruling unless the court clearly abuses its discretion. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001).

### A. *Probative value of the recording*

A district court may admit evidence only if it is relevant. Minn. R. Evid. 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. Evidence is inadmissible, however, if the probative value of the evidence is substantially outweighed by the potential for unfair prejudice. Minn. R. Evid. 403.

Appellant argues that the district court abused its discretion by admitting into evidence a recorded phone conversation between him and respondent because the

probative value of the tape was substantially outweighed by its unfair prejudice and persuaded the district court that appellant had a temper. We disagree. The record reflects that the admitted evidence depicted an argument between appellant and respondent. The evidence was relevant because it demonstrated that appellant occasionally loses his temper and becomes argumentative with respondent when dealing with issues concerning the parties' child. The district court specifically found that the recording was not unfairly prejudicial and our review of the recording supports the district court's decision.

*B. Foundation*

Appellant also contends that the district court abused its discretion in admitting the recording because proper foundation was not laid. In *Furlev Sales & Assocs. v. N. Am. Auto. Warehouse, Inc.*, the supreme court stated:

There are seven foundational elements that must be established before a tape recording can be admitted: (1) a showing that the recording device was capable of taking testimony; (2) a showing that the operator of the device was competent; (3) establishment of the authenticity and correctness of the recording; (4) a showing that changes, additions and deletions have not been made; (5) a showing of the manner of the preservation of the recording; (6) identification of the speakers; and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

325 N.W.2d 20, 27 n.9 (Minn. 1982).

Here, appellant argues that proper foundation was not laid because (1) appellant had no idea that he was being recorded, and (2) the testimony did not establish the authenticity and correctness of the recording because respondent admitted that she did not know whether the conversation was recorded from beginning to end. The district court

specifically found that the fact that appellant did not know that the conversation was being recorded did “not make [his] recorded statements involuntary.” Also, with respect to the authenticity of the recording, the district court found that

through [respondent’s] testimony, it was established that the recording fairly and accurately portrays the telephone conversation, although [respondent] did not know if the cell phone recorded the conversation from beginning to end. Also, [respondent] testified that she did not make any alterations to the recording, which is an adequate showing that changes, additions, and deletions had not been made to the recording.

The district court’s findings are based on witness credibility, and this court defers to the district court’s credibility determinations. *See Vangsness*, 607 N.W.2d at 474.

*C. Trustworthiness of the recording*

Appellant argues that the district court abused its discretion in admitting the tape because a substantial portion of the tape is indiscernible and, therefore, untrustworthy. To support his claim, appellant cites *In re Gonzalez*, in which this court stated that “[w]hen a tape is partially inaudible or a portion of a statement or conversation is not recorded, courts have applied the broad general rule that the recording is admissible unless the inaudible or omitted portions are so substantial the recording as a whole is rendered untrustworthy.” 456 N.W.2d 724, 728 (Minn. App. 1990).

Here, a review of the transcript of the phone conversation reveals that a substantial portion is indiscernible. But the conversation was not admitted for specific statements. Rather the conversation was admitted to show that appellant had a temper. The district court considered it for that purpose and not for any specific statements made in the

recording. Thus, any indiscernible portion of the tape was not substantial because it was not needed to establish the general mood of the person being recorded. More importantly, the district court found that even if the recording had not been admitted, there was reasonable evidence to establish that appellant had a temper, and the district court's findings of fact and conclusions of law on this issue would have remained the same.

**Affirmed.**