STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1567

In re the Marriage of:

Kristine M. Kast, petitioner,
Respondent,

vs.

Richard W. Kast,
Appellant.

Filed March 4, 2008
Affirmed
Kalitowski, Judge

Anoka County District Court
File No. 02-F1-05-003377

Judith M. Rush, 26 East Exchange Street, Suite 400, St. Paul, MN 55101 (for respondent)

Maury D. Beaulier, Hellmuth & Johnson, PLLC, 10400 Viking Drive, Suite 500, Eden Prairie, MN 55344 (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Collins, Judge.*

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

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Appellant Richard W. Kast challenges the district court's judgment dissolving his marriage, arguing that the district court abused its discretion in (1) awarding respondent-mother sole physical custody of the parties' two minor children; (2) determining his total child-support arrears; and (3) dividing the parties' marital debt and marital assets. We affirm.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by making its custody determination without giving proper weight to (1) the opinion of a custody evaluator retained by appellant; (2) appellant's testimony; and (3) the custody preference expressed by his daughter. We disagree.

The district court "is given broad discretion in determining custody matters." *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989). When a custody determination is appealed, our review 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). Accordingly, if there is evidentiary support for the district court's decision, we must affirm, even though we might have reached a contrary decision. *Sefkow v. Sefkow*, 427 N.W.2d 203, 211 (Minn. 1988); *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985).

Custody decisions are made based on an analysis of the best-interest factors set forth in Minn. Stat. § 518.17 (2006). When undertaking a best-interest analysis, the district court may not rely solely on one factor to the exclusion of all others. Minn. Stat. § 518.17, subd. 1. But the district court is not required to make specific findings with respect to each factor, 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).

Here, the district court made detailed findings on each of the statutory best-interest factors after reviewing the reports and testimony of the court-appointed custody evaluator, the custody evaluator retained by appellant, and both parties. Moreover, the district court set forth a number of detailed findings supporting its rejection of appellant's request for joint physical custody of the children, including: (1) the parties' demonstrated inability to cooperate; (2) appellant's continued attempts to undermine the relationship between respondent-mother and the children; (3) appellant's refusal to take seriously the recommendations of his daughter's treating mental-health professionals; and (4) the increased continuity and stability that would result from the children continuing to live with respondent where they would reside in the same community and attend the same school.

Discrediting the opinion of the second custody evaluator

Appellant challenges the district court's decision to give more weight to the evaluation and recommendation of the court-appointed, neutral custody evaluator than appellant's retained expert. On appeal, the district court's findings of fact "shall not be

set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. And it is not error for the district court to discredit significant portions of an expert's testimony after making credibility determinations. *See Engebretson v. Comm'r of Pub. Safety*, 395 N.W.2d 98, 100 (Minn. App. 1986). Appellant argues that the district court unfairly discredited the testimony and report of his retained expert because she was paid and because appellant failed to fully disclose to her his marijuana use. But it was within the district court's discretion to discount her opinion for these reasons. Moreover, the record indicates that the retained expert's custody evaluation was otherwise deficient in its failure to address several pertinent best-interest factors, including (1) appellant's alleged attempts to undermine the children's relationships with respondent-mother; (2) the current mental-health needs of appellant's daughter; and (3) the children's need for stability. Therefore, we conclude that the district court's weighing of the two experts' testimony and recommendations was within its discretion and was supported by evidence in the record.

Discounting appellant's testimony

Appellant argues that the district court unreasonably discredited his testimony. But because the district court is in a unique position to make "primary observations" of witnesses' credibility, its fact-finding will not be disturbed unless clearly erroneous. *Engebretson*, 395 N.W.2d at 100. Here, evidence throughout the record calls appellant's veracity into question. Appellant's MMPI test results, failure to fully disclose his marijuana use, and purported inability to recall the threatening letter he sent to appellant's

counsel all cast doubt on his candor. Accordingly, it was within the district court's discretion to give appellant's testimony limited weight.

Ignoring daughter's expressed preference

Appellant claims that the district court erred in awarding custody contrary to his daughter's expressed preference. Although Minn. Stat. § 518.17 requires the court to consider the "reasonable preference of the child, if the court deems the child to be of sufficient age to express preference," a child's preference is not determinative, and must be considered as one of several best-interest factors. Minn. Stat. § 518.17, subd. 1; *see Madgett v. Madgett*, 360 N.W.2d 411, 413 (Minn. App. 1985). It is within the district court's discretion to decide what weight, if any, to give a child's testimony regarding his or her custody preference. *Aske v. Aske*, 233 Minn. 540, 544, 47 N.W.2d 417, 419 (1951).

Here, the record shows that neither child expressed a custody preference to the court-appointed custody evaluator, and that only the daughter expressed a custody preference to the custody evaluator retained by appellant. The district court found that granting sole physical custody to respondent was nonetheless in the daughter's best interests because it (1) provided the stability of allowing her to remain in the same community and attend the same school; (2) spared her the stress of integrating into a blended family; (3) allowed her to live in an environment that encouraged and supported her in maintaining a relationship with both of her parents; and (4) placed her in an environment where her mental-health treatment needs would be addressed. On this

record, we conclude that the district court did not abuse its discretion in awarding sole physical custody to respondent.

In sum, because the record indicates that the district court performed the statutorily-mandated best-interests analysis, and because the court's factual findings supporting its conclusion are sufficiently detailed, we conclude that the district court was within its discretion to award respondent sole physical custody of the parties' two minor children.

II.

Appellant argues that the district court abused its discretion in determining his total child-support arrears. We disagree. First, the district court had authority to retroactively grant temporary child support regardless of whether an extrajudicial child-support agreement between the parties existed. Second, there was sufficient evidence that respondent never received the full support she was due pursuant to the May 24, 2005 order for temporary relief and the August 29, 2006 order for temporary child support.

We review determinations of past-due child support under an abuse-of-discretion standard. *Kemp v. Kemp*, 608 N.W.2d 916, 920 (Minn. App. 2000); *LaChapelle v. Mitten*, 607 N.W.2d 151, 166 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). Accordingly, the district court's support determination is within its discretion unless it is shown to be "against logic and the facts on record," or a misapplication of the law. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984); *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. App. 1998).

Here, the district court concluded that appellant owed respondent child-support arrears in the amount of $14,290. Appellant argues that the district court abused its discretion in basing its calculation of his past-due support on an extrajudicial agreement allegedly stipulated to between the parties in August of 2005 that required appellant to pay child support in the amount of $210 per week. But even if we accept appellant's argument that evidence of the parties' extrajudicial child-support agreement was insufficient, the district court did not abuse its discretion. Pursuant to Minn. Stat. § 518.131, subd. 9(b), the district court may retroactively grant temporary child support for the period of time during the pendency of a dissolution proceeding. Minn. Stat. § 518.131, subd. 9(b) (2006). *See In re J.M.K.*, 507 N.W.2d 459, 461 (Minn. App. 1993). Thus, the district court had authority to establish retroactive temporary support, even without relying on the alleged extrajudicial agreement between the parties.

And even though the district court did not itemize its calculations, its total award of past-due child-support is supported by the record. Bank statements and respondent's testimony indicate that appellant failed to deposit sufficient funds into the household-management account, or alternatively deposited funds and then withdrew them, which resulted in him paying less than the $6,435 he was ordered by the court to pay during that time period. And the record indicates that funds from this account were used for almost entirely child-focused purposes: mortgage and utilities for the home where the children and respondent resided, groceries, medical co-pays, and music lessons for the children. Although it would have been preferable for the district court to specify whether it intended for any part of the designated household-support funds to function as a spousal-

maintenance award, as opposed to a strict child-support award, appellant has not demonstrated that he was prejudiced by this oversight. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (refusing to remand when a technical error in the district court's findings was found to be de minimis in its effect).

Accordingly, since both appellant and respondent were required to deposit a certain percentage of their earnings into the household-management account each month, and because the purposes for which the deposited money was used were in the nature of child support, it was reasonable for the district court to include some of the shortfall under the terms of this order in calculating appellant's total child-support arrears. And although appellant disputes that he agreed to pay $210 per week, it was reasonable, and in fact, in his favor, for the district court to use that figure rather than the $2,145 per month that he was originally ordered to pay. Using that figure, appellant owes an additional $11,130 in arrears. And since appellant's court-ordered child-support obligation of $645 per month was not withheld from his income until September 22, 2006, appellant owed an additional $645 in past-due child support.

Based on the aforementioned itemization, appellant's unpaid child-support arrears totaled $11,775. And it was reasonable for the district court to include an additional $2,515 based on appellant's failure to make adequate deposits to the household-management account, for a total of $14,290. And appellant's failure to bring a motion for amended findings prevented the district court from considering any adjustment he believed was necessary. In addition, appellant's failure to bring a motion for a new trial prevents effective appellate review of the issue, limiting our analysis to determining

"whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and the judgment." *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976). Because the district court's calculation of appellant's child-support arrears is supported by sufficient evidence in the record and is authorized by Minn. Stat. § 518.131, subd. 9(b), we cannot say that it constituted an abuse of discretion.

III.

Appellant argues that the district court abused its discretion in dividing the parties' marital debt and marital assets. But because there is sufficient evidence that the district court's division of the marital property and debt was fair and equitable, we disagree.

The district court has broad discretion when dividing marital property. *Sirek v. Sirek*, 693 N.W.2d 896, 898 (Minn. App. 2005). This court will not modify "a district court's property division absent a clear abuse of discretion or an erroneous application of the law." *Id*. Although Minnesota law requires that a property division be equitable, it need not be equal. *White v. White*, 521 N.W.2d 874, 878 (Minn. App. 1994). When dividing property, a district court may consider a number of factors, including length of the parties' marriage, the parties' respective sources of income, and the manner in which each party contributed to the marital property's preservation. *Sirek*, 693 N.W.2d at 899. The district court approaches division of marital debt upon dissolution in the same way that it approaches division of marital property. *Dahlberg v. Dahlberg*, 358 N.W.2d 76, 80 (Minn. App. 1984).

Here, the district court apportioned the parties' marital debt to appellant, noting that appellant's failure to maintain two of the parties' rental properties pending

dissolution, as he was court-ordered to do, resulted in a significant loss of equity in those properties. Because of appellant's neglect, and because of the significant discrepancy between appellant's and respondent's income levels, the district court's apportionment of the parties' marital debt was fair and reasonable. And although appellant contends that the district court lacked sufficient evidence of the parties' specific marital debts, the record shows that, in addition to respondent's testimony, the parties' debts and respective creditors were enumerated in both the order for temporary relief and appellant's prehearing statement.

Likewise, a review of the record shows that the district court's apportionment of the parties' marital property was fair and reasonable. Although respondent received her retirement interests and appellant did not, appellant did not claim to have any retirement interests in his prehearing statement or at trial. *See Bollenbach v. Bollenbach*, 285 Minn. 418, 428, 175 N.W.2d 148, 155 (1970) (stating that failure to fully and accurately disclose one's assets in a dissolution proceeding "justifies inferences adverse to the party who conceals or evades"). In contrast, respondent's retirement interests were claimed in her prehearing statement and were substantiated by pay stubs she submitted to the court. Aside from the parties' retirement interests, appellant concedes that the district court divided the remainder of the parties' marital property equally between them. Given the parties' disparate incomes and the otherwise equitable nature in which the parties' marital property was divided, the district court did not abuse its discretion in awarding respondent her retirement interests.

Because evidence in the record confirms that the district court's apportionment was fair and equitable, we conclude that the district court's division of the parties' marital property and marital debt was within its discretion.

Affirmed.