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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-33**

In re the Marriage of: Joseph Samuel Owen, petitioner,
Respondent,

vs.

Bonita Kaye Owen,
Appellant.

**Filed November 24, 2009
Affirmed
Larkin, Judge**

McLeod County District Court
File No. 43-FA-06-931

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Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this child-custody dispute, appellant claims that the district court erred by
granting sole physical custody of the parties' minor children to respondent and by

erroneously calculating her child-support obligation. We conclude that the district court did not abuse its discretion, and we affirm.

FACTS

Appellant Bonita Owen (mother) and respondent Joseph Owen (father) are the parents of three minor children. Father initiated dissolution proceedings in November 2006. The district court ordered a custody evaluation on January 24, 2007. The custody evaluation began on April 30 and was submitted to the district court on August 3. The custody evaluator recommended that father be granted sole physical custody subject to mother's parenting time. A custody trial was held on February 11, March 20 and 24, and April 23, 2008. Both parties sought joint legal custody, but each wanted sole physical custody. The district court heard the testimony of 13 witnesses, including the custody evaluator. The district court received numerous exhibits, including the custody evaluation. The district court awarded the parties joint legal custody and awarded father sole physical custody. The district court also ordered mother to pay \$565 per month in child support. Mother filed a motion for amended findings of fact, conclusions of law, order for judgment and judgment and decree and a new trial. The district court denied mother's motion. This appeal follows.

DECISION

Mother claims that the district court abused its discretion by granting sole physical custody of the parties' minor children to father and that the district erred in its child-support determination. We address each claim in turn.

I.

“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). A district court’s findings of fact will be sustained unless they are clearly erroneous. *Id.* In deciding whether a district court’s findings are clearly erroneous, the appellate court must view the record in the light most favorable to those findings. *Ayers v. Ayers*, 508 N.W.2d 515, 521 (Minn. 1993). “Deference must be given to the opportunity of the [district] court to assess the credibility of the witnesses.” *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

A determination of custody is governed by the best-interests-of-the-child factors, which are enumerated in Minn. Stat. § 518.17, subd. 1 (2008), as follows:

(a) “The best interests of the child” means all relevant factors to be considered and evaluated by the court including:

- (1) the wishes of the child’s parent or parents as to custody;
- (2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
- (3) the child’s primary caretaker;
- (4) the intimacy of the relationship between each parent and the child;
- (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child’s best interests;
- (6) the child’s adjustment to home, school, and community;
- (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
- (8) the permanence, as a family unit, of the existing or proposed custodial home;
- (9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363A.03, of a proposed custodian or the child shall not be determinative of the custody of the child,

unless the proposed custodial arrangement is not in the best interest of the child;

(10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;

(11) the child's cultural background;

(12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and

(13) except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.

The district court has broad discretion when determining the custody of children.

Durkin v. Hinich, 442 N.W.2d 148, 151 (Minn. 1989); *Lenz v. Lenz*, 430 N.W.2d 168, 169 (Minn. 1988); *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). The law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000).

Mother makes multiple arguments concerning the adequacy of the district court's best-interests findings. Our review of the record evidence and the district court's findings indicates that these arguments are without merit.¹

¹ Mother does not challenge the district court's findings regarding the following statutory factors: the wishes of the parents as to custody, the child's cultural background, and the effect on the child of the actions of an abuser. Accordingly, this opinion does not address these factors.

The Child's Preference

The district court found that the children were not of a sufficient age to express a preference. The oldest child, who was 12 years old at the time of trial, did not state a preference at the time of the custody evaluation. The custody evaluation stated that the children were relieved that the decision regarding where they would live was not up to them. At trial, the custody evaluator testified that the children did not want to decide which parent to live with. Mother argues that the custody evaluator did not give the oldest child the opportunity to state her desire. Mother submitted a letter at trial from the oldest child indicating that the child wanted to live with mother. The district court found that the oldest child's stated preference was equivocal. The district court's determination is based on a credibility determination to which we defer. *See Sefkow*, 427 N.W.2d at 210 ("Deference must be given to the opportunity of the [district] court to assess the credibility of the witness.").

The Child's Primary Caretaker

The parties agree, and the district court found, that mother was the children's primary caretaker prior to the parties' separation. The district court found that after the separation, father rearranged his work schedule to be home with the children as their primary caretaker. The district court noted concerns regarding mother's lack of supervision and the lack of activities for the children while mother was the primary caretaker. In contrast, the district court found that when father became the primary caretaker, he made sure that the children attended school, participated in activities, and participated in therapy while he worked to financially support the children.

The district court's findings are supported by the record. The custody evaluation states that when mother was the primary caretaker, there were complaints about mother's failure to supervise the children. And the parties' former apartment-complex manager testified that she observed the children to be unsupervised on multiple occasions. The manager also testified that she received complaints from other residents about the children's lack of supervision. Moreover, the parties received a notice threatening to evict them if the children continued to disturb neighbors while unsupervised.

The Intimacy of the Relationship Between the Parent and Child

The district court found that "[father] exhibits a strong bond with the children and openly provides the children with love, affection and security." In contrast, the district court found that mother "at times placed her needs ahead of those of the children," specifically noting instances when mother left the children during her parenting time to "engage in adult social activities."

The custody evaluator's testimony supports the district court's findings. The custody evaluator testified that she had no concerns regarding father's parenting skills, but did have concerns regarding mother's parenting abilities. The custody evaluator expressed concerns regarding mother's lack of engagement with the children during her parenting time, whereas the custody evaluator stated that father had a fairly intimate relationship with the children. The custody evaluator noted that father ended a relationship with someone because father did not feel that she was appropriate with the children, leading the custody evaluator to conclude that the children are important to father.

The Interaction and Interrelationship of the Child with the Parents, Siblings, and Others Who May Affect the Child's Best Interests

The district court found that the children are comfortable with father's significant other and her two children, who began residing with father and the children in August 2007. The district court found that mother's parents are important to the children and that father agrees that the children's relationship with their maternal grandparents should and would continue. The district court found that mother had been in a relationship with four male friends since the parties separated (two of whom she moved in with) and was currently in a relationship with a fifth. The district court did not make any findings regarding mother's current significant other because he was not interviewed by the custody evaluator and did not testify at trial. The district court's findings regarding this factor are supported by the record.

The Child's Adjustment to Home, School, and Community

The district court found that while the separation of the parties was difficult for the children, they were able to remain in the family home until February 2008, and have continued to reside in Hutchinson and to attend the same school. The district court found that father has been actively involved in the children's education, activities, and therapy. The district court noted that the youngest child has improved emotionally and academically, the middle child's schooling has not been impacted, and the oldest child's academics have either improved or remained constant. The district court found that mother had not been actively involved in the children's schooling or activities until shortly before trial. The district court also found that mother "lacked understanding of

the importance of developing connections with the children's community when she repeatedly left Hutchinson to go to Red Wing," and that "[mother] has chosen not to attend all of the children's events or activities."

The district court's findings regarding this factor are supported by the record. The custody evaluation provides much of the information relied on by the district court. The district court's findings are also supported by appellant's testimony that she took the children to Red Wing during her parenting time.

The Length of Time the Child Lived In a Stable, Satisfactory Environment and the Desirability of Maintaining Continuity

The district court found that the children resided in the family home in Hutchinson until February 2008, at which point father moved the children into a five-bedroom home in Hutchinson. The district court found that the new home provides adequate space for the children and allows the children to remain in the same schools and activities. The district court's findings on this factor support the district court's conclusion that father has provided the children with a stable, satisfactory environment.

Mother does not contest the district court's findings on this factor, but argues that the district court inappropriately made additional findings regarding the number of moves that mother has made and the number of men that she has associated with since the parties separated. The district court found that mother moved seven times since the parties separated. Mother argues that the district court improperly considered this conduct, because it does not impact the parent-child relationship.

But mother's living situation is relevant to the district court's analysis of the children's stability and environment. Mother's history of multiple residences, post-separation, indicates that the children's stability may be disrupted if the children are placed in her physical custody. Mother also argues that because she was the primary caretaker, it is disruptive to the children's stability to have respondent assume that role. This argument is similarly without merit. Father has assumed the role as the children's primary caretaker. There is no evidence in the record indicating that the children's stability has been disrupted as a result. To the contrary, the record supports the district court's conclusion that father has maintained stability for the children despite the parties' separation.

The Permanency of the Family Unit of the Existing or Proposed Custodial Home

The district court found that mother stated her intention to remain in the Hutchinson area, but also found that she previously expressed an interest in relocating to Red Wing. Mother argues that the district court's conclusions regarding her intent to remain in the Hutchinson area are refuted by her testimony that she has no intention to move to Red Wing. But the district court's finding is supported by the custody evaluation, which states that mother did not demonstrate an appreciation that moving the children away from their father would be detrimental and that mother failed to establish connections within Hutchinson that would illustrate a commitment to remaining in the community. The district court's findings on this factor indicate that the district court did not find mother's testimony credible. We defer to this implicit credibility determination. *Sefkow*, 427 N.W.2d at 210.

The Mental and Physical Health of All Individuals Involved

The district court found that father does not have physical health issues, but that he had struggled, at the time of separation, with depression and anger due to the deterioration of the parties' marriage. The district court found that father sought appropriate resources and does not currently have any significant health issues. The district court found that mother had been placed on a 72-hour hold in August 2006, suffered from depression and anxiety, had blood clots on her lung in September 2006, and had wrist surgery in November 2007. Regarding the children's mental health, the district court found that the children had been negatively affected by the separation and by the parties' inability to reach an agreement regarding custody and parenting time. The district court found that father enrolled the children in therapy and that mother had chosen not to attend therapy with the children or to have contact with the therapist. The district court found, "[f]or the most part the children have worked through their parents' separation and pending divorce."

Mother argues that her physical health has no effect on her ability to parent. But the district court did not find that mother's health impacted her parenting ability. The district court merely addressed her health as is required under Minn. Stat. § 518.17, subd. 1(a)(9). Mother also argues that the district court did not adequately address father's anger issues. But the district court recognized father's prior depression and anger issues and specifically found that father had sought appropriate support. The custody evaluation references mother's report that father has anger issues and details the supportive resources that father sought after the parties' separation. The district court's finding that

father sought appropriate resources to address his previous anger and depression issues is supported by the record. Mother's assignment of error in this regard is without merit.

Finally, mother argues that the district court should have addressed the fact that father was sexually abused by his father as a child. Mother does not cite to any record evidence indicating that this abuse impacts father's parenting ability. At trial, mother's counsel attempted to question father about the abuse, and the district court sustained father's relevancy objection. But the custody evaluation contains information regarding the abuse, and the evaluator concluded that it motivates father to provide a better family life for his children. Moreover, there is no evidence that the abuse impacts father's current mental health. Given the absence of any record evidence indicating that the abuse father suffered as a child impacts his current mental health or the best interests of the children, the district court's failure to specifically address the abuse in its findings is not prejudicial error. We do not reverse for non-prejudicial error. Minn. R. Civ. P. 61; *see also Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that error without prejudice is not ground for reversal) (quoting *Waters v. Fiebelkorn*, 216 Minn. 489, 495, 13 N.W.2d 461, 464 (1944)).

The Capacity and Disposition of the Parties to Give the Child Love, Affection, and Guidance and to Continue Educating the Child In the Child's Current Culture and Religion

Mother was found to have the capacity to provide the children with love and affection, although the district court noted that some of mother's past choices and resulting unavailability has negatively impacted the children. Mother admitted that she sometimes left the children during her parenting time so she could go out with friends.

The district court found that mother put her own needs before her children's needs and only recently had become more involved in the children's activities. The district court's findings are supported by the record.

The district court found that father has demonstrated a commitment to parent the children and has sought resources to help him provide stability and structure for the children. For example, the evidence indicates that father completed a class entitled Children in the Middle. Father testified that he also attended a class entitled Parent Connection and a class at his church entitled Divorce Care. The district court also found that father has demonstrated his love and affection for the children and is involved with their educational and therapy needs. Father testified that he hugs and kisses the children, tells them that he loves them, and helps the children with their homework. The district court also found that father is involved with the children's religious needs and had recently returned to an Assemblies of God church because of the activities available there for the children.

Mother cites *Johnson v. Johnson*, 424 N.W.2d 85 (Minn. App. 1988), for the proposition that the district court erred by not weighing the religious aspect of this factor more heavily in her favor. But mother does not explain how the district court erred. In *Johnson*, the issue of religion was clearly contested. 424 N.W.2d at 88-89. The district court in *Johnson* ordered the party being awarded custody to raise the children in a specific faith even though the party insisted at trial that he would raise the children in his own faith. *Id.*

Mother argues that “[a]s to religion, this is greatly disputed.” Mother complains that father takes the children to an Assemblies of God church, rather than a Lutheran church, which had been the family’s faith denomination. While there was testimony that the children’s maternal grandfather, who is an important figure in the children’s lives, is a Lutheran pastor, mother’s proposed findings of fact on this factor did not address father’s decision to take the children to a non-Lutheran church. The record thus refutes mother’s argument that the issue of the children’s religion was greatly disputed at trial.

The Disposition of Each Parent to Encourage and Permit Frequent and Continuing Contact by the Other Parent

The district court found that father has encouraged the children to have contact with mother and will continue to encourage the contact. The district court also found that father allowed mother to have more time with the children than required under the parenting-time order. Mother complains that the district court’s finding is based on the custody evaluation, which is the product of father’s own statements. Mother appears to suggest that father did not actually allow mother to have more time with the children than required under the court’s order, but mother does not cite record evidence in support of this suggestion. Assignment of error in a brief based on “mere assertion” and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971)). Moreover, the district court’s finding on this factor is based on a credibility determination to which we defer. *Sefkow*, 427 N.W.2d at 210.

Mother also argues that the district court relied too heavily on the custody evaluation, that the custody evaluation was outdated at the time of trial, and that the custody evaluation inappropriately referenced mother's infidelities prior to the evaluation. These arguments were made to and considered by the district court. The district court's findings, which are consistent with the custody evaluation, indicate that the district court rejected mother's arguments regarding the weight to be given to the custody evaluation and the evaluator's testimony. We defer to the district court's credibility determination regarding the custody evaluator's report and testimony. *Sefkow*, 427 N.W.2d at 210.

In summary, we find no error in the district court's findings. The district court considered each of the best-interests factors, made appropriate findings supported by the record, and its ultimate decision is well within its broad discretion. Mother would have us second guess the district court's balancing of the best-interests factors, which this court has "scant if any room" to do. *Vangness*, 607 N.W.2d at 477. Accordingly, the district court's custody determination is affirmed.

II.

This court will reverse a district court's order regarding child support only if the district court abused its "broad discretion" by resolving the matter in a manner "that is against logic and the facts on record." *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). Findings on net income for child-support purposes "will be affirmed on appeal if those findings have a reasonable basis in fact and are not clearly erroneous." *State ex rel. Rimolde v. Tinker*, 601 N.W.2d 468, 470 (Minn. App. 1999).

The district court ordered mother to pay \$565 a month as child support. Mother argues that the child-support award is excessive and improperly calculated under Minn. Stat. § 518A.34 (2008). Mother's primary argument is that the district court erred by imputing income to her. Mother next argues that the district court erred by not making a specific finding of gross monthly income. Mother's final argument is that the district court should have deviated downward in consideration of her debt and limited earnings and earning potential. We address each argument in turn.

Imputation of Income

Mother testified that she underwent surgery to remove a cyst from her wrist in November 2007, and as a result was unable to work. Mother testified that she was released for work in March 2008, and was looking for employment at the time of trial. Mother offered no evidence to suggest that she was medically unable to work at the time of trial.

The district court found that mother is capable of earning \$2,118 per month and that she is voluntarily unemployed. The record evidence indicates that mother was previously employed at Dassel Lakeside Community Home from November 2006, through March 2007, and earned \$12.22 per hour. Mother was more recently employed by Cosmos Assisted Living from May 2007, through July 2007, at a rate of \$10 per hour, working full-time.

If a parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis, or there is no direct evidence of any income, child support must be calculated based on a determination of potential income. For purposes of this determination, it is rebuttably presumed that

a parent can be gainfully employed on a full-time basis. As used in this section, “full time” means 40 hours of work in a week except in those industries, trades, or professions in which most employers, due to custom, practice, or agreement, use a normal work week of more or less than 40 hours in a week.

Minn. Stat. § 518A.32, subd. 1.

Determination of potential income must be made according to one of three methods, as appropriate: (1) the parent’s probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community[.]

Id. at subd. 2. The district court properly relied on evidence regarding mother’s recent work history and appropriately calculated child support based on a determination of mother’s potential income. The district court’s findings regarding potential income are supported by the record. And mother’s argument that the district court erred by imputing income to her absent a finding of bad faith is without merit. As we recently explained:

In 1991, the legislature adopted the provisions of 1991 Minn. Laws ch. 292, art. 5, § 76, at 1901-02, some of which are now included in Minn. Stat. § 518A.32 (2008). Section 518A.32 allows the district court to impute income for the purposes of computing child support when the obligor is “voluntarily unemployed or underemployed.” These provisions do not require the district court to find bad faith in order to impute income. *See Walker v. Walker*, 553 N.W.2d 90, 95 n.1 (Minn. App. 1996) (stating that in determining child support after 1991 Minn. Laws ch. 292, art. 5, § 76, “courts are no longer required to find bad faith before considering an obligor’s earning capacity”).

Melius v. Melius, 765 N.W.2d 411, 415 (Minn. App. 2009). The district court did not err by imputing income to mother for the purpose of its child-support award.

Gross Monthly Income

Mother's argument that the district court erred by not making a specific finding regarding gross income is not supported by the record. The district court found that father's gross monthly income is \$2,253. Mother suggests that the district court should have imputed additional income to father because his income was higher in the years preceding the parties' separation. But the district court found that father's reduction in income resulted from economic conditions. Specifically, father previously owned a carpentry business and earned between \$6,500 and \$10,000 monthly. However, the district court found that as a result of reduced demands for carpentry services, father took a job at Medallion Kitchens earning \$2,253 per month. Mother cites no evidence to support her insinuation that father intentionally reduced his income or is currently capable of earning more. Accordingly, this argument is waived. *See Modern Recycling, Inc.*, 558 N.W.2d at 772 (holding that assignment of error in brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

Downward Deviation

The district court awarded the presumptive guidelines child-support amount based on the parties' income. Mother argues that the district court should have deviated downward in consideration of her debt and limited earnings and earning potential, citing Minn. Stat. § 518A.43, subd. 2, which provides "[i]n establishing or modifying a support obligation, the court *may* consider debts owed to private creditors." (Emphasis added.) Mother's assignment of error regarding the district court's failure to deviate from the

guidelines is unsupported by legal argument or citation to record evidence. Moreover, any deviation from the guidelines must be supported by findings regarding how the deviation serves the best interests of the children. Minn. Stat. § 518A.37, subd. 2(5). Mother advances no argument regarding how a downward deviation would serve the best interests of her children, and on this record, it is not obvious that a downward deviation is in the children's best interests. Again, assignment of error in brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *Modern Recycling, Inc.*, 558 N.W.2d at 772. The district court's child-support award is not an abuse of discretion.

Affirmed.

Dated:

Judge Michelle A. Larkin