STATE OF MINNESOTA
IN COURT OF APPEALS
A09-974

Gary Schander,
Appellant,

vs.

Charity Hultin,
Respondent,

County of Becker,
Respondent.

Filed January 12, 2010
Affirmed
Klaphake, Judge

Becker County District Court
File No. 03-FA-08-1335

Charles A. Krekelberg, Mathew A. Soberg, Krekelberg, Skonseng & Hastings, P.L.L.P., P.O. Box 353, Pelican Rapids, MN 56572-0353 (for appellant)

Timothy H. Dodd, Suite 110, 611 Summit Avenue, Detroit Lakes, MN 56501 (for respondent)

Michael Fritz, Becker County Attorney, Tammy L. Merkins, Assistant County Attorney, P.O. Box 476, Detroit Lakes, MN 56502 (for Becker County)

Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and Bjorkman, Judge.

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

KLAPHAKE, Judge

In this custody dispute, appellant Gary Schander argues that the district court abused its discretion by awarding sole physical custody of their child, M.S.-H., to respondent Charity Hultin, and that the court further abused its discretion by determining that joint physical custody was not appropriate without analyzing the joint custody factors found in Minn. Stat. § 518.17 (2008).

Because the district court's custody determination is supported by the evidence and is not a misapplication of the law, and because appellant failed to request joint physical custody or to submit evidence in support of it, we affirm.

D E C I S I O N

Our review of the district court's 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). We review the district court's findings for clear error. *Id.* "A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Dailey v. Chermak*, 709 N.W.2d 626, 629 (Minn. App. 2006), *review denied* (Minn. May 16, 2006) (quotation omitted). We view the record in the light most favorable to the district court's findings. *Id.* at 629-30. "That the record might support findings other than those made by the [district] court does not show that the court's findings are defective." *Vangness v. Vangness*, 607 N.W.2d 468, 474 (Minn. App. 2000). The district court is not bound by the recommendations of experts or custody evaluators.

Id. at 476. Finally, although "[a]ll custody and custody-related rulings must clearly and genuinely consider and give effect to the best interests of the child," *Dailey*, at 709 N.W.2d at 632, the district court may not rely on one of the Minn. Stat. § 518.17 best-interest factors to the exclusion of all others. *In re Custody of the Child of Williams v. Carlson*, 701 N.W.2d 274, 281 (Minn. App. 2005).

Appellant challenges the district court's findings on the statutory factors as clearly erroneous, citing four findings in particular: (1) stability of environment; (2) disposition of each parent to encourage and permit contact with other parent; (3) child's primary caretaker; and (4) mental and physical health of individuals. *See* Minn. Stat. § 518.17.[1]

1. Stability of Environment

Appellant argues that the district court ignored the recommendations of the custody evaluator and the psychologist, who expressed concerns about the number of jobs held by respondent, the number of different residences she had between 2000 and 2008, and a pattern of forming new romantic relationships, in contrast to their conclusions that appellant showed greater consistency and stability.

In determining that the stability of environment factor favored respondent, the court noted that the child had lived with respondent and the child's two half-siblings her

[1] Appellant argues that the district court erred by considering evidence of events after the disruption of the parties' relationship, citing *Pikula*, 374 N.W.2d at 714 n.3. Appellant's reliance on *Pikula* is misplaced. *Pikula* suggests that the question of which parent is the primary caretaker should be determined as of the date of the marital dissolution. This is only one of the factors considered here by the court and is not factually apposite here. The other cases cited by appellant, *Vangness*, 607 N.W.2d at 474 and *Peterson v. Peterson*, 408 N.W.2d 901 (Minn. App. 1987), *review denied* (Minn. Sept. 23, 1987), do not support appellant's argument.

entire life; that since the child's birth, respondent has lived in an apartment in Audubon; that the environment was "satisfactory" for the child; and that respondent's ex-husband offered a favorable opinion of her "parenting abilities and the environment in which his children spend half of their time." The court found that "staying in the living situation and parenting time schedule she has known for the past nine months will best promote consistency and predictability in [the child's] life." While different findings could be made upon the same record, there is support in the record for these findings, which are not clearly erroneous.

2. Disposition of Parents to Encourage Contact

Appellant argues that the court clearly erred in finding that respondent would be more likely to encourage and permit contact with appellant. Appellant relies heavily on the six to eight week period during which respondent denied him contact, when the child was two to four months old. The court noted that the psychologist found that the parties had "fundamental differences" in their personalities and parenting styles and concluded that these conflicts led to the breakdown in the parenting time schedule during that period of time. The court found that respondent had fully cooperated with the court's temporary order setting parenting time and had initially been willing to permit overnight parenting time when the child was only two weeks old. The court concluded that this "early behavior [was] indicative of [respondent's] willingness to encourage visitation." Further, the court found that appellant's "preference for routine may inhibit last-minute changes to or additional parenting time." Again, although the record could support other findings, it also supports these findings.

3. Child's Primary Caretaker

Appellant argues that the court clearly erred in finding respondent to be the primary caretaker, when he had extensive parenting time and the experts agreed that he interacted well with the child. The court found that respondent had been the child's primary caretaker from birth and that the child was reported to be always clean and well-cared for. This is supported by the record.

4. Mental and Physical Health of the Individuals

Appellant argues that this factor weighs in his favor, noting that the psychologist said his obsessive-compulsive tendencies would be helpful and that respondent might withhold parenting time if angry. The court found that both parties were physically and mentally healthy and that the child was also healthy despite some respiratory problems. The court stated that both parties attempted to mitigate environmental factors that might lead to the respiratory illnesses. These findings are supported by the record.

Again, although different findings could be made based on the same record, the district court's findings are not clearly erroneous. *See Vangness*, 607 N.W.2d at 474. "A district court's findings 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." *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006). Based on the record before us, the district court's findings are not clearly erroneous; the court did not abuse its discretion by awarding sole physical custody to respondent.

Joint Physical Custody

Appellant argues that the district court erred by finding that joint physical custody would not be appropriate. Neither party requested joint physical custody, but appellant asserts that the court must have considered it when making a summary finding that "the requisite level of trust and cooperation that would be necessary to successfully achieve a joint physical custody arrangement does not exist in this case." This is an almost verbatim recommendation from the custody evaluator's report.

Minn. Stat. § 518.17, subd. 2 (2008), states:

> [W]here either joint legal or joint physical custody is contemplated or sought, the court shall consider the following relevant factors: (a) the ability of parents to cooperate in the rearing of their children; (b) methods of resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods; (c) whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing; and (d) whether domestic abuse . . . has occurred between the parents.

There is no presumption in favor of joint physical custody. *In re Custody of J.J.S.*, 707 N.W.2d 706, 711 (Minn. App. 2006), *review denied* (Minn. Mar. 14, 2006). There is no presumption disfavoring joint physical custody, as long as it is in the best interests of the child. *Schallinger v. Schallinger*, 699 N.W.2d 15, 19 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005).

Here, both parties requested sole physical custody and neither requested joint physical custody. Although the statute requires that the analysis must be made if joint physical custody is contemplated, the question arises when a party makes the request, rather than on the court's own initiative. *See Zander*, 720 N.W.2d at 366 ("When a party

seeks joint physical custody, the district court is required to consider four additional factors."). By failing to raise the issue in district court, appellant waived the opportunity to present evidence that would support an award of joint physical custody. *See Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) ("On appeal, a party cannot complain about a district court's failure to rule in her favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question."). We see no error in the district court's failure to make the additional joint custody findings.

Affirmed.