STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1636

In re the Marriage of:
Kristine Anne Schisel, petitioner,
Appellant

vs.

Daniel Todd Schisel,
Respondent.

Filed May 18, 2010
Affirmed
Harten, Judge[*]

Blue Earth County District Court
File No. 07-FA-06-3017

Julia Ketcham Corbett, Kevin A. Velasquez, Blethen, Gage & Krause P.L.L.P., Mankato, Minnesota (for appellant)

Stacey R. Edwards Jones, Ryan B. Magnus, Jones and Magnus, Mankato, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Harten, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

HARTEN, Judge

Appellant-mother challenges a marriage dissolution judgment, arguing that the district court abused its discretion by requiring her to maintain her children's primary residence in the Mankato area so that they can continue to have the opportunity for daily contact with the respondent-father, with whom appellant shares joint physical and legal child custody.

This is appellant's second appeal from the dissolution judgment. In her previous appeal, she argued that the district court did not have the authority to impose a geographical restriction on a parent who wishes to relocate in-state. We held that the district court had the authority to impose the residence restriction, but remanded the case because the district court's findings were insufficient to support a finding that the restriction is necessary to serve the best interests of the children. On remand, the district court maintained the residence restriction and augmented its findings to support its conclusion that the restriction is necessary to serve the children's best interests. Appellant challenges the amended judgment and seeks reversal of the residence restriction. We affirm.

FACTS

Appellant Kristine Schisel and respondent Daniel Schisel married in 1995 and had two children, now ages 11 and 9. In July 2006, appellant petitioned for marital dissolution. The parties agreed to share joint legal and physical custody of the children. The district court held a trial in June 2007 to resolve the remaining issues, including

parenting time, the children's residence, child support, and property division. Appellant wanted the children's primary residence to be with her, and she intended to move with the children to Lakeville, approximately one hour from the family home in Mankato. Appellant's job in the Twin Cities requires an approximate 3 1/2 hour roundtrip commute from Mankato four days a week. Respondent wanted the children to remain in Mankato, and parenting time to be split equally between the parties. Appellant stated that if she were not allowed to move the children to Lakeville, she would continue to live with them in the family's Mankato home.

The district court ordered judgment dissolving the marriage and awarded the parties joint legal and physical child custody. The district court held that the children's primary residence would be with appellant in the family's Mankato home, precluding appellant from moving to Lakeville with the children. Appellant moved for multiple amendments to the district court's findings of fact and conclusions of law, including the removal of the residence restriction. The district court denied the motion, with the exception of changing the residence restriction from Mankato to the area served by the Mankato school district.

In *Schisel v. Schisel*, 762 N.W.2d 265 (Minn. App. 2009) (hereafter *Schisel I*), appellant challenged the amended district court judgment, arguing, among other things, that the district court did not have the authority to impose a geographical restriction on a parent who wishes to relocate in-state.

We held that the district court has the authority to restrict the in-state residence of a minor child upon a showing that the restriction is necessary to serve the children's best

interests. But we remanded the case because the district court's findings were insufficient to support a geographical restriction of the children's primary residence to the Mankato area. On remand, the district court maintained the residence restriction and added findings to support its conclusion that the restriction is necessary to serve the best interests of the children. Appellant challenges the amended judgment, seeking reversal of the residence restriction.

D E C I S I O N

A district court has broad discretion to determine matters of child custody. *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002). "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." *Id.* "Even though the [district] court is given broad discretion in determining custody matters, it is important that the basis for the court's decision be set forth with a high degree of particularity." *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989) (quotation omitted). We rely on the district court's findings unless they are clearly erroneous. *Schallinger v. Schallinger*, 699 N.W.2d 15, 22 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005).

In *Schisel I*, we first determined that "the district court enjoys the authority to restrict the in-state residence of a minor child upon a showing that the restriction is necessary to serve the child's best interests." *Schisel I*, 762 N.W.2d at 270. Appellant did not seek further review of that holding. We remanded the case for further proceedings because the district court's findings did not demonstrate a necessity for the

residence restriction. *Id.* at 271. It appeared that the district court's principal reason for imposing the restriction was its finding that "the children have been ingrained into the Mankato community." *Id.* This finding alone, although important, was insufficient to demonstrate that a residence restriction is necessary to serve the children's best interests. *Id.* We also emphasized that the children's best interests, and not that of the parents, should be the fundamental focus of custody decisions: "[T]he mere fact that a residence relocation might collaterally benefit one parent and create a detriment to the other is not sufficient to justify a residence restriction[.]" *Id.*

On remand, the district court added fact findings to support its holding that the restriction is necessary to serve the children's best interests. The district court also attached a memorandum to its amended order "to better articulate the basis for its decision" because "the appellate court may have misconstrued the district court's reliance on the fact that the children had been 'ingrained' in the present community." The district court addressed each of the best-interests factors listed by Minnesota Statutes section 518.17, subd. 1, and "other factors." *See* Minn. Stat. § 518.17, subd. 1 (2008) (listing relevant best-interests factors), subd. 3(a)(3) (2008) ("In determining custody, the court shall consider the best interests of each child . . . ."). The district court found that the residence restriction is necessary to serve the children's best interests because it allows the children an opportunity for daily contact with their father. The issue in the instant appeal is whether the district court's amended findings sufficiently show that the restriction is necessary to serve the children's best interests.

The district court rejected appellant's assertion that living one hour away in Lakeville will not significantly decrease the overall quality time that respondent will have with the children; it found that allowing appellant to move to Lakeville "will significantly and negatively impact the children's relationship with [their father]." Appellant claims that the record does not support this finding.

Respondent is a police commander for the City of Mankato. His job requires him to work three different 12-hour shifts: the day shift from 6 a.m. to 6 p.m., the night shift from 6 p.m. to 6 a.m., and the mid-shift from 3 p.m. to 3 a.m. Respondent generally works the same shift for six weeks and then rotates. He works 14 to 16 days per month and weekends in rotations of three weekends on and three weekends off. The district court noted that for two of the three possible shifts, the night shift and the mid-shift, it would be impossible for him to see the children during the evenings if they resided in the Twin Cities; even while working the day shift, it would be difficult for him to see the children if they lived an hour away. But if the children remained near Mankato, the respondent could continue to have daily contact with them.

The opportunity for the children to continue to have meaningful and frequent interaction with both parents was given prominent attention by the district court:

> If a child is used to this manner of interaction with both parents, and there is not a compelling reason to limit the interaction,[1] then it cannot be denied that it is in the best interests of the children to set forth a parenting plan which enables the

[1] Appellant interprets this language as the district court requiring that the party seeking relocation to provide "compelling evidence" to limit interaction with the non-primary parent. After reviewing the district court's entire order, we find that the district court independently determined the children's best interests without placing the burden on either party to present "compelling evidence."

> interaction of each child with each parent to continue, as much as possible, as it was before the parents' marriage dissolved.

The record suggests that the children were accustomed to a high level of interaction with each parent. The district court found that both parties have been involved in the lives of the children; they have acted as caretakers, and each party described the other as an excellent parent. Appellant was generally responsible for getting the children ready in the morning and dropping them off at school or daycare. Respondent (or his mother if he was unavailable) generally picked up the children in the afternoon. Respondent's position allows him, even when on duty, to transport the children to or from school or sporting events and to attend portions of these events. If the children remained in or near Mankato, the district court found that it was possible that they would continue to have daily contact with their father because he could stop by a sporting event, attend school conferences, offer a ride, or take them to appointments. The district court's finding that allowing appellant to move to Lakeville would have a significant negative impact on the children's relationship with respondent is supported by substantial evidence.

Appellant argues that it is respondent's work schedule, and not the distance between Mankato and the Twin Cities that would prevent him from interacting with the children during the evening. But this argument overlooks respondent's ability to have had meaningful interaction with his children prior to the dissolution despite his work schedule. Appellant correctly emphasizes that the parenting schedule places the children in her care while respondent works and that, due to the unfortunate consequences of divorce, he will no longer be able to stop by her house to see the children at night. The

district court did not find that the residence restriction would allow respondent to continue to "drop in" at appellant's house to tuck in the children at night, but it did focus on respondent's ability to continue to attend sporting events, school conferences, appointments, and transport them. And although the parenting schedule does not provide respondent parenting time during work shifts, the district court did not intend to preclude the respondent from seeing the children if his work duties allow the opportunity. The district court acknowledged that it was "uniquely difficult to establish a rigid parenting time plan" due to respondent's schedule and that the adjudicated schedule should not be considered "set in stone."

The district court encouraged the parties to continue their "relationship of cooperation" and to be flexible in sharing parenting time: "The parties should merely use [the parenting plan] as a framework and continue to work out any additional times when [r]espondent is available." Although this may be an unrealistic expectation in all dissolutions, the district court thought that it was likely in this case. The district court found that appellant has continued to accommodate the respondent's work schedule and there was no indication that she would discontinue her flexibility in the future.

The district court also emphasized that the children have lived their entire lives in the family's Mankato home in close proximity to extended family. Although a neutral custody evaluator found that the children were capable of adjusting to a new environment, the evaluator also concluded that it would "be detrimental for the children to be totally removed from their present home and community." The district court properly considered this factor. *See Schisel I*, 762 N.W.2d at 271 (children's local

involvement is an "important consideration" but it is not alone sufficient to support a geographical restriction).

Appellant argues that the restriction of the children's residence to the Mankato school district required the district court to find that the Mankato school district has "unique and compelling attributes" that make it necessary for the children's best interests that they remain there. In our *Schisel I* analysis of whether the district court made a sufficient showing of necessity, we indicated:

> That minor children are "ingrained" in a particular community is not alone sufficient to support a geographical restriction of their primary residence to that community. If that were the case, it is unlikely that any custodial parent would be allowed to relocate the primary residence of school-age children either within or outside of the state, for it could be persuasively argued that the children had become "ingrained" in their school and local activities. Although local involvement is an important consideration, there needs to be a showing as to why that local involvement has sufficiently unique or compelling attributes to meet the *Sefkow* requirement of demonstrating that a residence restriction is necessary to serve the children's best interests.

Id. at 271. We provided this guidance in light of what we now understand to be our incorrect initial conclusion that the district court based the residence restriction solely on the finding that the children were "ingrained" in the community. On remand, the district court clarified that the children's involvement in the community was not the sole, or even primary, justification for finding the residence restriction necessary to serve their best interests. Because the district court found that the residence restriction is necessary to serve the children's best interests in maintaining daily contact with their father and not solely because they are ingrained into the community, there was no need to find that the Mankato school district had unique and compelling attributes.

Appellant also questions the district court's consideration of the parties' agreement to share joint physical custody of the children. "'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) (2008). Appellant argues that the district court "implicitly concluded" that joint physical custody requires daily contact with the parent. There is some support in the record for this argument. The district court made multiple references to the parties' agreement to joint physical custody, including that "[a] restriction on the [mother's] right to relocate the children to Lakeville . . . will enable the parties to effectuate their agreement for joint physical custody."

In *Blonigen v. Blonigen*, 621 N.W.2d 276, 281 (Minn. App. 2001), we emphasized that joint physical custody does not require equal division of parenting time. "[R]ather, it is only necessary that physical custody of the child be the shared responsibility of the parties." *Id.* (quotation omitted). The fact that the Blonigen children spent two-thirds of their time at their mother's home was an insufficient basis to disregard the parties' choice to describe their agreed upon custody arrangement as joint physical custody. *Id.* It is clear in the instant case that the district court did not interpret joint physical custody to mean equal parenting time; the district court estimated that the children would be in the care of their mother 75% of the time. But parents can share physical custody of their children if they live an hour apart just as they can share physical custody if one parent is awarded the majority of the parenting time. The residence restriction is unnecessary to "effectuate their agreement for joint physical custody." This finding, however, was not essential to the district court's decision to impose the residency restriction. After

mentioning that the restriction will enable the parties to effectuate their agreement for joint physical custody, the district court stated that "*[m]ost importantly*, it allows them the opportunity to have daily contact with their father and is thereby necessary to effectuate a parenting plan that represents the best interests of the children." (Emphasis added.)

Appellant claims that the district court failed to address the impact the residence restriction would have on the children's best interests in relation to their interactions with their mother. The district court's order does focus largely on preserving the children's interaction with their father. But rather than viewing this as a negative, we note that appellant had already been awarded the majority of the custodial time with the children and the district court likely was not concerned that the children's relationship with their mother would be "significantly and negatively" affected. It is apparent from the parenting plan that the children will spend the majority of their time in their mother's care even if she remains near Mankato and continues to commute 3 1/2 hours on Monday through Thursday. Appellant asserts that the residence restriction reduces the children's time with her by three hours a day, four days every week. This argument unjustifiably assumes that almost all of the time that appellant would save in a shorter commute from Lakeville would be spent with the children. The district court stated that it denied appellant's request to move the children to the Twin Cities, closer to her workplace, "because [she] has been commuting to the Twin Cities four days a week throughout her marriage to [respondent] and for the entire lives of both children." Appellant acknowledged that, at the time of trial, she had successfully commuted for nine years.

Obviously, but for the children's best interests, relocating to Lakeville would be more convenient for appellant.

Finally, appellant alleges that under the law of the case doctrine, the district court was prevented from concluding on remand that the children would suffer harm if their opportunity for daily contact with their father ended. The law of the case doctrine provides that once an appellate court makes a *legal determination*, that determination becomes law of the case and may not be disregarded by a district court on remand. *In re Trusteeship of Trust of Williams*, 631 N.W.2d 398, 404 (Minn. App. 2001), *review denied* (Minn. 25 Sept. 2001). In *Schisel I*, this court did refer to the district court's lack of findings suggesting that a relocation would be detrimental to the children: "Nor was there evidence or any finding that the children would be harmed in some way by a change of residence. On the contrary, the evidence shows that they both have the capacity to adjust and adapt to a new home." *Schisel I*, 762 N.W.2d at 271. But this statement was not intended to determine a legal issue; it simply was in reference to the district court's findings.

We conclude that the district court's amended findings of fact provide an adequate showing that the residence restriction is lawful and necessary to serve the children's best interests.

Affirmed.