**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-1768**

In re the Marriage of:
William David Koberoski, petitioner,
Appellant,

vs.

Michelle Diana Koberoski, n/k/a Michelle Knudsen,
Respondent.

**Filed June 8, 2010**
**Affirmed**
**Stoneburner, Judge**

Watonwan County District Court
File No. 83FA08470

Jon G. Sarff, Sarff Law Office, Mankato, Minnesota (for appellant)

Eric Richard, Law Offices of Southern Minnesota Regional Legal Services, Inc., Mankato, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Harten, Judge.*

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

**STONEBURNER**, Judge

In this dissolution action, appellant father challenges the district court's exclusion of certain evidence, alleges that several findings of fact are not supported by the evidence

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

and that associated conclusions of law are, therefore, not supported by proper findings. He also argues that the district court abused its discretion by denying his motion for a new trial. We affirm.

## FACTS

Appellant William David Koberoski (father) and respondent Michelle Diana Koberoski (mother) were married in 2002. There are two children of the marriage, J.R.K., born in July 2004, and R.N.K., born in March 2006. Mother and father separated in June 2008 and agreed to joint legal and physical child custody. The district court ordered a parenting-time schedule that gave the parties equal overnight parenting time with the children. Temporary child support was established by a child support magistrate (CSM) who found that the parenting-time schedule was "presumptively equal"[1] and ordered father to pay child support of $91 per month and medical support of $91 per month.

At trial, both parties asked for joint legal and physical child custody. Father asked that the parenting-time schedule established by the temporary order remain in place. The temporary order gave father overnight parenting time every Tuesday and Wednesday and alternate weekends. Mother requested that she have the children overnight from Monday through Friday to provide more consistency for the children. Mother also wanted to have

[1] The schedule actually provided father with 42% of the parenting time and mother with 58% of the parenting time calculated by the number of hours each parent spent with the children. But the parents had presumptive equal parenting time for the purpose of calculating child support because they had equal overnights. *See* Minn. Stat. § 518A.36, subd. 1(a) (2008) (providing that the percentage of parenting time may be determined by calculating the number of overnights that a child spends with a parent).

the children on Tuesday evenings to attend Early Childhood Family Education (ECFE) with the children. Father testified that he would be willing to take the children to ECFE on Tuesday evenings. Mother testified that she would agree to father having parenting time every Sunday because father is the parent involved in the children's religious training. Father did not request that he have the children every Sunday, but he argued to the district court that mother is not religious and has not been involved in the children's religious training.

At trial, father attempted to introduce the testimony of mother's former employer, a letter from that employer concerning mother's termination from employment, a 60-page transcript of mother's internet instant messages on her computer at work from June 2008, and the testimony and notes of psychologist Al Mumma, who provided marriage counseling to the parties prior to the commencement of the dissolution proceedings. In an offer of proof, father explained that this evidence would establish mother's addiction to adult internet sex, marijuana use, past history of having been sexually assaulted, possible diagnosis of a Borderline Personality Disorder, absence of allegations of domestic abuse during the marriage, and dishonesty about a trip she took immediately prior to commencement of the dissolution. Father argued that the evidence was relevant to mother's parenting skills and imputation of income for child-support purposes. The district court excluded the evidence from the psychologist in part because it was untimely disclosed. And after reviewing the proffered documents, the district court excluded all of the evidence, concluding that the evidence was not relevant to issues to be decided in the

dissolution trial. Father, however, was permitted to testify at length regarding mother's internet activities and termination from employment.

Father testified that on one occasion he discovered mother engaged in sexual behavior on the internet in the children's bedroom while the children were sleeping. The district court specifically found father's testimony about this incident, which was denied by mother, not credible.

After trial, the district court issued findings of fact, conclusions of law, and order for judgment: judgment was entered. The district court granted the parties joint legal and physical custody of the children but adjusted the parenting-time schedule. The adjusted schedule eliminates Tuesday overnight parenting time that father had under the temporary order but grants him parenting time every Sunday from 8 a.m. to 6 p.m. This adjustment resulted in father's loss of four overnights and gain of two days of parenting time per month, removing the presumption of equal parenting time under section 518A.36, subd. 1(a), and reducing his parenting time, calculated in hours, from 42% to 26%. The district court calculated father's child-support obligation under the guidelines, resulting in a support obligation of $727 per month (including a medical-support obligation of $83 per month).[2]

The district court awarded each party the personal property in his or her possession except for a 1980 motorcycle in mother's possession, valued at $6,000,

[2] Had the temporary support order been based on parenting time calculated in hours, rather than overnights, the guideline child-support obligation for 42% of parenting time would have been the same amount as the guideline child-support obligation for 26% of parenting time. *See* Minn. Stat. § 518A.36, subd. 1(a).

purchased prior to the marriage by father. The district court ordered that the motorcycle be sold and the proceeds be divided equally, or that father purchase mother's interest in the motorcycle for $3,000. Both parties moved for amended findings of fact and conclusions of law, and father moved, in the alternative, for a new trial. The district court amended one finding to provide for communication about children's issues in a communication notebook or, in the event of emergencies, by text message. All other requests were denied. This appeal followed.

## D E C I S I O N

### I. The district court did not abuse its discretion by excluding evidence from mother's employer and the marriage counselor.

In general, "[t]he admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto Ins. Co.*, 567 N.W.2d 42, 45–46 (Minn. 1997) (quotation omitted). "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Id.* at 46 (quotation omitted). *See also Poppenhagen v. Sornsin Constr. Co.*, 300 Minn. 73, 79–80, 220 N.W.2d 281, 285 (1974) (stating that for an error in the exclusion of evidence to be grounds for a new trial, "it must appear that such evidence might reasonably have changed the result of the trial if it had been admitted").

The district court rejected the evidence of the counseling records as untimely disclosed and, after a review of all of the proffered evidence, including evidence from

mother's former employer and transcripts from multi-party internet communications, rejected that evidence as well, finding that it was not relevant to the issues to be determined.[3] On this record, and based on our own review of the proffered evidence, we cannot conclude that the district court abused its discretion in denying its admission. Father does not cite any authority to support his assertion that exclusion was an abuse of discretion and has not explained how inclusion of this evidence, which father characterizes as "consistent with" his own testimony, would have affected the outcome of this trial. Father requested and received joint physical custody. Although father was awarded less parenting time than he requested, he was willing for mother to have 50% parenting time, despite his disparagement of her parenting. The increase in the parenting time that the district court awarded mother primarily involved hours when the children would be sleeping, and the district court awarded father two additional days per month with the children when they will require active parenting. Although the district court's order significantly reduced father's parenting-time hours, we fail to see the connection between the exclusion of evidence proffered by father and the parenting-time schedule.

**II. The district court's findings of fact are reasonably supported by the record.**

Father argues that many of the district court's findings of fact are not supported by the evidence and should be amended. Factual findings are not subject to reversal unless clearly erroneous. Minn. R. Civ. P. 52.01. "[T]he findings of the [district] court will not

[3] Father argues that his having discovered mother engaged in inappropriate conduct in the children's bedroom while the children were sleeping is relevant to whether mother should have been awarded the majority of the parenting time. But the district court did not exclude evidence of that incident as irrelevant: the district court found father's testimony about the incident not credible.

be disturbed if they are reasonably supported by evidence in the record considered as a whole." *Hubbard v. United Press Int'l*, 330 N.W.2d 428, 441 (Minn. 1983).

Father first challenges finding of fact X:

> An Order for Protection [OFP] was issued in Minnesota on June 18, 2008 by the Watonwan County District Court. The [OFP] prohibited [father] from committing any act of domestic abuse against [mother]. The parties agreed to a mutual no contact order in the divorce file and [mother] agreed to drop the [OFP] against [father]. Subsequently, [father] violated the no contact order and was charged with a misdemeanor level violation of the no contact order. [Father] received a stay of adjudication on the charge.

Father argues that the finding does not include the additional information that the OFP issued was ex parte, that "there has never been a finding of domestic abuse," and that the record indicates that mother was the first to violate the no-contact order. But there are no inaccuracies in the finding and it is supported by evidence in the record. Therefore it will not be disturbed on appeal.

Father next challenges finding XIV as "misleading." This finding contains the district court's analysis of the best-interest factors contained in Minn. Stat. § 518.17 (2008), supporting the finding that joint legal and physical custody is in the best interests of the children. A district court has broad discretion to determine custody matters. *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989). Appellate review of a custody determination is limited to whether the district court abused its discretion by improperly applying the law or by making findings unsupported by the evidence. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996).

In this case, the district court made detailed findings on each factor, as required by Minn. Stat. § 518.17, subd. 1. But father complains that the district court failed to include negative information about mother, to which father testified at length; incorrectly stated that the children are bonded with mother; and failed to state that mother does not believe in God and that mother has not attempted to continue the children's religious training. Notwithstanding father's displeasure that the findings do not reflect his disparagement of mother, the best-interest factor findings, with one minor exception, are supported by evidence in the record.

We agree with father that the record does not support the district court's statement that both parties testified that they would like some changes in the temporary parenting-time schedule to accommodate ECFE participation with mother on Tuesdays and church with father on Sundays, and to provide a smoother transition for the children. A correct summary of the testimony would be that father wanted no change in the temporary schedule (although he erroneously characterized the temporary order as providing for 50/50 parenting time) and that only mother requested changes, including elimination of all weekday overnight parenting time with father. But a summary of testimony is not a finding. *See Dean v. Pelton*, 437 N.W.2d 762, 764 (Minn. App. 1989) (stating that recitation of claims are not true findings of fact). The district court correctly summarized the parties' testimony in the memorandum incorporated into the order denying father's posttrial motions, reaffirming its conclusion that the parenting time ordered is in the children's best interests because it provides more continuity and permits father to continue the children's religious training. Because father's complaint does not relate to a

true finding, and because it is apparent that the district court did not misunderstand the parties' positions at trial, we conclude that father is not entitled to any relief for this misstatement of trial testimony. Father's concern, on appeal, "about the internet men [mother] will expose the children to when no one is able to keep tabs on her" is inconsistent with his position at trial that mother should have 50% of the parenting time.

Father asserts that the district court's finding XXVII with respect to parenting time is unsupported by the evidence and that the temporary schedule should have been adopted. "It is well established that the ultimate question in all disputes over [parenting time] is what is in the best interest of the [children]." *Clark v. Clark*, 346 N.W.2d 383, 385 (Minn. App. 1984), *review denied* (Minn. June 12, 1984). And 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). As stated above, in the circumstances of this case, we conclude that the parenting-time schedule ordered is supported by the evidence.

Father challenges the district court's findings about the parties' incomes, asserting, without any citation to authority, that the district court was precluded from establishing child support because gross income had been established by the CSM and the time to appeal the CSM's order has expired. The CSM established temporary child support, pending the dissolution, based on a temporary parenting-time schedule. We find no merit in father's argument that the temporary child support order could not be altered by the district court in the dissolution judgment. *See* Minn. Stat. § 518.131, subd. 5 (2008) (providing that a temporary order continues in effect until "the earlier of its amendment

or vacation, dismissal of the main action or entry of a final decree of dissolution or legal separation"). Furthermore, father does not argue that the district court's child-support calculation is erroneous or an abuse of discretion.

Father challenges as erroneous the district court's finding that the parties own motorcycles titled in father's name and purchased with father's funds. Father argues that mother's claim to either motorcycle "is precluded by Minn. Stat. § 513.075 and 513.076." The referenced statutes deprive the district court of jurisdiction to hear certain claims for property of another if the claim is based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock. Father cites these anti-palimony statutes given mother's argument to the district court that the motorcycles were marital property because the parties were living together when they were purchased. At appellate argument, mother conceded that the anti-palimony statutes cited by father preclude premarital accumulation of joint property under the circumstances of this case and that, absent a finding that the 1980 motorcycle was a gift to mother, the motorcycle was father's nonmarital property, having been purchased by father with father's funds prior to the marriage. *See* Minn. Stat. § 518.003, subd. 3b(b) (2008) (defining "nonmarital property" as property acquired before the marriage). Father argues that the district court erred by treating the 1980 motorcycle as marital property.[4]

[4] Father did not argue to the district court that it erred by treating the 1988 motorcycle awarded to father as marital property. This court will generally not consider matters not presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Therefore, we do not address the disposition of the 1988 motorcycle.

The district court stated in the memorandum incorporated into the order denying posttrial relief that the evidence supported a finding that father gifted the 1980 motorcycle to mother. And the district court explained that even if this motorcycle was nonmarital property, given the parties' financial circumstances, the district court would have invaded this nonmarital property to reach an equitable result. Because a remand to the district court on this issue would only result in additional findings supporting the district court's award, we conclude that father has not demonstrated that he is entitled to any relief on appeal for the district court's treatment of the 1980 motorcycle. *See Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985) (refusing to remand a custody award for findings of fact where the file and record showed that the district court "would undoubtedly make [the required findings]").

Father challenges findings XXIV and XXV as not supported or justified by the evidence. These findings provide, respectively, that father is responsible for the $700 debt on a laptop computer awarded to him, and that proceeds from a check from a mortgage company, an economic-stimulus check, and a 2007 income-tax refund shall be divided equally. Father asserts that he used nonmarital funds to pay mother's nonmarital debt and, therefore, argues that it is inequitable to require him to assume the debt on the computer. Father asserts that the evidence he presented demonstrates that proceeds from the economic-stimulus check and the 2007 income-tax refund were used to pay marital debts. But the district court had ordered equal division of the tax refund and stimulus check in the order for temporary relief, and there is insufficient evidence in the record to demonstrate that this division is inequitable or that those specific funds were actually

used to pay marital debt. The district court did not abuse its discretion by ordering that father pay the debt on the computer that was awarded to him.

Father asserts that conclusions of law "Nos. 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16 and 17 are not supported by the evidence and constitute an abuse of the Court's discretion." To the extent we address this unsupported assertion at all, we conclude that the conclusions of law cited are supported by the evidence and do not constitute an abuse of discretion for the reasons already discussed.

Father also asserts that the district court "should have granted [father] a new trial." But "the granting of a new trial rests in the discretion of the [district] court, and [its] decision will be reversed only for a clear abuse of discretion." *Klein v. Klein*, 366 N.W.2d 605, 606 (Minn. App. 1985), *review denied* (Minn. June 27, 1985). The district court's decision is supported by the evidence and father has not offered any new, previously undiscovered evidence that was not available at the time of trial, nor has he otherwise demonstrated any circumstance that would entitle him to a new trial. *See* Minn. R. Civ. P. 59.01 (stating the grounds on which a new trial may be granted).

**Affirmed.**