STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1107

In re the Marriage of:
Thomas Gordon Burnett, petitioner,
Appellant,

vs.

Daniela Estefania Burnett Torres Parra,
Respondent.

Filed February 12, 2018
Affirmed
Jesson, Judge

Wabasha County District Court
File No. 79-FA-16-843

Andrew Laufers, Cordell & Cordell, P.C., Edina, Minnesota (for appellant)

Karen E. England, England Law Office, Ltd., Lake City, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Connolly, Judge; and Jesson, Judge.

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

JESSON, Judge

Respondent Daniela Parra is originally from Chile but married appellant Thomas Burnett and moved to Minnesota where they had a child. The marriage did not last and respondent petitioned for dissolution. Respondent wished to return home to Chile with the child, but appellant did not approve of the child living outside the country. To resolve this

dispute, the couple took the issue of child custody to trial where the district court awarded international joint custody. Under the court's order, the child would attend school in Chile with respondent for most of the year and spend breaks in Minnesota with appellant. Appellant appealed, arguing that the district court abused its discretion by not considering how international law might impact the court's custody decision and because the court, in a too-general order, awarded him less than 25% parenting time. We affirm.

FACTS

Respondent Daniela Estefania Burnett Torres Parra was a foreign-exchange student from Chile when she met appellant, Thomas Gordon Burnett, in Wabasha. After respondent-mother returned home to Chile, father—who lived in Minnesota—would travel to her home country to see her. The couple began dating and mother eventually moved to Minnesota. They married in July 2010, and about a year and a half later, they had a son who holds dual citizenship in the United States and Chile.

Mother and father made their home in Minnesota but continued to make trips back to Chile to visit mother's family. To help maintain the child's roots in his Chilean heritage, the couple raised the child bilingually in English and Spanish and cultivated an immersion of the cultures of both Chile and the United States.

But the marriage was tumultuous, including an incident of domestic abuse by father against mother in front of the child. This incident led to father being charged with domestic assault, which was eventually reduced to disorderly conduct. Father pleaded guilty to the reduced charge. Mother petitioned for dissolution of the marriage in September 2016, and the couple worked out the terms of the dissolution except for one: the custody arrangement

for the child. Mother wished to return to Chile and make her permanent home there with her family, but father opposed the child being taken to Chile for any reason.

After a two-day trial, the district court issued an order awarding mother and father joint legal and physical custody. The order allowed the child to attend school in Chile with mother and spend his breaks and school vacations with father in Minnesota. Father took issue with multiple findings of fact in the court's order and petitioned the court to amend its findings. The district court held a hearing on father's petition and issued an amended order just a few days later, but the overall terms of the parenting-time schedule remained substantially the same. Father appeals.

D E C I S I O N

Father asks us to reverse the district court's parenting-time determination allowing the child to attend school in Chile and spend breaks and vacations back in Minnesota. Generally, a district court has broad discretion in deciding parenting-time questions and will not be reversed absent an abuse of discretion. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). A district court abuses its discretion in parenting-time cases by misapplying the law or relying on facts that are not supported by the record. *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017). A district court's findings of fact that are used to support a parenting-time decision will be upheld unless they are clearly erroneous. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978).

Father argues that there are two main areas where the district court abused its discretion. First, father argues the court abused its discretion when it failed to consider how international law might affect future custody disputes. Second, father contends the

parenting-time award is insufficient because it fails to acknowledge that father has less than 25% parenting time with the child and, relatedly, that it is too generalized. We discuss each argument below.

The district court adequately considered how international law would affect the parenting-time arrangement.

Father's main argument is that the district court did not give enough consideration to how its decision allowing the child to live part-time in Chile could be impacted by an international treaty called the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention). The Hague Convention was adopted in 1980 as a way to discourage international forum shopping in child custody[1] cases. *Navani v. Shahani*, 496 F.3d 1121, 1128 (10th Cir. 2007). The treaty is designed to prevent a parent who is upset with a custody decision in one country from fleeing with a child to another country to re-litigate the custody arrangement in a more favorable forum. *Id.*

Although the Hague Convention is certainly entwined with international custody disputes, it explicitly does not concern itself with re-litigating these disputes. Its purpose is to maintain the status quo by requiring each signatory country to return a wrongfully removed child back to the child's country of "habitual residence" where the dispute can be settled in the proper court. *Karkkainen v. Kovalchuk*, 445 F.3d 280, 287 (3d Cir. 2006). This term "habitual residence" is not defined, but the treaty's accompanying report

[1] Father's argument is specifically aimed at the court's parenting-time decision rather than the overall custody arrangement. *See* Minn. Stat. § 518.003, subd. 3 (2016) (outlining the different aspects of custody, including parenting time). But the Hague Convention does not draw much of a distinction between parenting time and custody, preferring the umbrella term "custody" for the most part.

describes it as a "well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile." Elisa Perez-Vera, *Explanatory Report*, ¶ 66, in 3 Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 426 (1982).[2] Federal courts have struggled to settle on a definition of habitual residence, but the Ninth Circuit's standard in *Mozes v. Mozes* emerged as a rough guideline in subsequent cases. 239 F.3d 1067 (9th Cir. 2001). The essence of the Ninth Circuit's definition is that habitual residence generally hinges on the intention of the parents and child about where they plan to permanently live. *Id.* at 1075-76.

Father argues that the district court's decision allowing the child to attend school in Chile will transform Chile into the child's habitual residence under the Hague Convention. This decision was an abuse of the district court's discretion, father argues, because any future custody or parenting-time issues would be settled not by a Minnesota court, but by a Chilean court—a judicial system with which father is unfamiliar. We reject the argument for two reasons. First, it is unclear if Chile would actually become the child's habitual residence under the Hague Convention. There is certainly a reasonable argument to this effect, but this is a determination that should be made by the correct forum if, and when, the time comes. For now, speculating about what the child's habitual residence might be

[2] This accompanying report was made by Elisa Perez-Vera, the official Hague Conference Reporter. Her report is recognized as the "official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,503 (March 26, 1986).

under the Hague Convention is too hypothetical and abstract to use as a basis for overturning the district court's decision. *See Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 841 (Minn. App. 2007) (explaining that claims which are premature are not ripe for adjudication), *review denied* (Minn. Aug. 7, 2007).

The second reason we reject father's argument that the district court ignored the implications inherent in the Hague Convention is because the record convinces us that the district court *did* consider these implications. For example, the district court clearly heeded the advice of father's expert witness and included in its order an obligation that mother pay a custody bond before taking the child to Chile.[3] The district court also adopted the expert's recommendation that the parties obtain a mirroring order[4] in Chile that would mimic its own findings and determinations to help ensure compliance between the two countries.[5]

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[3] Father's expert explained that a custody bond in this context is a type of bond purchased by one parent before taking the child outside the country. If that parent decides not to return the child, the proceeds from the bond would flow to the other parent to help offset that parent's litigation costs in attempting to return the child.

[4] Father's expert also explained that a mirroring order is when one parent registers an existing court order from one country with another country's courts who then issue their own order "mirroring" the original order. For example, in this case, mother would take the district court's custody order and register it with Chile. Then the appropriate Chilean court would issue its own order duplicating—or mirroring—the district court's order. This way, the district court's order and intentions would have full legal effect in the Chilean judicial system.

[5] Mother also makes an argument on appeal that the district court abused its discretion by ordering her to pay a custody bond before taking the child outside of the country. But mother acknowledges that she did not file a notice of related appeal on this point as required by Minnesota Rule of Civil Appellate Procedure 106 (2016), and we conclude the issue is not properly before us. *See Arndt v. Am. Family Ins. Co.*, 394 N.W.2d 791, 793 (Minn. 1986) (stating that a respondent is barred from raising issues on appeal that are not included in a notice of related appeal).

Far from ignoring the complexities raised by the specter of the Hague Convention, the district court went to great lengths to recognize and then address those complexities. In fact, when father argued to the district court that it did not adequately consider his expert witness's testimony about the possible ramifications of the Hague Convention, the district court responded that it "considered it very much." Although the parenting-time decision was not the outcome father wanted, the district court weighed and considered the implications of the Hague Convention and the credible testimony of father's expert. And in our review of the district court's decision, we give wide deference to those credibility assessments. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1998). In reaching its decision to allow the child to attend school in Chile, the district court did not misapply the law nor did it rely on facts unsupported by the record, either of which would have resulted in a parenting-time decision that would have been an abuse of the district court's discretion. *Shearer*, 891 N.W.2d at 75. For these reasons, we conclude that the district court properly exercised its discretion.[6]

[6] Father also makes two brief arguments (1) that the district court did not adequately consider how this arrangement would impact the child's relationship with his step-sister and (2) did not adequately consider the nature of father's domestic abuse against mother. But these arguments do not change our conclusion. Nothing in the record suggests that the child had the type of relationship with his step-sister that would be so negatively affected by attending school in Chile. And the requirement for courts to consider the nature of domestic abuse is for the benefit of the victim of the abuse, not the abuser. *See* Minn. Stat. § 518.17, subd. 1(b)(9) (2016) (creating a rebuttable presumption that a domestic abuser should not have joint custody of a child and courts should consider the nature of the domestic abuse only to rebut that presumption). We are not aware of any support in caselaw or otherwise that conforms with father's use of this statutory shield as a sword.

The district court gave sufficient reasons to justify father's parenting time and sufficient details to implement its order. As a result, the district court did not abuse its discretion.

Father's second argument is two-fold but interrelated; he argues that the district court abused its discretion when it awarded him less than 25% parenting time with the child and by not providing sufficient details to implement its custody order. Both arguments rest on the abuse-of-discretion standard. We examine each challenge in turn.

Minnesota Statutes section 518.175, subdivision 1(g) (2016), contains a rebuttable presumption that a parent is entitled to receive "a minimum of 25 percent of the parenting time for the child" in a joint-custody decision. We analyzed the 25% presumption in *Hagen v. Schirmers*, 783 N.W.2d 212, 217-19 (Minn. App. 2010). There, we decided that district courts must "demonstrate an awareness and application of the 25% presumption when the issue is appropriately raised and the court awards less than 25% parenting time." *Id.* at 217 (citing *Dahl v. Dahl*, 765 N.W.2d 118, 124 (Minn. App. 2009)). We also concluded that the 25% line is a "legislatively imposed benchmark" and would be "stripped of its purpose if appellate courts could, after the fact, calculate parenting time in a light most favorable to the decision and supply findings" not clearly laid out in the record which would meet that 25% mark. *Id.* at 218. In other words, the burden is on the district court to outline how its parenting time decision meets the 25% minimum, or else rebut this presumed minimum by clearly explaining why it cannot be met.

Originally, the district court's parenting-time decision in this case was a short paragraph that allowed the child to attend school in Chile with mother from March to December and then spend time with father in Minnesota during January and February.

After father's motion to amend, which is the first time father raised the 25% presumption, the district court expanded this parenting-time decision to include two additional weeks with father during the Chilean school year's winter break, which would be in the summer in the northern hemisphere.

If we assume that the child spends the entire months of January and February, plus two weeks in the summer, with father in Minnesota, then this would fall below the 25% mark.[7] But we are convinced the district court adequately justified its reasons for sliding below this line. The court wrote in its amended order that it "considered an arrangement under which the child would spend part of the school year in Minnesota and part of it in Chile" but determined that this type of arrangement was "not practical" because "the Chilean school year runs from March to December while the Minnesota school calendar runs from September to June." The court concluded that, given the distance between the United States and Chile, it would be impractical to set a holiday schedule and that parenting time "must of necessity be scheduled in fewer, but longer, blocks of time than would be the case if the parties lived closer." The court justified this decision by saying that its intention was "for both parents to have liberal time to spend with the child while providing the child with the opportunity to continue to experience both cultures and enjoy extensive time with both sides of the family."

[7] Mother disputes this calculation but because we conclude that the district court demonstrated an awareness of the benchmark and justified why father's parenting time fell below the 25% limit, we do not need to decide whose arithmetic is correct.

These statements demonstrate a thoughtful approach to the unique problem this case presented for the district court: attempt to strike a balance in a parenting-time arrangement between countries in different hemispheres that was in the best interests of the child, that allowed the child to attend only one school, that continued to foster the child's immersion in both cultures and families, and that maximized the amount of time mother and father could each spend with the child. This was a challenging needle to thread, but the district court's decision adroitly navigated the delicate path. The court acknowledged that it considered alternative arrangements that could have been more equitable for father, but it deemed them impractical in lieu of keeping the child consistently in one school throughout the academic year and in light of the great distance separating the United States from Chile. The district court sufficiently justified its reasons for rebutting the 25% presumption and did not abuse its discretion.

Similar reasoning applies to father's argument that the district court did not provide sufficient details for implementing its custody decision. Father singles out the supposed lack of clarity when it comes to outlining specific dates and exact times when custody exchanges should occur and who shoulders the costs of transportation. He stresses that it was unrealistic for the district court to assume the parties could work out these matters on their own.

But the record shows that the parties have demonstrated their willingness to work out complex details on their own. As noted in the introduction to the district court's order, both mother and father negotiated nearly all the terms of their marriage dissolution before their custody trial. Adding to this, the parties appear to have negotiated reasonable

parenting-time arrangements in Minnesota on their own. The district court took notice of the parties' past collaboration and relied on it in multiple findings of fact. Granted, mother's move to Chile adds a layer of complication to the arrangement, but the district court acted reasonably in relying on the parties' previous cooperation and assuming that would continue into the future. Given the exceptional circumstances of this international-custody arrangement, nailing down a meticulous parenting-time schedule to father's exacting standards was unrealistic. This situation demanded more play in the joints than there might be in a typical custody order, and we defer to the district court's discretion in building in that flexibility. For these reasons, we conclude that the district court did not abuse its discretion by not setting a more specific parenting-time schedule.

Father summarizes his overall argument by likening the district court's custody decision to a careless student's math homework—reaching an answer without showing the proper work. But court orders are not calculus. We do not require rigorous mathematical precision when considering facts, weighing evidence, considering the law, and then making informed decisions. If anything, the district court impressively rose to the occasion when faced with this complicated nexus of interjurisdictional child-custody arrangements and international treaty obligations. The court considered how the Hague Convention might affect its custody determinations and took reasonable steps to address those concerns. The court justified its reasons for granting father less than 25% parenting time in its amended findings and order. And the court's order was specific enough in its decision to meet the demands of the unique circumstances of the case. We affirm its decision.

Affirmed.