IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)

STATE ON BEHALF OF DUSTIN W. V. TREVOR O.

STATE OF NEBRASKA ON BEHALF OF DUSTIN W., A MINOR CHILD, APPELLEE,

V.

TREVOR O., APPELLEE AND CROSS-APPELLANT,

AND

SHELBY W., APPELLANT AND CROSS-APPELLEE.

Filed April 2, 2024. No. A-23-311.

Appeal from the District Court for Hall County: PATRICK M. LEE, Judge. Affirmed in part as modified, and in part reversed and vacated.

Susan K. Alexander, of Law Office of Susan K. Alexander, for appellant.

Michele J. Romero and Vikki S. Stamm, of Stamm, Romero & Associates, P.C., L.L.O., for appellee Trevor O.

RIEDMANN, ARTERBURN, and WELCH, Judges.

WELCH, Judge.

I. INTRODUCTION

Shelby W. appeals from the Hall County District Court's order modifying custody, child support, awarding the child tax dependency exemption, and awarding attorney fees to Trevor O. Trevor cross-appeals alleging that the district court erred in failing to award him sole physical custody. For the reasons set forth herein, we affirm in part as modified, and in part reverse and vacate.

II. STATEMENT OF FACTS

1. BACKGROUND

Trevor and Shelby are the biological parents of Dustin W., who was born in 2018. In September 2020, the district court entered an order awarding the parties joint legal custody but awarding Shelby physical custody subject to Trevor's parenting time, which was defined as every other weekend, one midweek visit on alternate weeks preceding Shelby's weekend and holidays, and, after Dustin completed kindergarten, Trevor was to have alternate weeks during the summer months. At that time, Shelby resided in Grand Island, Hall County, Nebraska, and Trevor resided in Merrick County, Nebraska. Trevor was ordered to pay $406 per month in child support based upon Shelby's employment as a dental assistant earning $15.75 per hour and Trevor's employment as a mechanic earning $16 per hour. Shelby was ordered to provide health insurance for Dustin and was granted the tax dependency exemption. Notwithstanding the award, the court noted that although Shelby was doing well as Dustin's primary caretaker, she had failed to provide Trevor with "access to Dustin or his records without court intervention." As it related to that concern, the court stated that "[Shelby] is encouraged, now that this matter has been resolved, to allow [Trevor] full access to the information regarding Dustin and to be flexible in making parenting arrangements as is contemplated by Nebraska law."

2. MODIFICATION

In April 2022, Trevor filed a complaint for modification seeking sole legal and physical custody of Dustin, or in the alternative, an award of significant and specific parenting time, child support, and attorney fees. In support of his complaint, Trevor alleged that shortly after the court entered the dissolution decree, Shelby moved with Dustin to Giltner, Nebraska, and systematically engaged in conduct designed to impede his relationship with Dustin. In her answer and counterclaim, Shelby alleged that the complaint for modification was filed in bad faith and was meant to harass her. She requested that the court dismiss the complaint for modification and award her attorney fees.

At trial, the parties provided differing accounts of Shelby's conduct as it related to Trevor's allegation that Shelby's conduct was designed to interfere with Trevor's relationship with Dustin. Trevor identified several examples of Shelby unilaterally making decisions concerning Dustin and informing him later which precluded discussion or Trevor being able to provide his input on issues including: (a) moving from Grand Island to Giltner; (b) removing Dustin from daycare; (c) enrolling Dustin in preschool; (d) selecting a counselor for Dustin and scheduling an appointment; and (e) Shelby being inflexible concerning parenting time and refusing to allow Trevor to exercise any additional parenting time.

(a) Move From Grand Island to Giltner

Trevor adduced evidence that during the original dissolution proceedings, Shelby represented to the court that to assure continuity for Dustin, she planned to remain in Grand Island because it was Dustin's home; that Dustin would be attending a Lutheran school in Grand Island; and that Dustin would remain in his current daycare. According to Trevor, despite Shelby's

representations, less than 2 months later, Shelby made plans to move to Giltner, Nebraska. Shelby informed Trevor of the planned move by text message on April 29, 2021. Trevor testified that despite his concerns, Shelby moved to Giltner without any further discussion with him. In response, Shelby testified that she believed she did discuss the move with Trevor because she informed him 7 months prior to the move and stated that, "if he had questions, it was up to him to ask questions." In contrast, Trevor testified that Shelby's April 2021 text message informed him that a decision had already been made and indicated that Shelby had already signed a contract to build a house in Giltner that was expected to be completed on July 1. Shelby acknowledged that she notified Trevor 2 days after the contract for the house was signed.

(b) Removal of Dustin From Daycare

Trevor testified that he learned that Shelby had removed Dustin from daycare by being informed by the daycare provider. And although Shelby testified that she informed Trevor that they "wouldn't have daycare expenses for awhile," Trevor testified that he interpreted that information as an acknowledgment that Shelby was taking maternity leave for a subsequent child, but not as an indication that she intended to permanently remove Dustin from daycare or that she did not intend to resume her employment. Shelby admitted that she did not discuss removing Dustin from daycare with Trevor but indicated her decision to become a stay-at-home mother and decisions on financial support related to her personal life did not concern Trevor.

(c) Enrolling Dustin in Preschool

Trevor also testified that Shelby enrolled Dustin in preschool without enlisting his advice and without providing the school with his contact information. Trevor stated that Shelby sent him a text informing him that she had enrolled Dustin in preschool in Giltner. Trevor testified that, although he had no objection to Dustin attending preschool, the decision to enroll Dustin in a preschool in Giltner was made without his input and he was under the impression that Dustin would attend a Lutheran school in Grand Island. Trevor also testified that when he asked Shelby for paperwork related to Dustin's preschool enrollment, she told him to obtain it from the school. After Trevor obtained the paperwork, he learned that his contact information, including his cell phone number, address, and email address, was missing. And although Trevor was also listed as an emergency contact person, the entry listed Shelby's telephone number and not his. Trevor also testified that Shelby informed him after she had already scheduled parent-teacher conferences but was upset that date and time did not work for Trevor and that Trevor insisted on scheduling his own conference.

(d) Counseling

As it related to counseling services, Trevor testified that one night after he dropped off Dustin, Shelby told him that she wanted to find a counselor for Dustin. Trevor informed her that he was not opposed to it but wanted to further discuss the matter and consider options. The following day, without any further discussion, Shelby advised Trevor that Dustin had an appointment with a counselor. Conversely, Shelby testified that she arranged for Dustin to attend counseling after discussing it with Trevor because Dustin was having some behavioral issues with

biting, hitting, yelling, and using inappropriate language. Shelby testified that her goals for counseling were "[t]o help Dustin navigate better going between homes, for Trevor and I to be on the same page . . . have basically the same set of rules [for] both homes" to provide consistency for Dustin.

Trevor expressed concerns with Shelby's choice of counselor for Dustin. He stated that even though Dustin was only 4 years old, all of Dustin's counseling sessions were conducted via Zoom. Trevor further expressed his belief that the counselor was not properly qualified, that a conflict of interest existed because the counselor was a family friend, that the counselor did not interact much with Dustin, and that the "focus [was] more on helping Shelby."

Dustin's counselor testified that she was a multi-systemic therapy (MST) therapist, that she began seeing Dustin in August 2022, and that they had completed 10 sessions. The counselor testified that the purpose of counseling was to decrease Dustin's behaviors; to address issues relating to Dustin's transitions between households; to establish consistency in both households related to consequences, routines, and schedules; and to work on co-parenting. The counselor testified that Trevor was not receptive to therapy, challenged her authority and credentials, and was not forthcoming with providing information. She stated that, "on two occasions, he wanted to know my background, my credentials, what exactly I was doing. He was preferring some other type of therapy. He didn't really think it was going to work with the parents involved." Although Shelby reported that Dustin was having behavioral problems in her home, Trevor denied having issues in his home, and Dustin's teacher stated that he did not have any abnormal issues for a 4-year-old boy. The counselor testified that she felt like the zoom therapy sessions were more for Shelby and Shelby's ability to parent because MST "is always parent focused." The counselor acknowledged that Trevor expressed concerns that the sessions were only being held via Zoom and that MST therapy was being done on a 4-year-old, but she informed Trevor that "that's what I do."

The court asked the counselor questions related to her therapy:

> THE COURT: I have a few questions first. Is MST the multi systemic therapy that is often done with juvenile offenders?
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> THE WITNESS: Yes.
>
> THE COURT: Who is the target population of MST?
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> THE WITNESS: Juvenile offenders.
>
> THE COURT: Is it validated for juveniles under 12 years of age?
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> THE WITNESS: Prior to 2013, we did a lot of 3, 4, 5, up to 11, and then when the laws changed and probation took over, then it was strictly 12 to 18 and it has been 12 to 18 ever since 2013.
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> THE COURT: I think I'm less interested in what the probation rules are and more interested in what the general counseling community viewpoint is. In the counseling viewpoint's view, is MST something you can do with a juvenile who is three or four or five years of age?
>
> THE WITNESS: Yes, we have.
>
> . . . .

THE COURT: Are these sessions focused on Dustin's behavior modification or coparent counseling between [Trevor] and [Shelby]?

THE WITNESS: They're both.

THE COURT: My last question is relating to the use of Zoom. Is Zoom counseling for a three or four year old generally accepted in the counseling community?

THE WITNESS: I don't know. I say that just because three and four year olds don't usually have therapy anyway because most insurances won't pay for them. I know Medicaid won't pay for them. I mean maybe play therapy, but those are few and far between finding someone who will do that.

THE COURT: So in these Zoom sessions, is this more focused on Dustin or is this more focused on [Shelby] and [Trevor]?

THE WITNESS: The interventions are focused on the parents. The behaviors are for Dustin.

THE COURT: You had ten hours of sessions max, correct?

THE WITNESS: Yes.

THE COURT: What percentage was relating to Dustin, and what was the percentage of the relationship between [Trevor] and [Shelby]? Can you allocate a percentage?

THE WITNESS: I mean I believe it was every session we tried to work on coparenting, the behaviors that were given to me.

(e) Issues Related to Parenting Time

Trevor also testified that Shelby was inflexible regarding parenting time and consistently refused to allow him to exercise any additional parenting time. Trevor stated that Shelby regularly indicated whether she will "allow" Trevor to have additional time or phone contact with Dustin. Trevor stated that since the original custody decree, out of 29 times that he has requested additional parenting time with Dustin, Shelby denied 21 of those requests. Shelby testified that she had never denied Trevor any of his court-ordered parenting time and that, out of the 29 times that Trevor requested additional parenting time, she only denied his request 11 times. Shelby further testified that she has never denied Trevor's request for FaceTime contact with Dustin.

3. District Court Order

In April 2023, the district court awarded the parties joint legal and physical custody of Dustin based upon its determinations that Trevor had established a material change in circumstances which constituted grounds for modification and that modification was in Dustin's best interests. The court summarized Trevor's allegations as "[Shelby's] foreshadowed inability or unwillingness to co-parent with [Trevor]" and found that Shelby had "undertaken a systematic pattern of unilateral decisionmaking and malicious compliance with the court's order regarding parenting and life choices about Dustin." According to the court, this "systematic pattern" was evident from Shelby's "pattern of withholding information or providing incomplete information,"

her "attempts to alienate" and interfere with Trevor and Dustin's relationship, and "the weaponization of Dustin's mental health." The court further stated:

> If the Court had known in 2020 that its concerns regarding [Shelby's] inability to co-parent would only escalate, the overall arrangement of parenting time and final decisionmaking authority would likely have been different.
>
> . . . .
>
> The evidence presented shows that [Trevor] has actively been involved in Dustin's life. A strong parent-child bond has been created between Dustin and [Trevor] and, applying the evidence presented in this case to the statutory factors relating to best interests and [Shelby's] malicious compliance with the Court Order, it is clear that there is a need to delineate specific and additional parenting time for [Trevor].
>
> [Trevor] has attempted to exercise his lawful involvement in all decisions that the Court's order of joint legal custody allow. However, these attempts have been frustrated by a systemic pattern of refusal of [Shelby] to either allow [Trevor] more parenting time with Dustin, or even to be actively involved in the decision making process of issues surrounding Dustin's life. While [Shelby] was granted primary physical custody in the original Order, she was still obligated to include [Trevor] in the decision making regarding Dustin's life. She has not done so. On the other hand, despite only hav[ing] Dustin for a handful of days each month, the evidence illustrates that [Trevor] routinely communicated regarding Dustin's status and circumstances while in [Trevor's] care.

The court also found that, based on Shelby's inability or unwillingness to communicate with Trevor, she was unable to serve in the role as the final decisionmaker under the prior order. Accordingly, the court found that Trevor "shall have the final say in the choices regarding [Dustin's] education, religious upbringing and medical needs." However, we note that, in the attached parenting plan the court states that "[t]he custodial parent, [Shelby], shall have the final say in the choices regarding the child's education, religious upbringing, and medical needs."

The court modified physical custody of Dustin by ordering joint physical custody of Dustin with Dustin's "principal place of residence" with Shelby and awarding Trevor increased parenting time. Trevor was awarded parenting time with Dustin every other weekend from Thursdays at 6 p.m. until Mondays at 8 a.m. until Dustin started kindergarten. After Dustin started kindergarten, Trevor was awarded parenting time every other weekend from after school on Fridays to 6 p.m. on Sunday. Trevor was also awarded midweek parenting time every other week from 5 to 7 p.m. Trevor's summer parenting time was increased to 6 p.m. on the day school dismisses for summer break until 6 p.m. on the Friday before school reconvenes subject to Shelby's alternating weekends from Thursday at 6 p.m. until Monday at 8 a.m. Shelby was also granted 7 consecutive days during the summer for a summer vacation should she choose to exercise it. Major holidays were split between the parties.

Regarding telephone and other contact, the court's modification order provided:

> Each party shall have the right to have reasonable telephone, text and email contact with the minor child. The parties or the child may initiate the phone calls and contact. Neither party shall deny, monitor, intercept or record telephone or postal communications

> between the child and the other parent. Instead, each parent shall encourage communication between the minor child and the other parent. Both parties should encourage communication between the child and the other parent during their parenting time. [Trevor] shall have telephone or FaceTime contact on Mondays, Wednesdays and non-custodial Saturdays for 15 minutes. [Shelby] shall have telephone or Facetime contact on Saturdays for 20 minutes when Dustin is in the custody of [Trevor.]

Having modified physical custody, the court also modified child support to provide that Trevor was to pay $177 per month. The court utilized worksheet 3 based upon its finding that Trevor had Dustin for 142 overnight visits and its findings that

• Trevor was employed full-time earning $20 per hour and that any additional income he received from his mechanical hobby was speculative and sporadic;

• Shelby had been employed earning $16 per hour until she left her employment to become a stay-at-home parent following the birth of her youngest child; and

• Shelby's imputed income was $15.75 per hour for 35 hours per week.

The court declined to award Shelby a credit for health insurance premiums because those premiums were paid by her current husband. The court further ordered that the tax dependency exemption would alternate between Shelby and Trevor each year except that if Shelby was unemployed for more than 180 days in a tax year, Trevor would claim the exemption regardless of whether it was an odd or even year. And the court awarded Trevor $2,500 in attorney fees. Shelby appeals, and Trevor cross-appeals, from the order of modification.

III. ASSIGNMENTS OF ERROR

Shelby's assignments of error, consolidated and restated, are that the district court abused its discretion in: (1) modifying custody and awarding final decisionmaking authority to Trevor; (2) allocating FaceTime contact in an inequitable manner; (3) restricting her ability to move without court permission; (4) awarding child support based upon a joint physical custody determination, errors in determining the parties' incomes, the denial of Shelby's deduction for payment of health insurance premiums because they were paid by her husband, and the failure to allocate reasonable and necessary expenses between the parties; (5) awarding the dependency exemption and child tax credit to Trevor if she worked less than 180 days per year; and (6) awarding Trevor attorney fees.

In his cross-appeal, Trevor contends that although the district court correctly found a material change in circumstances warranted a change in custody, the district court erred in failing to award him sole physical custody of Dustin.

IV. STANDARD OF REVIEW

Modification of a judgment or decree relating to child custody, visitation, or support is a matter entrusted to the discretion of the trial court, whose order is reviewed by an appellate court de novo on the record and will be affirmed absent an abuse of discretion. *Keiser v. Keiser*, 310 Neb. 345, 965 N.W.2d 786 (2021). When evidence is in conflict, the appellate court considers and

may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than the other. *Id.*

V. ANALYSIS

1. MODIFICATION OF CUSTODY

Shelby first assigns as error that the district court abused its discretion in modifying physical custody and awarding final decisionmaking authority to Trevor. Trevor's sole assignment of error in his cross-appeal is that the district court abused its discretion in failing to award him sole physical custody of Dustin.

Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing either that the custodial parent is unfit or that the best interests of the child require such action. *Jones v. Jones*, 305 Neb. 615, 941 N.W.2d 501 (2020). We have described this showing as a two-step process: First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. *Id.* Next, the party seeking modification must prove that changing the child's custody is in the child's best interests. *Id.*

(a) Material Change in Circumstances

Shelby first argues that the district court erred in finding a material change in circumstances occurred which affected Dustin's best interests. Shelby describes the court's order as being grounded in circumstances surrounding her move to Giltner, her removal of Dustin from daycare, and the weaponization of Dustin's mental health. She argues that the court erred in concluding that the circumstances surrounding these and other events demonstrated an attempt by Shelby to alienate Trevor's parenting time, withhold information from him, interfere with Trevor's relationship with Dustin, and/or create barriers between Dustin and Trevor.

We have long described a material change in circumstances as the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Jones v. Jones, supra*. We have also explained that if a change in custody is to be made, it should appear to the court that the material change in circumstances is more or less permanent or continuous and not merely transitory or temporary. *Id.*

Here, the district court found that there had been a material change in circumstances affecting Dustin's best interests since the entry of the initial custody decree due to Shelby's inability or unwillingness to co-parent with Trevor. More specifically, the court found that the material changes included Shelby's "malicious compliance" with previous orders, her reluctance to allow Trevor to be involved in decisionmaking regarding Dustin or to be involved in Dustin's activities, her systematic pattern of unilateral decisionmaking, her pattern of withholding information or providing incomplete information to Trevor, her attempts to alienate Trevor's parenting time, and the weaponization of Dustin's mental health.

In *Burton v. Schlegel*, 29 Neb. App. 393, 419, 954 N.W.2d 645, 664 (2021), this court found that the district court did not abuse its discretion in finding a material change in circumstances where

> [the mother] did not exhibit flexibility and cooperation with parenting time exchanges, she withheld information regarding [the child's] behavioral issues, she made unilateral decisions regarding [the child] without engaging in meaningful discussion with [the father] and otherwise took advantage of the "final say" authority granted to her, and she repeatedly refused to converse with [the father] or ignored his legitimate questions and instead told him to contact her lawyer. The behaviors between the parties, and most notably [the mother], constitute a material change of circumstances affecting [the child's] best interests, which had it been known to the trial court at the time of the initial decree, would have persuaded the court to decree differently. Although at the time of the initial decree the court noted its lack of confidence in [the mother's] ability to be flexible and accommodating, the court "hope[d] this attitude [would] moderate after the parties [could] settle into a routine with the child." The court's hope did not come to fruition. Accordingly, we cannot say that the district court abused its discretion in finding there was a material change in circumstances affecting the best interests of the minor child.

Shelby does not argue that an orchestrated attempt by one parent to interfere with the relationship of the other cannot justify a change in custody; she simply argues that the evidence failed to demonstrate that is what happened here. Shelby points to portions of the record where Trevor acknowledged receiving notice from Shelby about her change in residence, her removal of Dustin from daycare and enrollment of him in preschool, and Shelby's scheduling of Dustin to see a counselor. Although Trevor acknowledged that he was eventually notified of significant events involving Dustin, he argued that Shelby made all such decisions impacting Dustin without Trevor's input, only notified him after the decisions were already made, and systematically withheld information related to Dustin. Issues such as Dustin's primary residence and decision to move from that primary residence; if and where Dustin would attend daycare; when and where Dustin would attend school; and whether Dustin needed professional counseling and who was best suited to address Dustin's needs, are significant decisions which directly relate to Dustin's best interests. As to all such decisions, Trevor provided evidence that Shelby failed to discuss these issues with him and only informed him after decisions were made. Among other things, the court took exception to the short period of time that elapsed following the entry of the dissolution decree before Shelby notified Trevor of her impending move from Grand Island, despite the importance of the location of Shelby's residence in the court's determinations contained in the original decree.

Although we recognize that Shelby argues that the court simply reached the wrong conclusions regarding its credibility determinations related to conflicts in the parties' testimony, we place weight on the fact that the trial court heard and observed the witnesses and accepted one version of the facts over another. There is sufficient evidence in this record to support the court's conclusion that Shelby demonstrated an inability and unwillingness to co-parent with Trevor including, but not limited to, Shelby's failure to involve Trevor in decisionmaking, obscuring information from Trevor, and interfering with Trevor's parenting time. On this record, we reach a conclusion similar to our findings in *Burton v. Schlegel*, 29 Neb. App. 393, 954 N.W.2d 645 (2021), and find that the district court did not err in finding a material change of circumstances had occurred which affected Dustin's best interests.

Although the district court originally noted some concerns associated with Shelby's reluctance to co-parent in the initial decree, the court expressed hope that the parties would be able to successfully communicate for Dustin's benefit. That hope did not come to fruition. We find no abuse of discretion associated with the district court's finding that Shelby had systematically attempted to interfere with Trevor and Dustin's relationship which constituted a material change in circumstances affecting Dustin's best interests.

(b) Best Interests

Shelby argues that the district court erred in finding Dustin's best interests warranted a modification of custody. She contends that her decisions complained of by Trevor did not affect Dustin's best interests. More specifically, she argues that her move to Giltner, Nebraska, did not negatively affect Dustin, because Dustin was not in preschool at the time of the move and therefore it did not affect his schooling. To the contrary, Shelby argues that since the move, she has been meeting Dustin's educational needs because she enrolled Dustin in preschool, Dustin was doing well in school, and he had established close friends. Shelby also argues she has been Dustin's primary caregiver, she has provided an appropriate home, and Dustin has extended family in Giltner. As it relates to her decision to remove Dustin from daycare and be a stay-at-home mother, Shelby argues that there was no evidence to show that Dustin was adversely affected by her choice to be a stay-at-home parent.

When determining the best interests of the child in the context of custody, a court must consider, at a minimum, (1) the relationship of the minor child to each parent prior to the commencement of the action; (2) the desires and wishes of a sufficiently mature child, if based on sound reasoning; (3) the general health, welfare, and social behavior of the child; (4) credible evidence of abuse inflicted on any family or household member; and (5) credible evidence of child abuse or neglect or domestic intimate partner abuse. *Jones v. Jones*, 305 Neb. 615, 941 N.W.2d 501 (2020). Other relevant considerations include stability in the child's routine, minimalization of contact and conflict between the parents, and the general nature and health of the individual child. *Id.* No single factor is determinative, and different factors may weigh more heavily in the court's analysis, depending on the evidence presented in each case. *Id.* The one constant is that the child's best interests are always the standard by which any custody or parenting time determination is made. *Id.*

Although not a completely determinative factor, the promotion and facilitation of a relationship by one parent with the other parent is a factor that may be considered when awarding custody. *Burton v. Schlegel*, 29 Neb. App. 393, 954 N.W.2d 645 (2021). It stands to reason that a parent's intentional refusal to promote and facilitate the other parent's involvement in a child's important educational, religious, and medical needs constitutes a significant factor to consider when making custody decisions. *Id.*

Here, the parties agreed that they both have a strong bond with Dustin. Both parties have a safe, stable home that offers structure and accountability for Dustin's behaviors and both parents are fit and proper persons to care for Dustin. Although Shelby was Dustin's primary caregiver for most of his life, the record is clear that Trevor has maintained significant involvement in Dustin's life and has frequently requested additional parenting time. The district court found that Shelby

had failed to disclose important information to Trevor or have meaningful discussions with him on matters that were material and important, she had attempted to alienate and interfere with Trevor's relationship with Dustin, and she was reluctant to involve Trevor in Dustin's life. After observing the witnesses and hearing the testimony, the district court found that Shelby's refusal to promote or facilitate Trevor's involvement in major decisions was significant and warranted a change in custody.

Having conducted a de novo review of the evidence, while also acknowledging and giving weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than the other, we cannot determine that the district court erred in determining that Shelby made unilateral decisions regarding Dustin without consulting Trevor and that Shelby denied Trevor additional parenting time and sought to interfere with Dustin and Trevor's relationship. See *Keiser v. Keiser*, 310 Neb. 345, 965 N.W.2d 786 (2021) (when evidence is in conflict, appellate court considers and may give weight to fact that trial court heard and observed witnesses and accepted one version of facts rather than other). Giving deference to the district court's findings, we cannot say that the court abused its discretion in finding that Dustin's best interests warranted a modification of custody to provide Trevor with additional parenting time with Dustin so as to assist in fostering their relationship when confronted with evidence that Shelby sought to marginalize the relationship between Trevor and Dustin.

(c) Final Decisionmaking Authority

Shelby next assigns as error that the district court abused its discretion in granting Trevor final decisionmaking authority. She argues that awarding Trevor final decisionmaking authority was not in Dustin's best interests because Shelby has been Dustin's primary caretaker and is in the best position to know Dustin's needs.

The best interests of the child are the primary consideration for developing custodial plans. *Blank v. Blank*, 303 Neb. 602, 930 N.W.2d 523 (2019). In considering such best interests, it is a common occurrence and a court is permitted to supply a party with final decisionmaking authority in some areas to avoid future impasses which could negatively affect the child while maintaining both parents' rights to consultation and participation in important decisions. *Id*.

Based on our review of the record, we note that after hearing and observing the testimony, the court found that Shelby was unable or unwilling to communicate and co-parent with Trevor and had been unsuccessful in her role as the final decisionmaker. Additionally, because Shelby continuously made unilateral decisions and attempted to interfere with Trevor's parenting time, the court determined that Dustin's best interests warranted granting final decisionmaking authority to Trevor.

In light of the district court's modification of primary physical custody to joint custody, Shelby's inability to include Trevor in meaningful discussions related to material decisions about Dustin's well-being, and her refusal to promote or facilitate Trevor's involvement in decisionmaking, we cannot find that the district court abused its discretion in awarding final decisionmaking authority to Trevor.

(d) Trevor's Cross-Appeal

In his cross-appeal, Trevor contends that the district court erred in failing to award him primary physical custody of Dustin. He argues that the award of joint physical custody does little to prevent Shelby from continuing to make unilateral decisions since Shelby has "primary physical custody" during the school year. Trevor contends that the day-to-day decisions during the school year and the current custody situation allow Shelby to continue to take advantage of, and exert authority and control over, the current situation.

As stated before, the court modified its custody award from Shelby having sole physical custody of Dustin to a joint physical custody award and modified legal custody to provide final decisionmaking authority in Trevor. Although Trevor argues this resolution "does little to prevent Shelby from making unilateral decisions," we disagree. Both parties agree that they have a strong bond with Dustin with safe and stable homes that offer structure and stability for Dustin, and both are fit and proper to care for Dustin. On this record, we find no abuse of discretion in the court's decision to modify custody to joint physical custody and believe the court's change in custody will profoundly impact the manner in which Shelby complies with the court's order as prior failures to comply in the past have resulted in significant consequences.

2. Allocation of Facetime Contact

Shelby next assigns that the court abused its discretion in unevenly allocating FaceTime contact to the parties. The argument contained in Shelby's brief concerning this issue in its entirety is that

> The court abused its discretion by unfairly and unjustly allocating Facetime contact to the parties. Pursuant to the Order of Modification, Trevor was awarded Facetime contact on Mondays, Wednesdays and on non-custodial Saturdays for 15 minutes during the school while Shelby is only awarded Facetime contact during the summer school break for 20 minutes on the alternate Saturday Dustin is with Trevor.

Brief for appellant at 32.

Shelby's argument is refuted by the language contained in the modification decree. The modification decree provided that "[Shelby] shall have telephone or Facetime contact on Saturdays for 20 minutes when Dustin is in the custody of [Trevor.]" Contrary to Shelby's claim, the modification decree does not limit her Facetime contact with Dustin on alternate Saturdays when Dustin is with Trevor to summer break. And, to the extent that she is arguing that the court abused its discretion by not awarding the parties equal Facetime contact, we disagree. Due to Shelby's continued hostility and interference with Trevor's parenting time, the court did not abuse its discretion in providing Trevor with more specified times to Facetime Dustin in order to preserve their father-son relationship. Further, even though Shelby was awarded less Facetime contact in the modification order, the evidence showed that Trevor is more communicative and accommodating when dealing with Shelby. We encourage both parties to facilitate the other parents' communication with Dustin in excess of the minimum allowances set forth in the modification decree. However, regarding Shelby's argument that the court abused its discretion in its award of Facetime contact, we reject that claim.

3. Restricting Ability to Relocate

Shelby next assigns as error that the district court abused its discretion in restricting her ability to relocate without obtaining prior court permission.

In the attached parenting plan, the district court ordered that "in the event that the custodial parent plans to change the residence of the minor child" the custodial parent must give advance notice to the noncustodial parent and that the custodial parent must obtain approval of the district court prior to changing the child's residence.

We agree that the district court abused its discretion in requiring that the parties obtain court approval prior to any change in the child's residence. Although a custodial parent is required to obtain the permission of the court prior to removing a child from the state (interstate move), see *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015), the parties have not directed us to any caselaw which provides the district court with authority to restrict intrastate moves without advance permission from the court and our independent research has uncovered none. See *Peck v. Peck*, No. A-20-919, 2021 WL 5313095 (Neb. App. Nov. 16, 2021) (selected for posting to court website) (reversing and vacating court's order restricting custodial parent from leaving specified Nebraska counties prior to obtaining court order or noncustodial parent's agreement). Further, an award of custody to a parent should not be interpreted as a sentence to immobility. *State on behalf of Ryley G. v. Ryan G.*, 306 Neb. 63, 943 N.W.2d 709 (2020).

Although an intrastate change in residence can result in modification to custody, we reject a blanket prescription in an order which requires a party to seek approval prior to changing the child's residence within the State of Nebraska. See *Bohnet v. Bohnet*, 22 Neb. App. 846, 862 N.W.2d 99 (2015) (ordinarily, custody of minor child will not be modified due to intrastate move of custodial parent unless there has been material change of circumstances showing that custodial parent is unfit or that best interests of child require such action). Because the language contained in the court's order in this case did not distinguish between intrastate and interstate moves, such language was overbroad. Accordingly, we reverse and vacate the portion of the order requiring the parties to obtain approval from the district court prior to "chang[ing] the residence of the minor child."

4. Calculation of Child Support and Allocation of Reasonable and Necessary Expenses

Shelby assigns that the district court abused its discretion in calculating child support because (a) the award of child support was based upon a joint physical custody determination, (b) the court erred in determining the parties' incomes, (c) the court denied her a deduction for a portion of health insurance premiums paid by her husband, and (d) the court abused its discretion in failing to allocate the reasonable and necessary expenses between the parties.

(a) Determination of Joint Physical Custody

Shelby assigns as error that the district court abused its discretion in determining child support based upon joint physical custody. She contends that the court erred in attributing 142 days to Trevor and in using worksheet 3 to calculate child support.

In the parenting plan, the district court awarded Trevor parenting time every other weekend beginning Thursdays at 6 p.m. and ending on Mondays at 8 a.m. until Dustin entered kindergarten at which time his parenting time would start on Friday after school and end on Sundays at 6 p.m. Trevor was also awarded parenting time every Thursday that was not his custodial weekend from 5 p.m. to 7 p.m. Trevor was awarded the entirety of the summer break with the exception of parenting time awarded to Shelby every other weekend beginning Thursdays at 6 p.m. and ending on Mondays at 8 a.m. and a consecutive 7-day-period for a summer vacation if Shelby elected to do so. The parties were awarded alternating holiday parenting time based on odd and even years. Specifically, Trevor was awarded:

> 1. In odd-numbered years, holiday parenting time with the child for the following holidays: Spring Break, Memorial Day Weekend, Labor Day Weekend and Christmas. [Trevor] shall have Dustin for his birth in odd-numbered years.
> 2. In even-numbered years, holiday parenting time with the child for the following holidays: Easter, Fourth of July, Fall Break, Thanksgiving and New Year's.

Neb. Ct. R. § 4-212, which defines when a court should utilize worksheet 3 to calculate child support, provides:

> When a specific provision for joint physical custody is ordered and each party's parenting time exceeds 142 days per year, it is a rebuttable presumption that support shall be calculated using worksheet 3. *When a specific provision for joint physical custody is ordered and one party's parenting time is 109 to 142 days per year, the use of worksheet 3 to calculate support is at the discretion of the court.* If child support is determined under this paragraph, all reasonable and necessary direct expenditures made solely for the child(ren) such as clothing and extracurricular activities shall be allocated between the parents, but shall not exceed the proportion of the obligor's parental contributions (worksheet 1, line 6). *For purposes of these guidelines, a "day" shall be generally defined as including an overnight period.*

(Emphasis supplied.)

Here, the court specifically awarded the parties joint physical custody and awarded Trevor a substantial amount of overnight parenting time per year, which the court found equaled 142 days per year. As to Shelby's specific assignment that the court's allocation of parenting time to Trevor does not amount to 142 days, we are unable to calculate the precise number of days that were awarded to Trevor in part because Dustin's school calendar is not part of the record before this court. That said, the number of days allocated to Trevor at least approximates 142 and, based upon the language of Neb. Ct. R. § 4-212 which, at a minimum, provides a court with discretionary authority to utilize worksheet 3 when parenting time exceeds 109 days, we find no abuse of discretion in the court's utilization of worksheet 3 under these circumstances.

(b) Parties' Incomes

Having determined that the court did not err in using worksheet 3 to determine child support, we next address Shelby's claim that the court erred in its determination of her income and

Trevor's income. Specifically, Shelby contends that the court erred in imputing income to her based upon her previous employment as a dental assistant, which "unfairly penalize[s] her for electing to be a stay-at-home mother" and fails to account for approximately $1,083 per month in daycare expenses that the parties saved due to her being a stay-at-home parent. Shelby further contends that the district court erred in calculating Trevor's total monthly income at $20 per hour for 30 hours per week and in failing to include his earnings from his side job as a mechanic. Shelby asserts that Trevor worked longer hours during harvest and had a side job as a mechanic for which his net income from September to December 2022 was $18,110.35.

Under the Nebraska Child Support Guidelines, Neb. Ct. R. § 4-204 provides in relevant part:

> If applicable, earning capacity may be considered in lieu of a parent's actual, present income. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources. When imputing income to a parent, the court shall take into consideration the specific circumstances of the parents, to the extent known. Those factors may include the parent's residence, employment and earnings history, job skills, educational attainment, literacy, age, health, and employment barriers, including criminal record, record of seeking work, prevailing local earning levels, and availability of employment.

As a general matter, child support obligations should be set according to the provisions of the Nebraska Child Support Guidelines. *Gandara-Moore v. Moore*, 29 Neb. App. 101, 952 N.W.2d 17 (2020). In determining income, the court may use earning capacity in lieu of a parent's actual, present income. *Id.* Child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in that parent's support obligation would seriously impair the needs of the children. *Id*. See also, *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001); *Muller v. Muller*, 3 Neb. App. 159, 524 N.W.2d 78 (1994) (earning capacity imputed to parent where parent chose to stay home with children and subsequent spouse paid all household expenses).

Regarding Shelby's imputed income, the evidence established that Shelby voluntarily left her employment as a dental assistant to be a stay-at-home parent. Shelby admitted that, although she was eligible to return to her employment at the end of her maternity leave for a subsequent child, she elected not to return to work. As a dental assistant, Shelby worked 36 hours per week at $15.75 per hour. The district court imputed 35 hours per week to Shelby at $15.75 per hour resulting in an imputed monthly income of $2,388. Based upon Shelby's employment history and her present ability to work, we cannot say that the prospect of future employment was speculative or unfair and we find no abuse of discretion in the court's determination that her earning capacity is $2,388.

We further reject Shelby's argument that the district court failed to consider that her status as a stay-at-home parent significantly saved the parties in daycare expenses. Shelby contends that her half of the daycare costs amounted to $541.67 per month and that her share was expected to increase another $50 per month.

In response to the court's questioning related to Shelby's income, the following colloquy ensued:

> THE COURT: Lastly, do you dispute the imputation of $16 an hour wage for your client for the child support calculation?
>
> [Shelby's Counsel]: I do. I think I used minimum wage because if she did that $16 an hour, they would be having daycare costs. Is that not factored into what they're saving there?
>
> THE COURT: But in calculating the child support, in terms of the Nebraska child support guidelines, what are you basing the deviation from her last employment and her ability to make a living versus what you have put on your proposed worksheet?
>
> [Shelby's Counsel]: The savings in daycare.
>
> THE COURT: Where would that be something I could rely on in terms of a case or the child support guidelines?
>
> [Shelby's Counsel]: Well, they're asking you to impute based on her earning capacity which this Court has the discretion to do, but the Court also has the discretion to consider the daycare costs and other factors involved when doing that. I am saying if you do that, I mean you have got to take into consideration what he would be paying over and above. If you take the difference between minimum wage and $16, that just increases her income which comes into the child support, but he is saving far more in daycare than what that little bit is going to make in his child support obligation.
>
> THE COURT: Do you have a case or a child support guideline rule that would support --
>
> [Shelby's Counsel]: I can provide that. I don't have it off the top of my head. I know it's in the Court's discretion. There's case law that indicates they can take into consideration the earning capacity and other factors . . . when determining the amount to use.
>
> . . . .
>
> THE COURT: I can find it if it's out there. I have looked before and I haven't found it, but I will look again.

It is clear Shelby's claim that the district court failed to consider daycare costs when determining her income for child support is refuted by the record. The preceding colloquy establishes that the court considered Shelby's request prior to rejecting it. Additionally, based upon the short duration of time before Dustin begins kindergarten and the lack of statutory authority or caselaw which would support a reduction in a party's earning capacity due to childcare expenses, we find no abuse of discretion in the court's failure to do so.

Shelby further argues that the district court erred in calculating Trevor's total income for child support purposes. The district court, in determining Trevor's total monthly income found:

> [Trevor] testified he was currently employed as a farm hand for James Reeves' Farm earning $20 per hour for around 30 hours per week. He testified that this is the highest paying job he has had. [Trevor] did not have health insurance available to him through his employer. In addition to this employment, he also has done some mechanical work on his

> own. From the evidence presented, the amount of money earned from this mechanical hobby employment appears to be speculative and sporadic. Exhibit 95 purports to show that [Trevor] earned $5,800 between January and April through his role as a mechanic. However, the evidence demonstrates that this is not regular income acquired by reasonable efforts and is, instead, akin to overtime wages, pursuant to Neb. Ct. R. § 4-204(B), that is not a part of [Trevor's] "regular" employment that he can expect to regularly earn. Accordingly, the Court is not including a monthly income amount relating to [Trevor's] sporadic mechanic hobby as part of the child support calculation since there is not a specific amount of income he can expect to regularly earn.

We agree. The child support guidelines, Neb. Ct. R. § 4-204 provides in relevant part:

> (A) Total monthly income is the income of both parties derived from all sources, except all means-tested public assistance benefits which includes any earned income tax credit and payments received for children of prior marriages. This would include income that could be acquired by the parties through reasonable efforts. . .
>
> (B) The court may consider overtime wages in determining child support if the overtime is a regular part of the employment and the employee can actually expect to regularly earn a certain amount of income from working overtime. In determining whether working overtime is a regular part of employment, the court may consider such factors as the work history of the employee for the employer, the degree of control the employee has over work conditions, and the nature of the employer's business or industry.

In *Guthard v. Guthard*, 28 Neb. App. 156, 165, 942 N.W.2d 792, 801 (2020), this court quoted the Nebraska Supreme Court which has continuously held:

> "[T]he level of income should not be based on income that is 'speculative in nature and over which the employee has little or no control.'" *Noonan v. Noonan*, 261 Neb. 552, 560, 624 N.W.2d 314, 322 (2001) (quoting *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991) (addressing overtime wages)). It is logical to extend the principles stated in Stuczynski to encompass forms of income other than overtime wages. *Noonan v. Noonan, supra*. Consequently, if the evidence shows that a party actually earns or can reasonably expect to earn a certain amount of income on a regular basis, it is appropriate to consider such income in calculating child support. *Id*.

Here, the district court imputed income to Trevor at $20 per hour for 35 hours per week but did not include any additional income. In viewing Trevor's 2019 to 2021 tax returns, his additional income was as follows: in 2019, he earned additional income of $1,231; in 2020, he earned additional income of $5,800; and in 2023, his business sustained a loss and he did not have additional income. Although the evidence established that Trevor earns some income doing mechanical work as a side job, the income was not consistent or regular. Accordingly, we find that the district court did not abuse its discretion in excluding the income earned from Trevor's side business in calculating Trevor's total income for the purposes of determining child support.

(c) Deduction for Health Insurance Premiums

Shelby next contends that the district court erred in failing to provide a deduction in the child support calculation for a portion of the health insurance premiums paid by her husband.

In calculating a party's child support obligation, a deduction shall be allowed for the monthly out-of-pocket cost to the parent for that particular parent's health insurance so long as the parent requesting the deduction submits proof of the actual cost incurred for health insurance as provided in Neb. Ct. R. § 4-205(F) (rev. 2016). *Drabbels v. Drabbels*, 25 Neb. App. 102, 902 N.W.2d 705 (2017). The increased cost to a parent for health insurance for the child shall be prorated between the parents; the parent paying the premium receives a credit against his or her share of the monthly support, provided that the parent requesting the credit submits proof of the cost of health insurance coverage for the child. See, *id*.; Neb. Ct. R. § 4-215(A) (rev. 2011).

Here, Shelby testified that her new husband pays for the health insurance for her, their two children, and Dustin. Because the insurance covers her other two children, there is no additional cost for Dustin to also be covered. Having failed to establish that she paid the insurance premium for which she requests a credit, we find that the district court did not abuse its discretion in declining to grant Shelby a credit for health insurance premiums.

(d) Reasonable and Necessary Expenses

Shelby also contends that the court abused its discretion in failing to allocate reasonable and necessary expenses between the parties. The following is the argument contained in her brief in its entirety:

> Additionally, if child support is determined using worksheet 3, Neb. Ct. R. §4-212 provides all reasonable and necessary direct expenditures made solely for the child such as clothing and extracurricular shall be allocated between the parents, but shall not exceed the proportion of the obligor's parental contributions (worksheet 1, line 6). Neb. Ct. R. §4-212 (rev. 2011)

Our review of the court's order reveals that the court ordered that Trevor was to pay 54 percent

> of any unreimbursed health care costs after the first $250, including medical, dental, orthodontia, and optical. Each party shall be responsible for daycare costs during their parenting time.
>
> Any party seeking to be reimbursed for any expenses pursuant to this Order shall submit an itemized statement, within 60 days of the date of the provided service to the other party. Payment in full shall be made within 60 days of receipt of the request pursuant to this provision. Billing and payment timelines shall not be waived, except by order of the Court upon a showing of good cause.

Here, the court's order does not specifically address expenses other than unreimbursed medical expenses and daycare expenses. Accordingly, we modify the court's order to provide that Trevor is responsible for 54 percent, and Shelby is responsible for 46 percent, of necessary direct expenditures made solely for the child. We further find that the portion of the court's order which

requires the submission of an itemized statement to obtain reimbursement for expenditures, applies to all necessary direct expenditures made solely for the child.

5. Tax Dependency Exemption

Shelby next assigns as error that the district court abused its discretion in requiring her to work 180 days before she was eligible to claim the tax dependency exemption and child tax credit. Because the district court's order only references the tax dependency exemption and not the child tax credit, we consider only Shelby's claim regarding the tax dependency exemption.

A tax dependency exemption is an economic benefit nearly identical to an award of child support or alimony. *Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015). The basis for claiming the exemption is provided by federal tax law. Notably, under federal tax law, the custodial parent is presumptively entitled to the federal tax exemption for a dependent child. *Id*. And, under federal tax law, the custodial parent is the parent with whom the child lived for the greater number of nights during the year. I.R.S. Pub. No. 501, Cat. No. 15000U (Jan. 2, 2024), https://www.irs.gov/pub/irs-pdf/p501.pdf. Even so, the exemption can be released to the noncustodial parent if the custodial parent provides the proper written declaration that the custodial parent won't claim the child as a dependent that year. *Id*.

Under Nebraska law, a tax exemption is considered an economic benefit and a court may exercise its equitable power and order the custodial parent to execute a waiver of his or her right to claim the exemption if the situation of the parties so requires. *Anderson v. Anderson, supra*.

Here, as the custodial parent under the law, Shelby was presumptively entitled to claim a tax exemption for Dustin. That said, the district court was vested with equitable power to order Shelby to waive the right to claim the exemption if the situation of the parties so required. See *id*. The district court equitably divided the exemption between Trevor and Shelby; however, the court included the proviso that in years in which Shelby was entitled to claim the exemption, she must be employed for 180 days. We find this proviso to be an abuse of the court's discretion.

The support which entitled Shelby to the presumptive award of the exemption was based upon Dustin living with her more than one-half of the year. And although the court was entitled to allocate this economic benefit to Justin because of his own support for Dustin, we find it unreasonable to completely eliminate Shelby's right to claim the exemption unless she is employed for 180 days in that year. Regardless of Shelby's employment status, she provides support for Dustin. So much so that she is considered the presumptive person entitled to this economic benefit. Although the district court's allocation might be more justifiable if the record indicated that Shelby's household would not benefit from the exemption, that is not the case here. The court required Shelby to provide a level of support commensurate with her earning capacity. There is no indication in the record that she would not provide that support. Thus, we find that the court abused its discretion by requiring Shelby to provide that level of support but denying her the ability to benefit from that support without showing that the source of her support came from her own earned income. We reverse and vacate that portion of the court's order requiring Shelby to be employed for at least 180 days in order to claim the tax exemption in the years in which the exemption is allocated to her.

6. Attorney Fees

Shelby finally assigns that the district court abused its discretion in awarding Trevor $2,500 in attorney fees.

Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014). Customarily, attorney fees are awarded only to prevailing parties or assessed against those who file frivolous suits. *Id*. A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases. *Id*. Thus, there was authority, in this modification of a dissolution decree case, for the awarding of attorney fees. *Id*. It has been held that in awarding attorney fees, a court shall consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Ewing v. Evans*, 32 Neb. App. 531, 1 N.W.3d 571 (2023).

Here, Trevor provided an affidavit from his attorney accompanied by a detailed transaction file. The affidavit provided that counsel's firm was hired at an agreed-upon rate ranging from $235 to $250 per hour for a total of 19.25 hours. Although the total amount of attorney fees billed was $4,624.07, Trevor requested only $2,500 in attorney fees. The district court awarded Trevor $2,500 in attorney fees. Because Trevor's request was supported by his attorney's affidavit and a detailed transaction file and Trevor was the prevailing party in the action, the district court did not abuse its discretion in awarding Trevor his requested attorney fees.

VI. CONCLUSION

In sum, we affirm as modified the district court's order except we reverse and vacate the portions of the court's order requiring the parties to obtain approval from the district court prior to "chang[ing] the residence of the minor child" and requiring Shelby to be employed for at least 180 days in order to claim the tax exemption in the years in which the exemption is allocated to her.

Affirmed in part as modified, and
in part reversed and vacated.