STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1981

In re the Custody of M. M. B.

Nicholas Bitker,
Respondent,

vs.

Corinna Nielson,
Appellant.

Filed October 1, 2012
Affirmed
Hooten, Judge

Blue Earth County District Court
File Nos. 07-FA-10-2642, 07-FA-07-1043

Corinna Nielsen, Mankato, Minnesota (pro se appellant)

Herbert C. Kroon, Yuri Jelokov, Chesley, Kroon, Harvey & Carpenter, Mankato, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Hooten, Judge; and Collins, Judge.*

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

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

HOOTEN, Judge

Appellant mother and respondent father signed a recognition of parentage shortly after the birth of their daughter, M.M.B. Five years later, father initiated an action for custody and parenting time. The district court awarded father sole legal and physical custody of M.M.B. subject to mother's parenting-time schedule. Mother, proceeding pro se, appeals from the district court's order and judgment.

FACTS

Appellant Corinna Nielson (mother) and respondent Nicholas Bitker (father) are the biological parents of M.M.B., born June 8, 2005. They have never been married. Both parties signed a recognition of parentage on June 9, 2005. The parties resided together with M.M.B. for the first two years of her life. Thereafter, father moved to Lucan, Minnesota, about seventy miles from mother's residence in Mankato, Minnesota.

On June 13, 2007, a Child Support Magistrate (CSM) signed an order requiring father to pay monthly child and medical support payments. On July 15, 2010, father served a paternity complaint and a petition for custody and parenting time. Prior to the commencement of father's paternity and custody action, the parties did not have a court order establishing custody or parenting time. Father also brought a motion for temporary legal and physical custody. Even though mother did not appear for the temporary hearing or otherwise respond to father's complaint, the district court granted temporary joint legal custody and established a temporary parenting-time schedule.

At the default hearing, father testified that mother failed to provide M.M.B. with a safe and stable environment. He noted that mother moved at least six times since M.M.B.'s birth and exposed M.M.B. to domestic violence on numerous occasions. He also testified that since their separation, mother would not cooperate or communicate with him about parenting time issues and refused to comply with the parenting-time schedule. Mother arrived late at the default hearing and the matter was eventually continued for trial.

At trial, father testified that during the previous year, M.M.B. exhibited delayed development of her motor and writing skills and would return from mother's home with uncombed hair and dirty fingernails. M.M.B.'s elementary school contacted mother on numerous occasions expressing concern over the fact that she had excessive absences. He accused mother of not placing M.M.B. in a car seat and failing to inform him about enrolling M.M.B. in school. He stated that mother failed to inform him of her new address within a reasonable time on multiple occasions. Father also explained that he provides M.M.B. with a stable home environment and described M.M.B.'s routine and activities during his parenting time, along with steps he undertook to assist M.M.B.'s educational development. He also described how M.M.B. interacted with peers during his parenting time and explained that she would know other children at school if he were to have custody.

Mother testified that father did not undertake a consistent role in M.M.B.'s life prior to the previous year and that she would permit him to exercise parenting time whenever requested. She denied disregarding M.M.B.'s hygiene and father's attempts to

communicate, and explained the circumstances surrounding some of M.M.B.'s absences from school. She asserted that M.M.B. would experience "huge anxiety" over a change of residence. Mother also explained that she could not always comply with the parenting-time schedule because she did not have a reliable vehicle. Curtis Rathai, mother's fiancé, testified that he and mother care for M.M.B. along with their other children and that M.M.B. is a happy and well-rounded child. He explained that M.M.B. is sometimes late for school because she is moody in the mornings and it is "hard to get her going sometimes."

In an order issued July 25, 2011, the district court adjudicated father's paternity, noting the parties' recognition of parentage and the fact that mother did not contest the issue of paternity. The district court also concluded that joint legal custody was not in M.M.B.'s best interests given the parties' inability to communicate or agree upon important decisions and that it is in M.M.B.'s best interests to award father sole legal and sole physical custody, subject to a parenting-time schedule. On August 29, 2011, mother, through legal counsel, filed a motion for amended findings and conclusions, or, in the alternative, a new trial, pursuant to Minn. R. Civ. P. 52.02 and 59.01. The district court denied mother's motion except to correct several typographical errors. This appeal follows.

D E C I S I O N

Mother argues that the custody order and order denying her motion for amended findings or a new trial should be reversed because: (1) the district court did not have jurisdiction to hear father's custody action; (2) she never received notice of the temporary

hearing; (3) the temporary order was erroneously issued pursuant to Minn. Stat. § 257C.07 (2010) and did not make required findings pursuant to Minn. Stat. § 518.17 (2010); and (4) the district court erroneously adopted father's proposed orders.

I. Validity and Service of Paternity Complaint and Custody Petition

Mother first argues that the district court did not have jurisdiction[1] to hear father's paternity and custody action because the issue of paternity and custody was previously determined by the CSM's child-support order. The applicability of the doctrine of res judicata to preclude a claim is a question of law, which we review de novo. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). It applies as an absolute bar to all subsequent claims when the initial action (1) involved the same set of factual circumstances; (2) involved the same parties or their privies; (3) was resolved through a final judgment on the merits; and (4) involved claims that the asserting party had a full and fair opportunity to litigate. *Id.*

There is no basis to apply the doctrine of res judicata to father's custody action. The CMS's order did not address the issue of custody. Moreover, Minn. R. Gen. Pract. 353.01, subd. 3(b) provides that proceedings and issues addressing the establishment, modification, or enforcement of custody or parenting time under Minn. Stat. ch. 518 shall not be conducted or decided in the expedited process, unless authorized by Minn. R. Gen. Pract. 353.01, subd. 2. Subdivision 2(b)(1) of this same rule provides that a CSM has the

[1] Mother characterizes this argument in terms of the district court's jurisdiction and father's standing. Despite the use of these terms and their particular meanings, we interpret mother's substantive argument to focus upon the applicability of the doctrine of res judicata in light of her reliance upon the import of the prior proceedings in the expedited process upon father's paternity and custody action.

authority to establish the parent-child relationship, legal and physical custody, parenting time, and the legal name of the child when the parties agree or stipulate to all of these particular issues or the pleadings specifically address these particular issues and a party fails to serve a response or appear at the hearing.

The record on appeal does not contain the pleadings that were filed in the expedited process, and nothing in the current record establishes that the parties agreed to address the issue of custody before the CSM. Rather, the order of June 13, 2007 states the issue only in terms of setting the amount of child support. Thus, with respect to custody, there was no final judgment on the merits regarding custody prior to the commencement of father's paternity and custody action.

Father's paternity and custody action is also not barred by the fact that the parties signed a recognition of parentage. The signing "has the force and effect of a judgment or order determining the existence of the parent and child relationship under section 257.66," and "[u]ntil an order is entered granting custody to another, the mother has sole custody." Minn. Stat. § 257.75, subd. 3 (2010). "'[P]arent and child relationship' means the legal relationship existing between a child and the child's biological or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." Minn. Stat. § 257.52 (2010). "Custody and parenting time and all subsequent motions related to them shall proceed and be determined under section 257.541." Minn. Stat. § 257.66, subd. 3 (2010). By operation of law, the biological, unmarried mother of a child has sole custody of the child "until paternity has been established under sections 257.51 to 257.74, or *until* custody is determined in a separate

proceeding under section 518.156." Minn. Stat. § 257.541, subd. 1 (2010) (emphasis added). Recognition of parentage is a specific basis for bringing an action to award custody or parenting time to either parent. Minn. Stat. § 257.75, subd. 3(1). "If paternity has been recognized under section 257.75, the father may petition for rights of parenting time or custody in an independent action under section 518.156." Minn. Stat. § 257.541, subd. 3. Thus, father's custody action was not barred by the parties' recognition of parentage.

Mother, citing Minn. Stat. § 518A.44 (2010),[2] also alleges that the district court could not hear father's paternity and custody action in light of father's failure to provide the public authority with notice. However, the district court's custody order specifically reserved the issue of child support for the CSM. Further, even assuming that mother has standing to assert an error on behalf of the public authority, she fails to establish how the failure to notify the public authority prejudiced the rights of the public authority, nor does she identify how the error, if any, affected her own rights.

There is also no merit to mother's claims that she was prejudiced by the fact that father's paternity and custody action had a different file number than the child-support action, or that service of father's paternity complaint and custody petition did not contain all of the notice requirements mandated by Minn. Stat. § 518.091 (2010). The notice required by section 518.091, subdivision 2, was included in the summons, which

[2] "The petitioner shall notify the public authority of all proceedings for dissolution, legal separation, determination of parentage, or for the custody of a child, if either party is receiving public assistance or applies for it subsequent to the commencement of the proceeding."

complied with the requirements of Minn. R. Civ. P. 4.01. *See* Minn. R. Gen. Pract. 302.01(a) (2010) (stating that service in family court proceedings, other than actions for marriage dissolution, legal separation and annulment, are governed by the rules of civil procedure). The notice required by section 518.091, subdivision 1, addresses a temporary restraining order and alternative dispute resolution relevant to the dissolution of marriage.

II. Temporary Order

Mother next argues that the district court erroneously issued the temporary order[3] after she failed to show at the temporary hearing. In order to effectuate appellate review of this order, mother must appear that it somehow served as a basis for the custody order of July 25, 2011. *See Korf v. Korf*, 553 N.W.2d 706, 709 n.1 (Minn. App. 1996) (stating that temporary relief orders are not final appealable orders, and a reviewing court considers a temporary order for relief only to the extent the district court used the order as a basis for its final judgment). The temporary order did not address the issue of physical custody and included only a temporary parenting-time schedule for the 2010–11 school year and the Thanksgiving and Christmas holidays of 2010. More importantly, it is clear that, in awarding temporary joint legal custody, the district court was hesitant to change sole custody based upon mother's failure to appear at the temporary hearing. After issuance of the temporary order, the ultimate issues relevant to father's custody action

[3] Father reasonably asserts that the district court's reference to Minn. Stat. § 257C.07 in the temporary order was a simple typographical error. When paternity has been recognized under section 257.75 and a father petitions for rights of parenting time or custody in an independent action under section 518.156, the "provisions of chapter 518 apply with respect to the granting of custody and parenting time." Minn. Stat. § 257.541, subd. 3. There is no indication that any issues on appeal implicate chapter 257C.

were fully addressed at a hearing before the district court. There is no evidence that the district court based its final determination of custody and parenting time upon the temporary order.

Mother's arguments with respect to service of the temporary order are baseless. She continually asserts that she never received service of the notice of father's motion for temporary relief.[4] The record contains the affidavit of service by mail relative to father's motion for temporary relief. Mother argues that this service was ineffectual because the record contains no acknowledgement of service received by the sender as set forth in Minn. R. Civ. P. 4.05. However, this rule refers to service "made by mailing a copy of the summons and of the complaint." In contrast, Minn. R. Civ. P. 5.02 states that "[s]ervice by mail is complete upon mailing."

Mother also argues that the temporary order did not address the best-interests factors set forth in Minn. Stat. § 518.17. However, section 518.131, subdivision 7, merely requires that the court "shall be guided by the factors set forth" in sections 518.17 to 518.175 and does not require explicit findings. Father concedes that his attorney e-mailed proposed findings to the court without sending mother a copy, but argues that such misconduct was not prejudicial in that the relief granted was only temporary. Given the limited scope of the temporary order, we conclude that mother was not prejudiced by the procedure by which father obtained the temporary order.

[4] She does not dispute that she was personally served with the summons and complaint on July 15, 2010.

III. Best Interests Analysis and Motion for New Trial/Amended Findings

Mother asserts that the district court erred by failing to apply the standard for a modification of custody and improperly awarded father sole physical and legal custody. District courts enjoy broad discretion in determining child custody matters. *J.W. v. C.M.*, 627 N.W.2d 687, 692 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001). We affirm the district court's factual findings unless they are clearly erroneous. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). "Appellate review of custody determinations is limited to whether the trial court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Id.*

The custody order includes a thorough analysis of the best-interests factors set forth in Minn. Stat. § 518.17, subd. 1. It does not utilize the provisions of Minn. Stat. § 518.18 and the endangerment standard. As noted, section 257.541, subdivision 3, provides that "[i]f paternity has been recognized under section 257.75, the father may petition for rights of parenting time or custody in an independent action under section 518.156." "The proceeding must be treated as an initial determination of custody under section 518.17. The provisions of chapter 518 apply with respect to the granting of custody and parenting time." Minn. Stat. § 257.541, subd. 3; *Custody of Child of Williams v. Carlson*, 701 N.W.2d 274, 280 (Minn. App. 2005). Thus, the district court did not err by applying section 518.17 to father's custody action.[5]

[5] Mother appears to cite to limited authority supporting the proposition that such a determination should be treated as a modification of custody when there has been a prior paternity judgment implicating custody. *See Morey v. Peppin*, 375 N.W.2d 19, 24 (Minn. 1985) (treating custody proceeding as a modification of custody because father waited

Additionally, application of the best-interests factors was not an abuse of discretion. The law "leaves scant if any room for an appellate court to question the trial court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000). The custody order sets forth in significant detail father's attempts to exercise parenting time both before and after entry of the temporary order. The district court found that father has a disposition to encourage and maintain mother's relationship with M.M.B. The testimony supports the finding that mother has persistently and willfully interfered with father's parenting time, both prior to and after the temporary order, and fails to communicate or cooperate with father about M.M.B.

The district court made additional findings comparing the stability of the parties' respective homes and expressed concern that mother has lived at numerous residences over the past years. Father also presented evidence that mother permitted excessive absences from school, requiring school officials to contact mother on several occasions. M.M.B. exhibited delayed educational development, and father and his wife took steps to help with her critical skills. The district court also noted that father has an extended history of providing care for M.M.B. despite the fact that she has resided with mother since the parties' separation. These findings are not clearly erroneous.

The district court did not err in denying mother's motion for amended findings or a new trial. A decision by a district court to deny a new trial motion is within its sound

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two and one-half years after he was adjudicated a parent before seeking custody, and prior order implied mother had custody); *see also Itasca Cnty. Soc. Servs. ex rel. Hall v. David*, 379 N.W.2d 700, 701–02 (Minn. App. 1986). In this case, however, there has been no formal proceeding addressing parentage in which father has had the opportunity to address the issue of custody.

discretion and will not be disturbed on appeal absent a clear abuse of that discretion. *Custody of Child of Williams*, 701 N.W.2d at 281. A denial of a motion for a new trial is not an abuse of discretion when the causes justifying a new trial, as listed in Minn. R. Civ. P. 59.01, have not been shown to exist. *Id.*

"When considering a motion for amended findings, a district court 'must apply the evidence as submitted during the trial of the case' and 'may neither go outside the record, nor consider new evidence.'" *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006) (quoting *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 238, 219 N.W.2d 641, 651 (1974)), *review denied* (Minn. Nov. 14, 2006). "This court reviews denials of such motions under an abuse-of-discretion standard." *Id.* A district court's findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01.

As grounds for a new trial, mother made many of the same meritless arguments advanced on appeal. None of these grounds satisfy the basis for a new trial as set forth in Minn. R. Civ. P. 59.01. The district court did not abuse its discretion by denying mother's request for a new trial. *See Custody of Child of Williams*, 701 N.W.2d at 281 ("In order to grant a new trial, a court must find a cause specified in the rules and must further find that prejudice has resulted to the opposing party."). Likewise, the district court did not err in denying mother's request for amended findings because they were based merely upon mother's disagreement with the application of the best-interests factors.

IV. Mother's Parenting Time

Finally, mother argues that the district court improperly restricted her parenting time with M.M.B. and failed to apply the presumption that a parent is entitled to 25% of parenting time. The district court has broad discretion in determining parenting-time issues and will not be reversed absent an abuse of that discretion. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law. *Pikula*, 374 N.W.2d at 710.

Mother cites section 518.175, subd. 5 (2010), which addresses a modification of parenting time.[6] However, the district court's custody order was an initial determination of custody and parenting time, and not an order modifying a prior custody and parenting-time order. The district court was required to "grant such parenting time on behalf of the child and a parent as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child." Minn. Stat. § 518.175, subd. 1(a) (2010).

Mother is correct that there is a rebuttable presumption that a parent is entitled to receive at least 25% of the parenting time for the child. *See id.*, subd. 1(e) (2010). We have held that "parenting-time allocations that merely fall below the 25% presumption can be justified by reasons related to the child's best interests and considerations of what

[6] "If modification would serve the best interests of the child, the court shall modify the decision-making provisions of a parenting plan or an order granting or denying parenting time, if the modification would not change the child's primary residence. Except as provided in section 631.52, the court may not restrict parenting time unless it finds that: (1) parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development; or (2) the parent has chronically and unreasonably failed to comply with court-ordered parenting time."

is feasible given the circumstances of the parties." *Hagen v. Schirmers*, 783 N.W.2d 212, 218 (Minn. App. 2010). A district court 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 (Minn. App. 2009)).

Father calculates that the district court awarded mother 91 days of parenting time throughout the year, which is approximately 25% of the parenting time. The district court's custody and parenting-time order sets forth a detailed parenting-time schedule that provides mother with parenting time every other weekend during the school year and over 28 consecutive days during the summer. There is also a particularized and evenly-divided holiday schedule. The district court's parenting-time schedule was not an abuse of discretion.

Affirmed.