STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1945

Kimberly Jestus, as Trustee for the Next-of-Kin
of Grant Allen Jestus, Decedent,
Appellant,

vs.

Michael A. Jestus,
Defendant,

State Farm Fire and Casualty Company,
Respondent.

Filed October 7, 2008
Reversed
Collins, Judge[*]

Anoka County District Court
File No. 02-C4-05-012011

Stephen M. Harris, Meyer & Njus, P.A., 1100 U. S. Bank Plaza, 200 South Sixth Street, Minneapolis, MN 55402 (for appellant)

C. Todd Koebele, Scott G. Williams, Murnane Brandt, 30 East Seventh Street, Suite 3200, St. Paul, MN 55101 (for respondent)

Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief 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

COLLINS, Judge

Appellant challenges the district court's determination that appellant, as trustee for the next-of-kin of her deceased son, was barred from recovering under the policy issued by respondent insurance company to appellant's former spouse, decedent's father, on the premise that decedent was a "resident" of his father's household. We reverse.

FACTS

Appellant Kimberly Jestus and Michael Jestus (father) separated in December 2001, and their marriage was dissolved on December 23, 2002. Two children were born during the marriage: Stephanie, born May 27, 1996; and Grant, born April 11, 1998. Appellant was awarded sole physical custody of the children and father was granted parenting time on alternating weekends, every Wednesday, every other Monday, alternating major legal holidays, and an optional three-week period during summers. Appellant and father shared legal custody. Appellant was awarded the family home and continued to reside there with the children.

Following the separation, father "lived somewhat of a nomadic lifestyle," residing with his brother for "months" before renting space for brief periods of time from others. According to father, these were all "temporary arrangements just until [he] could purchase [his] home." During a period of approximately six months, father declined to exercise five weekends and six weeknights of his parenting time and occasionally returned the children early when he did exercise his weekend parenting time. Father never sought to arrange for alternative dates to make up his missed time.

On April 24, 2003, father purchased a manufactured home in Blaine, located two or three blocks from the family home. Father's house had three bedrooms, and when the children came to stay with him they slept in what father described as "their own room[s]," which were furnished with bunk beds and shelving. Father contended that he exercised his parenting time in his home as provided by the dissolution decree. Appellant confirmed that father exercised his parenting time "[o]n a consistent basis" after purchasing his house. The children brought their clothing, toys, and medicine from the family home on each visit, though, according to father, he provided toothbrushes and "[o]ver a period of time" the children kept pajamas there. Father stated that the children would take their belongings back to the family home, although "[s]ome toys they would forget . . . and they would get them next time they came to visit." Grant did not personalize the bedroom at father's house, and he did not use father's home address as his own for any purpose. Father asserted that when the children stayed with him he would cook for them, they ate together, and they played together. Father also stated that it was his intention that the children "stay in [his] home in the space that [he] provided for them" until they reached adulthood and that he "[m]ost definitely" considered the children to be members of his household.

On May 23, 2003, father picked up the children at daycare to exercise his weekend parenting time. The next day, Grant accidentally drowned during a boating excursion with father. Father carried boatowner's insurance under a policy issued by respondent State Farm Fire and Casualty Company (State Farm). The policy excluded coverage for "bodily injury to [father] or any insured within the meaning of . . . the definition of

insured." The policy defined "insured" as "you and, if residents of your household . . . your relatives."

Appellant was appointed trustee for Grant's next-of-kin and initiated a wrongful death action against father and State Farm, alleging that the accident was caused by father's negligence. Appellant subsequently entered into a *Miller-Shugart* settlement in which father stipulated to a $100,000 judgment against him and appellant agreed to seek collection only from State Farm.[1] Following denial of appellant's and State Farm's cross-motions for summary judgment, the parties stipulated to relevant facts. A bench trial on the stipulated facts and a record including previously submitted affidavits and depositions was held April 16, 2007. The district court identified as the "sole issue" whether Grant was a "resident of [father's] household, therefore an 'insured' under the policy."

The district court determined that the phrase "residents of your household" is unambiguous and, after addressing the *Pamperin* factors,[2] concluded that Grant was a resident of both father's and appellant's households for insurance purposes. Thus, coverage for Grant's death was excluded under the State Farm policy at issue. This appeal followed.

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[1] A *Miller-Shugart* agreement is one in which the insured stipulates to a money judgment in favor of the plaintiff and the plaintiff agrees to seek satisfaction only from the insurer. *Burbach v. Armstrong Rigging and Erecting, Inc.*, 560 N.W.2d 107, 109 (Minn. App. 1997) (citing *Miller v. Shugart*, 316 N.W.2d 729 (Minn.1982).

[2] *Pamperin v. Milwaukee Mut. Ins. Co.*, 197 N.W.2d 783, 788 (Wis. 1972).

D E C I S I O N

I.

Challenging several of the district court's threshhold legal determinations, appellant argues that (1) the district court erred in determining the term "residents" in the phrase "residents of your household" is unambiguous; (2) "resident" should have been construed narrowly because it is a word of exclusion; (3) because under Minnesota marriage dissolution law "[p]hysical custody and residence" share a common definition, Grant could be a resident only of appellant's houshold because she had been awarded sole physical custody; and (4) it was an error of law for the district court to apply the *Pamperin* factors in determining whether Grant was a "resident" of father's houshold as opposed to relying on a common-sense definition of the term. We disagree with each of these arguments.

1. Determining whether an insurance policy provision is ambiguous is question of law, which we review de novo. *Ill. Farmers Ins. Co. v. Eull*, 594 N.W.2d 559, 561 (Minn. App. 1999).

The supreme court has consistently held that the term "resident" in an insurance policy is unambiguous. *Lott v. State Farm Fire & Cas. Co.*, 541 N.W.2d 304, 307 (Minn. 1995) (concluding "residents of your household" is clear and unambiguous); *Firemen's Ins. Co. of Newark, N.J. v. Viktora*, 318 N.W.2d 704, 706 (Minn. 1982) (concluding that "residents of the [n]amed [i]nsured's household" is unambiguous); *Tollefson v. Am. Family Ins. Co.*, 302 Minn. 1, 5, 226 N.W.2d 280, 283 (1974) (concluding that "residents

of the same household" is clear and unambiguous). Therefore, the district court correctly determined that this policy language is unambiguous.

2. Exclusions from insurance coverage are to be construed narrowly so as to favor the insured. *Midwest Family Mut. Ins. Co. v. Schmitt*, 651 N.W.2d 843, 845 (Minn. App. 2002). But because the term "resident" is unambiguous, it is "not subject to application of rules of construction which favor finding coverage." *Viktora*, 318 N.W.2d at 705; *see also Dairyland Ins. Co. v. Implement Dealers Ins. Co.*, 294 Minn. 236, 244, 199 N.W.2d 806, 811 (1972) ("[W]here there is no ambiguity in an insurance policy, there is no room for construction."). Thus this rule of construction is inapplicable and the district court's failure to construe the term "resident" narrowly was not erroneous.

3. Although the phrase "[p]hysical custody and residence" is given one definition in Minnesota marriage dissolution law, Minn. Stat. § 518.003, subd. 3(c) (2006), the supreme court has determined that a child may be the resident of both parents' households for purposes of insurance disputes in the context of a custody-sharing arrangement following marriage dissolution. *Am. Family Mut. Ins. Co. v. Thiem*, 503 N.W.2d 789, 790 (Minn. 1993) (concluding that a child was a resident of father's household as well as mother's household for insurance purposes, although mother had been awarded sole physical custody); *see also Mut. Serv. Cas. Ins. Co. v. Olson*, 402 N.W.2d 621, 624 (Minn. App. 1987) (distinguishing domicile from residence, stating that it is possible to have multiple residences), *review denied* (Minn. May 20, 1987).

Appellant's attempt to distinguish *Thiem* on this point is unpersuasive. While the *Theim* court's finding of residency resulted in coverage whereas here a finding of

residency results in exclusion, the rule of construction that policy language is construed broadly if it results in inclusion and narrowly if it results in exclusion is not applicable where the language is unambiguous. *Viktora*, 318 N.W.2d at 705. Thus, although Minn. Stat. § 518.003, subd. 3(c) suggests that residency equates to physical custody in the context of marriage dissolution, the district court did not err in finding that dual-residence can exist in the insurance context.

4. Finally, because the supreme court has determined it is appropriate to consider the *Pamperin* factors in such case, *see id.* at 706-07 (adopting the *Pamperin* factors to determine residency in Minnesota), the district court's reliance on these factors was not erroneous.

II.

Alternatively, appellant argues that even if application of the *Pamperin* factors was appropriate, the district court's finding that Grant Jestus was a "resident" of father's houshold, based on the stipulated facts and record, was erroneous. With this we do agree.

Generally, whether an individual is a resident of an insured's home is a question of fact reviewed for clear error. *Morgan v. Ill. Farmers Ins. Co.*, 392 N.W.2d 37, 39 (Minn. App. 1986), *review denied* (Minn. Oct. 22, 1986). But, where the relevant facts are stipulated and there is sufficient information in the record, the question of residency may be determined as a matter of law. *Frey v. United Servs. Auto Ass'n*, 743 N.W.2d 337, 344 (Minn. App. 2008); *see also Thiem*, 503 N.W.2d at 790-91. Questions of law are reviewed de novo. *Morton Bldgs., Inc. v. Comm'r of Revenue*, 488 N.W.2d 254, 257 (Minn. 1992).

As noted above, in determining residency it is appropriate to consider the three *Pamperin* factors: (1) if the individual and the insured are "living under the same roof"; (2) if the individual and the insured are "in a close, intimate and informal relationship"; and (3) if their relationship's duration is "likely to be substantial." *Viktora*, 318 N.W.2d at 706 (citing *Pamperin*, 197 N.W.2d at 788). These factors are interpreted broadly to examine "all aspects of the relationship." *McGlothlin v. Steinmetz*, 751 N.W.2d 75, 83 (Minn. 2008). The supreme court recently noted that "the seemingly overarching concern in the residency cases is whether the relationship between the parties constitutes a 'social unit which is something more than a group of individuals who occasionally spend time together in the same place.'" *Id.* at 84 (quoting *Lott*, 541 N.W.2d at 307).

There is some evidence to support the district court's legal conclusion. Although it is undisputed that father did not exercise his parenting time scrupulously in the six months prior to purchasing his home, he did do so more regularly thereafter. During periods of parenting time, father and Grant acted like a "family" in that father had designated bedrooms in his house for the children, and this relationship was likely to endure indefinitely. *See Viktora*, 318 N.W.2d at 707 (stating that the first two *Pamperin* factors equate to a "family" relationship); *see also Olson*, 402 N.W.2d at 625 (explaining that the "duration" factor refers to the nature of "the relationship of the persons to each other and to the household, rather than to the lengths of time of individual visits"). However, although the first two *Pamperin* factors are generally equated to "family," this court recently made an apt distinction: "[W]e recognize that [the child] undoubtedly had a close, intimate, and informal relationship with her family. . . . However, there is a

difference between being 'close' and living together." *Frey*, 743 N.W.2d at 345 (determining a college-age child resided with her fiancé, not her parents). Similarly, although Grant may have been close to father, and certainly they were family, it does not necessarily follow that Grant *lived* with father. On this record it cannot be concluded that Grant and father were "*living* under the same roof," despite the fact that Grant did occasionally spend the night at father's house.

While the *Thiem* court held that a child may be considered a resident of a custodial *and* a noncustodial parent's household, the facts here are distinguishable from those in *Thiem*:

> [The father] and his new family spent considerable time with [the son] and routinely maintained space for him during his visits in the home. The parties appear to have established a *cooperative effort* by which both [parents] participated fully in their son's life and [the father's] regular contacts and interaction were maintained. . . . The nature and extent of [the son's] routine inclusion in his father's household, together with the continued provision of space for those routine visits demonstrates *that parents and child considered the child a resident of his father's household* as well as his mother's household.

503 N.W.2d at 790 (emphasis added). In *Thiem*, the father exercised regular parenting time with his son,

> and at other times when [the son's] mother was out of town. [The father] also saw [the son] on "spur of the moment" occasions. . . . There were times when [the father] stayed with the children [at their mother's home] when [the son's] mother had to work. There were also times when [the son's] mother would call [the father] and ask him to take the children.

Am. Family Mut. Ins. Co. v. Thiem, 498 N.W.2d 279, 281 (Minn. App. 1993), *aff'd in part, rev'd in part*, 503 N.W.2d 789 (Minn. 1993).[3] The facts here do not indicate that appellant viewed father as a partner in a joint parenting effort. There is no evidence that father sought or exercised parenting time beyond that ordered by the district court, or that appellant had ever reached out to father for help with the children. To the contrary, appellant testified that she did "[n]ot comfortably" trust father with their children because he is an alcoholic, and she only allowed the children to be supervised by him because it had been ordered by the district court. Although each child had a furnished bedroom at father's house, during parenting time the tender-age children's needs were not fully provided for by father as appellant had to send "overnight bags" with the children for their visits.

Although State Farm argues that father's parenting skills are not at issue, nor is whether father is "a good person," the degree of his involvement in Grant's life and of Grant's integration into father's life are relevant when making a residency determination. *Thiem* does not stand for the proposition that a child is *always* a resident of both parents' households if some amount of parenting time is exercised by the noncustodial parent; rather, as the supreme court subsequently noted, dual residency was found there given the "narrow confines of [*Thiem*'s] factual setting." *McGlothlin*, 751 N.W.2d at 82. In view of the factual setting presented here, we disagree with the district court's determination that Grant was a resident of both parents' households. Because we conclude that Grant

[3] In *Thiem*, the supreme court noted its reliance on the facts "detailed in the decision of the court of appeals." 503 N.W.2d at 790-91.

was not a resident of father's household, coverage for Grant's death under father's insurance policy issued by State Farm is not excluded.

Reversed.