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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2011**

In the Matter of the Welfare of the Child of: J. A. C. and M. J. E.-C., Parents.

**Filed April 21, 2014
Affirmed in part, reversed in part, and remanded
Randall, Judge***

Carver County District Court
File No. 10-JV-10-192

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Considered and decided by Stauber, Presiding Judge; Hudson, Judge; and Randall,
Judge.

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

UNPUBLISHED OPINION

RANDALL, Judge

Appellant-mother challenges a juvenile court order denying her request for an evidentiary hearing and her request to release child-E.M.C.'s medical and therapeutic records. Mother also argues that the district court improperly granted an untimely motion that requested suspension of the parenting time plan and closure of the juvenile protection file and permanency files. We reverse and remand the issues raised in the untimely motion. Mother's other arguments to this court do not establish a basis for reversal.

FACTS

Mother-M.J.E.-C. (mother) and father-J.E.C. (father) are the biological parents of E.M.C., born June 6, 2000. The parties married in 1995 and divorced in 2002. Custody was initially awarded to mother, subject to father's reasonable parental access. In April 2010, respondent-Carver County Community Social Services (the county) filed a petition alleging that E.M.C. was a child in need of protection or services (CHIPS) due to mother's over-medication of E.M.C. E.M.C. was adjudicated CHIPS and placed into foster care.

In February 2011, E.M.C. moved into the home of father and the woman with whom father was living with. A permanency petition requesting transfer of legal and physical custody to father was filed in August 2011 by the county. A permanency hearing was held in October 2011, and both father and mother waived their right to a trial. An order to transfer permanent legal and physical custody to father was filed in January 2012. The permanency order also incorporated an agreed-upon graduated

parenting time plan (GPTP). The GPTP had multiple steps and stages that required successful completion by mother before she could have increased contact and visitation with E.M.C. The GPTP charged medical professionals with making recommendations to the court concerning mother's progress through the plan and the visitation parameters.

From April 2010 to August 2013, the court held periodic permanency-review hearings. During this time, both mother and E.M.C. were doing well in their individual and joint therapy sessions. In November 2012, however, E.M.C. was admitted to a hospital due to behavioral and psychological concerns. After E.M.C.'s hospital admission, E.M.C.'s therapist recommended that visitation between mother and E.M.C. be suspended for a three-month period. The county then filed a motion requesting that contact between mother and E.M.C. cease for a period of up to three months.

At a January 2013 permanency-review hearing, mother subpoenaed E.M.C.'s medical, therapeutic, and school records. Mother also requested an evidentiary hearing to address the change in her contact with E.M.C. The county opposed mother's requests and, instead, the district court conducted an in camera review of the medical and therapeutic records. After the review, mother's parenting time was not reinstated, and the district court declined to release any records.

Mother again filed a motion requesting E.M.C.'s records from her therapist, school, and hospitals. The district court determined that it was appropriate to release E.M.C.'s school records to all the parties but that it was not in E.M.C.'s best interest to release her therapeutic or medical records. Mother then renewed her requests for E.M.C.'s mental and therapeutic records and an evidentiary hearing.

On August 20, 2013, the county filed a motion requesting that contact between E.M.C. and mother be indefinitely suspended, that the GPTP be abrogated, and that the CHIPS and permanency court files be closed. The motion was heard the next day at a previously scheduled August 21, 2013 hearing. At this hearing, mother objected to the untimely filing of the motion. Following the hearing, the district court indefinitely suspended appellant's parenting time with E.M.C. and closed the files.

The district court determined that it was in the best interest of E.M.C. to suspend mother's contact with E.M.C. for an undetermined period of time. The district court also concluded that E.M.C.'s medical and therapeutic records would not be released to the parties except through expert review. Lastly, the district court closed the CHIPS and permanency files until such time as the court found it appropriate to re-open the case or until E.M.C.'s treatment team or therapist believed it would be appropriate to resume contact between E.M.C. and mother. This appeal followed.

D E C I S I O N

I.

Mother first argues that the district court erred in granting the county's motion to suspend mother's parenting time and to close the juvenile protection file because the motion was untimely. Minnesota Rule of Juvenile Protection Procedure 15.02, subdivision 3, requires any written motion to "be served at least five (5) days before it is to be heard, unless the court for good cause shown permits a motion to be made and served less than five (5) days before it is to be heard." The county filed its written motion, supporting affidavits, and exhibits to indefinitely suspend mother's parenting

time on August 20, 2013. The motion was heard at the previously scheduled August 21, 2013 hearing.

The county offers no explanation for its failure to comply with rule 15.02's time requirements. Rather, the county argues that mother "was not prejudiced" because she had prior notice of its intention to suspend mother's contact with E.M.C. due to the county's filing of a similar motion on December 14, 2012.

The county's December 14th motion, however, only requested a three-month suspension of mother's contact with E.M.C. It did not request indefinite suspension of her parenting time. Moreover, the December 14th motion was filed almost eight months prior to the county's untimely motion. The county failed to show good cause for its untimely motion. We reverse the district court's decision to grant the county's motion and remand the issues raised in that motion.

On remand, the parties are restricted to renewing only arguments raised in the August 20th motion. At oral argument to this court, mother requested that we 'throw it wide open' on all contested issues. We will not do this. The remand is limited to issues raised in the conceded untimely motion—the closing of the files and suspension of the GPTP. The district court is free to receive new evidence it believes is necessary on any renewed argument. We make no comment on which party should prevail on remand.

Finally, we note that the juvenile court has original and exclusive jurisdiction of children in CHIPS and permanency matters. *See Stern v. Stern*, 839 N.W.2d 96, 100-01 (Minn. App. 2013) (rejecting appellant's argument that the family court and juvenile court had concurrent jurisdiction in child protection or permanency proceedings). We

recognize that, here, after the juvenile court case was closed, jurisdiction was transferred to family court and subsequent rulings have been made in this case. Accordingly, on remand, the juvenile court has discretion to leave the consequent family court rulings in place until it evaluates and rules on any renewed arguments. This is consistent with the “coordinated decision-making process” advised by the rules “to assure a consistent outcome that is in the best interests of the child.” Minn. R. Juv. Prot. P. 1.02(h) comm. cmt.

II.

Mother also raises several issues in addition to the untimely motion. First, mother maintains that the district court violated the settlement agreement of the parties when it suspended mother’s parenting time. Mother cites to *Toughill v. Toughill*, 609 N.W.2d 634 (Minn. App. 2000) to support her assertion that marital dissolution stipulations are “binding contracts” that a party cannot repudiate except with consent of the other party or by leave of the court. But the agreement at issue, the GPTP, is not a marital dissolution stipulation. Rather, it was an agreement adopted by the court that resulted from the transfer of legal custody of E.M.C. to father after E.M.C. was adjudicated CHIPS. Mother’s argument that the GPTP cannot be altered by the court is unavailing.

Moreover, the GPTP never specified or guaranteed mother parenting time. Instead, the GPTP laid out stages that made parenting time contingent on successful completion of each stage. Mother’s argument that the GPTP was violated when her parenting time was suspended fails to recognize that the GPTP did not guarantee her a

defined amount of parenting time. Consequently, the GPTP was not violated when the treating professionals recommended suspension.

Second, mother claims that the district court deprived her of constitutional and due process rights when it denied her an evidentiary hearing and suspended her parenting time. The United States and Minnesota Constitutions provide that the government may not deprive an individual of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. Parents have a protected fundamental right to the care, custody, and control of their children and the parent-child relationship is constitutionally protected. *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060 (2000); *SooHoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007).

Whether a parent's due-process rights have been violated in a permanency proceeding is a question of law, which this court reviews de novo. *See In re Welfare of Children of B.J.B.*, 747 N.W.2d 605, 608 (Minn. App. 2008) (applying de novo review to alleged deprivation of due process in a juvenile protection proceeding). In considering whether a party has been deprived of due process, this court balances the private interest affected by official action, the risk of erroneous deprivation of that interest through the procedures used and the value of additional or substitute procedural safeguards, and the government's interest. *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 415-16 (Minn. 2007). The applicable due-process standard for juvenile proceedings is fundamental fairness. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543, 91 S. Ct. 1976, 1985 (1971).

To support her constitutional arguments, mother broadly argues that she did not receive adequate process when the district court revoked her parenting time and denied her access to E.M.C.'s medical and therapeutic records, claiming there is no evidence in the record to support the district court's decision. We disagree. After father was granted custody of E.M.C., mother's parenting time was governed by the court-adopted GTP. Pursuant to the agreement, all of E.M.C.'s medical and school decisions would be made by father. The GTP also specifically relied on E.M.C.'s treatment team for recommendations regarding mother's progress through the plan.

From January 26, 2012 to October 3, 2013, the district court conducted periodic permanency-review hearings to monitor mother and E.M.C.'s progression through the GTP. At these hearings, mother had the opportunity to be heard on her requests for an evidentiary hearing and access to E.M.C.'s records. The district court considered and followed the advice of the treating professionals in determining mother's parenting time under the plan and her access to E.M.C.'s records. When the hospital treatment team recommended that mother be denied access to E.M.C.'s records, the district court solicited information from the treating hospital pertaining to the basis for their recommendation. Furthermore, the district court then allowed all parties to submit additional information for the hospital to consider in its recommendations.

On August 21, 2013, counsel for E.M.C., her therapist, her social worker, her guardian ad litem, and the county all recommended that contact with mother was not in E.M.C.'s best interests. The record is void of any contrary expert opinion submitted by mother. The district court did not completely preclude mother from accessing E.M.C.'s

records. Rather, it instructed mother that she could obtain an evidentiary hearing if she provided an expert opinion stating that contact with mother would be in E.M.C.'s best interest. And any retained expert would have full access to E.M.C.'s medical and therapeutic records.

Viewing the record on the whole, the district court properly balanced mother's interest in obtaining access to E.M.C.'s records against the potential concerns raised by this access. In addition, because the district court provided an avenue for mother to review the records at issue, mother's due-process rights were not violated when the district court restricted her access to the records. Lastly, because we reverse and remand the issues contained in the untimely motion, we decline to address mother's due-process argument regarding the suspension of her parenting time.

III.

Mother argues that the district court violated various Minnesota rules and statutes when it suspended her parenting time without an evidentiary hearing and restricted her access to E.M.C.'s medical and therapeutic records. Mother appears to argue for the first time on appeal that the district court ran afoul of Minn. Stat. § 518.17, subd. 3(b)(1) (2012), because her parental rights were never terminated. Generally, we will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We will, however, in the interests of justice, consider mother's argument on appeal. Minn. R. Civ. App. P. 103.04.

To the extent that we address mother's Minn. Stat. § 518.17, subd. 3(b)(1) argument, we note that the this provision arguably applies to CHIPS determinations.¹ Under subd. 3(b), a court may restrict or alter a party's rights if it makes "specific findings" per Minn. Stat. § 518.68, subd. 1 (2012). Section 518.68, subdivision 1, allows a court to waive "all or part of the notice . . . relating to parental rights under section 518.17, subdivision 3, if it finds it is necessary to protect the welfare of a party or child." Here, because neither party raised the record-access issue under section 518.17, subdivision 3(b), the district court did not make specific findings as outlined in section 518.68, subdivision 1. The district court did issue a protective order that restricted access to medical and therapeutic records, citing E.M.C.'s best interests as the basis for the order. Thus, the interests of E.M.C. outweigh what, in the absence of prejudice, is a technical violation that does not warrant reversal. *See In re Welfare of S.R.A.*, 527 N.W.2d 835, 838 (Minn. App. 1995) (refusing to reverse a termination of parental rights for harmless error), *review denied* (Minn. Mar. 29, 1995).²

In addition, mother claims the district court violated Minn. R. Juv. Prot. P. 8.04 and Minn. R. Juv. Prot. P. 17.04(c) when it denied her access to E.M.C.'s medical and

¹ Subdivision 3(a) of Minnesota Statute section 518.17 controls "[u]pon adjudging the nullity of a marriage, or in a dissolution or separation proceeding, or in a child custody proceeding." And a "custody proceeding" is defined to include a CHIPS case. Minn. Stat. § 518.003, subd. 3(g) (2012).

² Mother also contends that the district court erred by not addressing the thirteen factors enumerated in Minn. Stat. § 518.17, subd. 1(a) (2012) when it conducted its in camera review of the medical and therapeutic records. Because this is not a marriage dissolution proceeding, section 518.17 does not control. Thus, the district did not err in conducting the in camera review.

therapeutic records. Rule 8.04 provides that “[t]he following records (a)–(m) in the court file are not accessible to the public. *Unless otherwise ordered by the court*, parties shall have access for inspection and copying to all records in the court file, except records (b), (d), and (e) listed below.” (Emphasis added.) The district court specifically ruled that the parties were not to have access to E.M.C.’s medical and therapeutic records. This is consistent with the clear language of rule 8.04.

Rule 17.04(c) requires any party to “disclose and permit the county attorney, attorney for petitioner, and other parties to inspect and copy any results or reports of physical or mental examinations” upon court order. Here, there was never an order by the district court for a party to disclose records to another, thus rule 17.04(c) is inapplicable.

Minnesota Rule of Juvenile Protection Procedure 8.07, subdivision 2, allows the court, “sua sponte, or upon motion and hearing, [to] issue a protective order prohibiting a party’s access to juvenile protection case records that are otherwise accessible to the party.” A protective order restricting certain medical records from review by any party was issued by the district court. The district court specifically stated that release of E.M.C.’s therapeutic records could compromise the confidence E.M.C. has in her therapist and the therapeutic relationship. Both rules 8.04 and 8.07 allow a district court to restrict a party’s access to records in a juvenile-protection proceeding. The district court did not err when it restricted mother’s access to E.M.C.’s therapeutic and medical records.

Next, mother argues that the district court violated Minn. R. Juv. Prot. P. 42.07, subd. 7 and Minn. Stat. § 260C.515, subd. 4(7) (2012) when it closed a case with a corresponding parenting time plan. Rule 42.07, subd. 7 provides:

When the court orders transfer of permanent legal and physical custody to a relative under this Rule, the court *may* retain jurisdiction over the responsible social services agency, the parents or guardian of the child, the child, and the permanent legal and physical custodian. The court *may* conduct reviews at such frequency as the court determines will serve the child's best interests

(Emphasis added.) And section 260C.515, subd. 4(f) states that “the juvenile court *may* maintain jurisdiction over the responsible social services agency, the parents or guardian of the child, the child, and the permanent legal and physical custodian for purposes of ensuring appropriate services are delivered to the child” (Emphasis added.) When used in a statute, “may” is permissive. Minn. Stat. § 645.44, subd. 15 (2012). Here, both the rule and statute use “may” and neither requires the juvenile court to maintain jurisdiction over the parties once permanent custody is achieved. The district court did not violate either the rule or statute when it closed the juvenile protection file.

Lastly, mother argues that Minn. Stat. § 518.75, subd. 5 (2012) governs the modification of a parenting plan in family court and claims the district court was required to hold an evidentiary hearing before it modified appellant's parenting time. We disagree. The requirements for a “parenting plan” are set out in Minn. Stat. § 518.1705 (2012), and the GPTP does not satisfy the requirements of that statute. The GPTP is not a “parenting plan.” *See Rutz v. Rutz*, 644 N.W.2d 489, 492 (Minn. App. 2002) (ruling that a plan that did not satisfy Minn. Stat. § 518.175, was not a “parenting plan”), *review*

denied (Minn. July 16, 2002). The requirements for modifying a parenting plan do not apply here.

Affirmed in part, reversed in part, and remanded.