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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-2306**

In the Matter of the Welfare of the Child of: A. B. and D. B., Parents.

**Filed May 19, 2014**
**Affirmed**
**Stauber, Judge**

Koochiching County District Court
File No. 36JV13652

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Amy Koebke, Bemidji, Minnesota (respondent guardian ad litem)

Considered and decided by Larkin, Presiding Judge; Stauber, Judge; and Kirk, Judge.

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

**STAUBER**, Judge

On appeal from the district court's order transferring physical custody of a child to the child's maternal grandfather, appellant-father argues that the evidence is insufficient to overcome the presumption that the child should be placed with the child's biological

parent, that it is in the child's best interests to be in appellant's custody, and that contrary to the district court's findings of fact, the parties did not agree on the placement of the child. We affirm.

**FACTS**

On November 29, 2012, J.B., born on October 28, 2010, was placed in emergency custody based upon allegations that his mother, respondent A.B., was chemically dependent and in need of in-patient treatment. The following day, respondent Koochiching County Community Services (KCCS) filed a child in need of protection or services (CHIPS) petition, and in December 2012, J.B. was adjudicated CHIPS. Since November 29, 2012, and often prior to that, J.B. has been in the care of his maternal grandfather, respondent J.C.B. and J.C.B.'s live-in girlfriend, L.F.

Six months after placing J.B. with J.C.B., KCCS prepared a permanency petition recommending transfer of sole physical custody to J.C.B.. But before the petition was filed, J.B.'s father, appellant D.B., contacted the county and stated that he wanted to be considered as a placement option for his son. Appellant resides in Montana and was adjudicated J.B.'s father in October 2011 in a child-support proceeding. Appellant was awarded joint legal custody along with A.B. and awarded reasonable parenting time at appellant's expense. Appellant never visited his son in Minnesota until July 2013, after A.B. moved with J.B. to Minnesota in March 2011. During that time, A.B. brought J.B. to Montana to visit her family when J.B. was about one-and-a-half years old, and appellant only interacted with his son briefly.

In response to appellant's request to be considered for custody of J.B., KCCS requested an extension of the permanency timeline and established a case plan for appellant as well as A.B. Appellant's case plan required him to "initiate visits with the child in Minnesota, become acquainted with the child and his needs, . . . have weekly phone contact with the child's placement . . . start with supervised visits and a trip . . . must [be arranged] with the social worker in advance." Appellant was also required to cooperate with a home study and background check.

On October 25, 2013, a hearing was held on KCCS's permanency petition. The petition requested that permanent physical custody of J.B. be awarded to J.C.B., with joint legal custody awarded to J.C.B. and A.B., with parenting time for A.B. and appellant at J.C.B.'s discretion. A.B. testified that she supported KCCS's petition. She testified that she observed her son in J.C.B.'s home and that she believes placement with J.C.B. is in the child's best interest. She testified that appellant expressed little to no interest in his son while they were living in Montana. According to A.B., he was "too busy" to visit his son when he was first born, and showed "no real interest in holding or car[ing] for [J.B.]." After A.B. moved to Minnesota, there was "almost a year where there was no communication other than receiving one present between [J.B.] and his father." A.B. attempted to set up a visit when she brought J.B. to visit family in Montana, but claimed that appellant did not return her phone calls and only saw his son for a few minutes. A.B. testified that if J.B. was placed with his father she would be concerned for his safety, but did not cite any specific concerns or safety issues.

Amy Koebke, the guardian ad litem (GAL) testified that J.B. is very attached to J.C.B. and L.F., having spent significant time in their care. She testified that during appellant's visit with J.B. in July 2013, appellant "was appropriate" but that J.B. "asked for [J.C.B.] quite a bit" and that J.B. showed no attachment to appellant. The GAL testified that she agreed with giving J.C.B. sole physical custody, but that she also thought that J.C.B. should have sole legal custody because she was concerned about A.B.'s sobriety. She testified that some young children can be resilient following a custody transfer, but that because J.C.B. has provided a safe and stable home environment she believed that there was a "possibility that [J.B.] could have some issues in the future" if he was separated from J.C.B.. The GAL also expressed concern about appellant's failure to stay in touch with his son, and testified that parents "that seem more concerned and make an effort to spend more time with their children tend to be better parents."

J.C.B. testified that he has been caring for J.B. since A.B. moved to Minnesota, even prior to the commencement of the CHIPS proceeding. He testified that he reported A.B. to the county out of concern for J.B. He testified that J.B. would be "devastated" if removed from his care, and that he is bothered by the fact that appellant did not contact him until his case plan required him to. He testified that after visiting appellant, J.B. was exceptionally "clingy" and "didn't want to be out of my sight or [L.F.'s] sight." J.C.B. testified that, because J.B. is lactose-intolerant, he purchased milk goats and milks them by hand to provide a source of lactose-free milk for J.B. L.F. testified that she and J.C.B.

have been together for five or six years. She agreed with J.C.B. that J.B. was very clingy following visits with appellant

Tammie Treat, a child protection social worker, testified that she helped supervise a visit with J.B. and appellant in July 2013. She observed that J.B. has a secure attachment to J.C.B. and L.F.. She testified that she observed that during the visit appellant failed to effectively comfort J.B. while he was upset about being separated from his grandfather. She testified that appellant would need "to learn how to engage [in a way] that will stabilize, comfort. Right now [appellant] doesn't have that ability in the [recorded visits she viewed] or in the visit that [she] conducted." Treat also testified that removing J.B. from his grandfather "might manifest itself in adolescence" as negative behaviors, and that no matter "how good [appellant] performs [as a parent] . . . there would be a great risk to this child."

Jean Anderson, the child protection social worker who facilitated the majority of visits between J.B. and appellant in July 2013, testified that it was in J.B.'s best interest to live with his grandfather, and it was not in his best interest to live with appellant. Anderson testified that during the visits J.B. became so stressed that she would have ended the visits under normal circumstances, but because of "the unique situation, the distance [appellant] traveled" she allowed the visits to continue. During the first visit, J.B. "continually . . . was asking for [J.C.B.], trying to go out the door and he was increasingly getting more and more upset." On the way to get lunch, appellant was trying to put J.B. in the car and J.B. became so upset that he threw up on himself. Afterwards, J.B. cried himself to sleep in the car. Anderson testified that it was "apparent to [her] that

[appellant] hadn't spent a lot of time with young children." She testified that she "found [herself] intervening more than [she] normally would have. [She] had hoped that [appellant] would have intervened more with trying to distract [J.B.] and engage him a little more." Anderson testified that she asked appellant how he would handle the situation if he obtained custody of J.B. and how he would "prevent trauma to the child," and appellant told respondent that "he'll get used to it." Anderson testified that appellant "complied with the majority of the terms of his case plan" but that she had urged appellant "to spend time with [J.B.], develop a bond, develop a relationship. And he only made the one visit." She testified that appellant does not have "an understanding of what being a full-time parent is versus just having some parenting time."

Appellant testified that he always wanted custody of J.B. but that he believed that A.B. would get custody of J.B. after she completed treatment, and therefore he did not seek custody until he learned that KCCS was proposing permanent custody with J.C.B. He testified that he tried to stay in touch with J.B. but he was never given J.C.B.'s phone number until after he received his case plan. He also testified that he did not contact A.B. because communicating with A.B. was "a little confrontational at times" and he was "worried about [J.B.] associating angriness and yelling with the only time his father might be around." Appellant explained that he did not visit his son when he was first born because A.B. had a new boyfriend and was not communicating with him. Appellant testified that he saw J.B. a few times a week while A.B. was living in Montana, although occasionally A.B. would not permit appellant to visit with J.B. Appellant testified that A.B. was able to contact him to set up visits, and that they had a much longer visit in

Montana than what A.B. described. Appellant testified that he is in school fulltime and also works fulltime, but that he would make time in his schedule to parent J.B. Appellant admitted that he has little parenting experience and that there is no attachment between him and J.B., but stated that he believes it would be in J.B.'s best interest to live with his biological father. He testified that it is important for J.B. to know his family in Florida, and to learn about his Italian/Filipino heritage. Appellant added that "there was [not] any reason why [J.B.] could not come to my house and do well and be with his father."

The district court granted KCCS's petition for permanency placement, giving J.C.B. sole physical custody, and providing for shared legal custody between J.C.B., A.B., and appellant. The district court found that appellant has never bonded with the child whereas "the intimacy of the relationship between [J.C.B.] and the child is close and [J.C.B.] has ensured the child's health, safety and welfare over the last year and a half." The district court also found that "if the child were to be taken from a safe, stable environment, of which he has strong attachments, and moved to an environment that is new and requires readjustment, [and] of which he has no attachments, that there is a high risk of causing trauma to the child." The district court found that it is in the child's best interest to be placed in J.C.B.'s care also because it was what A.B. wanted, and J.C.B. has been the child's primary caretaker since March 2011, the child has a "close, intimate relationship" with J.C.B. and L.F., the child is well-adjusted in the home, the child will be able to maintain relationships with relatives, and there is a "strong desirability of maintaining continuity of the child's life." Based on the evidence in the record, the district court concluded that the legal presumption favoring custody with a biological

parent was overcome by "overwhelming clear and convincing evidence." This appeal followed.

## DECISION

On appeal, "findings in a juvenile-protection proceeding will not be reversed unless clearly erroneous or unsupported by substantial evidence." *In re Welfare of Child of S.S.W.*, 767 N.W.2d 723, 733 (Minn. App. 2009). The petition must be proved by "clear and convincing" evidence. *Id.* "Considerable deference is due to the district court's decision because a district court is in a superior position to assess the credibility of witnesses." *Id.* (quoting *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996)).

### I.

Appellant argues that the evidence in the record failed to rebut the legal presumption favoring custody placement with a natural parent. "All other things being equal, the natural parents have the paramount right to the care and custody of a child." *State ex rel. Rys v. Vorlicek*, 229 Minn. 497, 500, 40 N.W.2d 350, 351 (1949). "That right is not absolute, however, and must yield to the child's welfare. If its best interests will be served by granting custody to someone else[,] that will be done." *Id.* The burden of overcoming the presumption of parental fitness is on the person challenging the parent's custody, and must be shown by "grave reasons." *In re Welfare of P.L.C.*, 384 N.W.2d 222, 225 (Minn. App. 1986). "The principle that the custody of young children is ordinarily best vested in the [biological parent], vital and established as it may be, is distinctly subordinate to the controlling principle that the overriding consideration in custody proceedings is the child's welfare." *Wallin v. Wallin*, 290 Minn. 261, 265, 187

N.W.2d 627, 630 (1971); *see also* Minn. Stat. § 260C.001, subd. 3(3) (2012) (stating that "[t]he paramount consideration in all proceedings for permanent placement of the child under sections 260C.503 to 260C.521 . . . is the best interests of the child").[1]

Appellant asserts that he demonstrated that he would provide a suitable home for J.B., and therefore he is entitled to have custody of his son. And appellant substantially completed his case plan and Montana's department of health and human services approved his home for placement. Although the fitness of a natural parent is an important consideration, the "superior" rule is that custody determinations are based on the best interests of the child. *See In re Custody of N.M.O.*, 399 N.W.2d 700, 703 (Minn. App. 1987) (stating that "the preference cannot be minimized as an interest competing with the child's interest").

In *Vorlicek*, the child's mother died when the child was about ten years old and was taken to live with her aunt and uncle. 229 Minn. at 498, 40 N.W.2d at 350. The child's father never visited the child until after the child's mother died. *Id.*, 40 N.W.2d at 351. Thereafter, the father visited twice, and on the second occasion the child ran and hid from him. *Id.* at 498-99, 40 N.W.2d at 351. The supreme court acknowledged the preference for placing children with their natural parent and noted that the father had a "good-sized modern home," was employed and earning a good salary, and was since

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[1] We note at the outset that appellant does not assert that placement of his child with the child's grandfather violates his constitutional right to parent his child. *See, e.g. Troxel v. Granville*, 530 U.S. 57, 66-67, 120 S. Ct. 2054, 2060-61 (2000) (concluding that a state court's order permitting grandparent's visitation over the parent's objection violated the constitution). Rather, appellant relies upon an older line of cases interpreting the best-interest standard.

remarried and is "honest and dependable." *Id.* at 499, 40 N.W.2d at 351. But the supreme court stated that "[t]his case is distinguishable from those cases where a parent has temporarily been unable to provide for a child, and, as a result, its custody has been awarded to someone else." *Id.* at 501, 40 N.W.2d at 352. The supreme court affirmed the district court's custody determination in favor of the aunt and uncle, stating that:

> So far as the child is concerned, the father is a complete stranger to her. . . . It would be idle for us to assume that mere blood relationship, which a parent has shown no disposition to manifest over these many years, may now be kindled into something akin to that love and affection which it is natural to suppose is inherent in all parents toward their children. . . . We are convinced that it would cause serious emotional and psychological disturbances to force her to change her place and mode of living at this time.

*Id.* at 501-02, 40 N.W.2d at 352.

Similarly, in *State ex rel. Ashcroft v. Jensen*, 214 Minn. 193, 194, 7 N.W.2d 393, 394 (1943), the mother placed the child in the care of another couple, and made it clear that the child was not available for adoption. The mother sent money for the first couple of years, but then the payments stopped. *Id.* When the child was about six or seven, the mother, now married to the father, sought custody of the child. *Id.* at 194-95, 7 N.W.2d at 394. The record showed that the parents were fit to have custody of the child. *Id.* at 195, 7 N.W.2d at 394. The supreme court acknowledged the presumption that parents are entitled to the custody of their children, but stated that "[e]xceptional cases often arise . . . where this desired relationship between parent and child does not exist." *Id.* at 195, 7 N.W.2d at 394-95. In affirming the district court's order placing the child with the other couple, the supreme court stated that:

> Since the time when this child was but a few months old it has been exclusively in respondents' care. . . . It would be as tragic to remove this child from the [other couple's] home as to take a child from its natural parents with whom it is living. We conceive that serious emotional and psychological maladjustment would result if the child were transferred from the [other couple] to the [natural parents'] home. This we should avoid unless overpowering reasons require it. The first and chief concern is the welfare of the child.

*Id.* at 195-96, 7 N.W.2d at 395; *see also Petition of Hohmann*, 255 Minn. 165, 170-71, 95 N.W.2d 643, 648 (1959) (discussing three other cases where a biological father's custody was denied because of lack of involvement or interest on the father's part).

Based upon this line of Minnesota cases, we conclude that it was not an abuse of discretion to order permanent placement of J.B. with J.C.B. The record clearly supports the conclusion that the best interests of the child would be served by leaving J.B. in J.C.B.'s care. Appellant admitted that there is no attachment between him and his son because of the "minimal amount of time [he has] spent with him." He also admitted that for a two-year period he spent no more than three hours with his son. Several witnesses testified that J.B. became extremely agitated when left in appellant's care to the point that, on one occasion, J.B. was so upset he became physically ill. Ordinarily visits would have been terminated under these circumstances, but KCCS made an exception because this was appellant's only visit with his son in Minnesota. Several witnesses also testified that removing J.B. from J.C.B.'s care, to whom he is strongly attached, would cause devastating trauma that could result in behavioral problems as J.B. grows older. The combined testimony of the witnesses in this case shows that J.B. would be greatly harmed by being removed from the care of his grandfather at this time.

Even so, appellant argues that caselaw supports his right to custody of his biological child. We acknowledge that, under normal circumstances, a biological parent has a paramount right over others to the custody of his child. *Vorlicek*, 229 Minn. at 500, 40 N.W.2d at 351. But, in this case, the record cannot support appellant's argument that the district court's custody determination was unsupported by substantial evidence or clearly erroneous. Placement of a child with someone other than a biological parent is lawful where it is in the child's best interest. *See id.* at 501-02, 40 N.W.2d at 352. Moreover, we conclude that the cases appellant cites in support of his argument are distinguishable from the facts here. *Cf. State ex rel. Olson v. Sorenson*, 208 Minn. 226, 230, 293 N.W. 241, 243 (1940) (concluding that the presumption of parental custody prevailed where the best interests of the child were equally served by placement with parents or with grandparents); *State ex rel. Vik v. Sivertson*, 194 Minn. 380, 380-81, 260 N.W. 522, 522-23 (1935) (holding that placement of twelve-year-old child with parent was in the child's best interest where parent regularly visited the child); *P.L.C.*, 384 N.W.2d at 224-227 (reversing custody with the child's grandparents where the biological father was "an involved parent" and the child was only briefly in the care of its grandparents).

Appellant also argues that the district court failed to consider evidence that supports placing J.B. with him, including the fact that he completed his case plan, J.B.'s separation anxiety is normal, appellant has prepared for the transition, and that J.B. should be with his father to learn about his heritage. But bare compliance with the case plan does not weigh heavily in appellant's favor. *See In re Welfare of Child of J.K.T.*,

814 N.W.2d 76, 89 (Minn. App. 2012) (concluding that parent who completed the county's case plan nevertheless failed to correct the conditions leading to foster care placement). Anderson testified that appellant "complied with the majority of the terms of his case plan," but that multiple visits were strongly recommended. It was significant to the district court's ruling in this case that appellant only expressed interest in having custody of his son seven months after he was first made aware of the CHIPS case, and that he had no meaningful contact with his son prior to their first and only visit in Minnesota in July 2013.

Moreover, appellant misconstrues the GAL's testimony regarding J.B.'s separation anxiety. The GAL testified that "[t]he younger kids are the more resilient they are." But she went on to say that at "[t]hree [years old], he's really starting to attach to his family here. And I think . . . there is a possibility that he could have some issues in the future." She also testified that most of the time when she has seen young children do well in a new home it was when they were taken from an "[u]nsafe environment" and not when they were taken from "a healthy, safe, loving home. And Treat testified that young children are not resilient, and that "birth to five years of age is probably the most—they're like a sponge. And this is the most formative years." And Anderson testified that, "knowing [J.B.] the way I do [he] would be really traumatized by being taken away from his grandfather and [L.F.]." None of the witnesses testified that J.B. would be unlikely to suffer trauma by being placed with appellant.

Appellant argues that he is ready to parent J.B. fulltime, but the record does not entirely support this argument. Appellant's Montana home study recommends placing

J.B. with his father in Montana. But Anderson testified that, based upon her observations of appellant's visits with J.B., appellant does not understand "what being a fulltime parent is versus just having some parenting time." She also testified that appellant has unrealistic expectations and dreams. Appellant plans to parent J.B. fulltime while also working and going to school fulltime, but did not consider whether this would pose a challenge.

Finally, appellant argues that he should have custody of J.B. so that J.B. can learn about his heritage. Appellant is Italian and Filipino. He testified that his sister speaks Tagalog, which is a language spoken in the Philippines. But appellant does not speak this language, and appellant's sister lives in Florida, not Montana. There is no evidence in the record to indicate what importance this cultural heritage holds for appellant or his son. Appellant only testified that learning Tagalog would be "neat." Appellant's arguments do not show that the district court clearly erred by placing J.B. with his grandfather.

**II.**

Appellant also argues that certain of the district court's findings were clearly erroneous. Respondents agree, and argue that the complained-of findings are mere clerical errors that may be corrected without reversing the district court's order.

Appellant argues that two of the district court's findings were in error:

> 2.0 The parties to this case agreed that as a disposition on this petition, the child's grandfather and interim custodian . . . be awarded sole physical custody of the child, joint legal custody with the . . . mother.
> . . . .
> 5.0 At the disposition hearing, . . . [J.C.B.] also agreed with the agency, the . . . mother and the GAL it is in [J.B.'s] best

> interests that he have sole physical custody with legal custody shared jointly with his daughter, the . . . mother.

Appellant asserts that the parties were not in agreement because appellant did not agree to sole physical custody remaining with the grandfather, and the GAL did not agree that the mother should share legal custody with the grandfather. Appellant also asserts that the district court erred by citing a repealed law when it cited Minn. Stat. § 260C.201, subd. 11 (2010).

The rules of juvenile protection procedure provide for a remedy where clerical errors arise:

> Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time upon its own initiative or upon motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected with leave of the appellate court.

Minn. R. Juv. Prot. P. 46.01. A clerical error is "apparent upon the face of the record and capable of being corrected by reference to the record only." *Wilson v. City of Fergus Falls*, 181 Minn. 329, 332, 232 N.W. 322, 323 (1930). It is an error "made by the court which cannot reasonably be attributed to the exercise of judicial consideration or discretion." *Id.*

The complained-of errors in this case are essentially clerical errors capable of correction without reversal. It is clear from the record that the parties did not agree upon the disposition because the permanency petition was contested by appellant. Moreover, the GAL clearly testified that she did not agree with KCCS that the mother should share

joint legal custody with the grandfather. And the statutory provision cited by the district court was repealed in 2012. *See* 2012 Minn. Laws ch. 216, art. 6, § 14, at 502. But Minnesota law still provides that permanent custody of a child may be given to a relative when it is in the child's best interest. *See* Minn. Stat. § 260C.515, subd. 4 (2012). We conclude that reversal is unnecessary to correct these errors.

**Affirmed.**