STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1778

In re the Matter of: Andrew Thomas Berg, petitioner,
Respondent,

vs.

Florentina Alina Parker n/k/a Florentina Alina Vazquez,
Respondent,

and

Victoria Mari Parker, interpleader,
Appellant.

Filed October 15, 2012
Affirmed
Muehlberg, Judge[*]

Ramsey County District Court
File No. 62-FA-08-2103

Timothy Douglas Lees, Hennek Klaenhammer & Lees PA, Roseville, Minnesota (for respondent Andrew Thomas Berg)

Florentina Alina Parker n/k/a Florentina Alina Vazquez, St. Paul, Minnesota (pro se respondent)

Elizabeth Ann Schading, Barna, Guzy & Steffen, Ltd., Coon Rapids, Minnesota (for appellant)

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

Considered and decided by Stauber, Presiding Judge; Cleary, Judge; and Muehlberg, Judge.

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

MUEHLBERG, Judge

In this appeal challenging the district court's order granting sole physical and legal custody of her grandson, P.P., to his biological father, respondent Andrew Berg, appellant Victoria Parker contends that the district court erred in (1) vacating a prior custody stipulation between Parker and P.P.'s biological mother, Florentina Vasquez; (2) applying a best-interests-of-the-child standard rather than an endangerment standard in analyzing the parties' custody claims; and (3) concluding that it was in P.P.'s best interests that Berg have sole custody. Because we conclude that the district court did not err in vacating the stipulation, properly applied the best-interests standard, and did not abuse its discretion in its best-interests conclusion, we affirm.

FACTS

Victoria Parker adopted Florentina Vasquez[1] from a Romanian orphanage in 1991, when she was four years old. Vasquez was severely neglected in the orphanage and lived in very poor conditions; she was rarely taken out of a crib for the first four years of her life. Throughout her life, Vasquez has been diagnosed with a variety of mental health issues, including depression, mood disorder, reactive attachment disorder, and an eating disorder.

[1] Florentina Vasquez was formerly known as Florentina Parker. She changed her name after she was adopted as an adult by Anna Vasquez.

In 2005, Vasquez lived and attended high school in Duluth. In the fall of that year, 18-year-old Vasquez thought she was pregnant, and told other students at school she was pregnant. When she found out she was not pregnant, she was disappointed and realized that she wanted to have a child. Her boyfriend at the time refused to impregnate her because he thought they were too young. Vasquez convinced Berg, who was 15 years old at the time, to help her get pregnant. She became pregnant in about December 2005, and told Berg that he was the father.

Wally Berg, Andrew Berg's father, found out about the pregnancy in January 2006 after a conference with school officials about problems Andrew was having at school. Wally Berg confronted his son, who admitted his belief that he was the father of Vasquez's child. Wally Berg contacted Parker, who expressed her fear that Vasquez would be charged with statutory rape, as Vasquez was 18 and Berg only 15 when the child was conceived. Wally Berg told Parker they were not interested in pursuing criminal charges against Vasquez.

In January 2006, Vasquez moved to St. Paul, apparently to attend college at St. Catherine's through a program where she would earn college credits while still in high school. She lived with a family friend, S.A., until Parker, who was still working as a teacher in Duluth, moved to the Twin Cities in May or June 2006. Vasquez then lived with Parker for the rest of her pregnancy. After Parker left Duluth, the Bergs had no further contact with Parker or Vasquez and did not know how to contact them.

Vasquez gave birth to the child, P.P., on September 18, 2006. Parker immediately assumed full care of the infant, and Vasquez returned to school only one week after P.P.

was born. Sometime in late summer or early fall 2006, Vasquez sent a letter to Berg using S.A.'s return address. With this address, Wally Berg obtained S.A.'s phone number and called her in an effort to locate Parker and Vasquez. S.A. told Wally Berg of P.P.'s birth, and Wally Berg told her to have Parker contact him within one week, or Berg would retain an attorney.

Parker called Wally Berg about one week later, using a calling card instead of her cell phone, which the district court found was "because she did not want [Wally] Berg or [Andrew Berg] to be able to contact or locate her." Wally Berg testified that, during this telephone conversation, Parker told him that P.P. was a "child of color," which led him to believe that Berg was not the father because Berg and Vasquez are both white.

Wally Berg and Parker set up a meeting, where she was to bring pictures of P.P., but Parker canceled at the last minute. The Bergs did not pursue the matter further, based on Parker's representation about the child's race and because they did not know how to contact Parker or Vasquez. Although he did not believe he was the father based on Parker's comment, Berg signed the Fathers' Adoption Registry.[2]

Shortly after P.P. was born, Parker filed a Petition for Adoption in Ramsey County, and obtained Vasquez's signature consenting to the adoption. Parker did not advise Berg of this petition, and did not further pursue the adoption matter until July 2008, except for one filing in 2007. The district court found: "the reason [Parker] delayed is because she knew [Berg's] interests, which were activated by his signing of

[2] If a putative father registers with the Fathers' Adoption Registry within 30 days of the child's birth, he is entitled to notice of any adoption proceeding involving the child. Minn. Stat. § 259.52 (2010).

the Fathers' Adoption Registry, could not be extinguished until [Berg] became eighteen years old."

In June 2007, Parker executed a stipulated agreement with Vasquez whereby Parker would get sole physical and sole legal custody of P.P. Parker hired and paid for an attorney for Vasquez, and drove Vasquez to his office where she signed the stipulation. Vasquez testified that she did not choose the attorney, and Parker told her if she did not sign the documents, Vasquez would not be "allowed to hold [P.P.] or say hi to him, or anything like that." The district court found that Parker coerced and manipulated Vasquez into signing the stipulation. Berg was not given notice of the stipulated custody agreement. The stipulation was filed and approved without a hearing in Dakota County district court in August 2007.

July 3, 2008 was Berg's 18th birthday. On or about that date, Berg received several documents from Parker's attorney related to Parker's Ramsey County adoption petition originally filed in 2006. These documents included a Notice to Registered Putative Father, Notice of Jurisdiction, a blank Intent to Claim Parental Rights form, a blank Denial of Paternity form, and a blank Consent of Parent to Adoption and Waiver of Notice of Adoption Hearing form. Berg filed his Intent to Claim Parental Rights, and intervened in the actions then pending relating to P.P.'s custody, including the Ramsey County adoption action, another Ramsey County action brought by Vasquez against Parker for custody and parenting time, and the Dakota County matter involving the stipulation. Berg also filed his own action in Ramsey County to establish paternity and custody of P.P. DNA tests confirmed that Berg is P.P.'s biological father.

The Ramsey County district court consolidated all of the various actions in Ramsey and Dakota counties related to adoption, custody, and parenting time of P.P. Before trial, the court granted Berg and Vasquez supervised parenting time with P.P., and Berg was later granted unsupervised parenting time. Parker continued to have physical and legal custody of P.P. while the action was pending.

The district court reviewed numerous medical and mental-health records of all the parties and especially Vasquez, because of her numerous mental-health issues. The district court also received testimony and reports from several psychologists and custody evaluators.

Before the trial started, Parker withdrew her Petition for Adoption, and the district court dismissed the petition with prejudice. Thus, at the trial, the district court had before it Berg's petition for an initial determination of custody (in which Parker was an interpleader) and Vasquez's request for modification of the 2007 stipulated custody agreement between her and Parker (in which Berg was an intervenor).

As to the request for modification of the 2007 stipulated custody agreement, the district court found that Vasquez did not "knowingly and voluntarily" enter into that stipulation "because of [her] youth, mental health status, and vulnerability," that Parker "manipulated and coerced [Vasquez] to secure her signature," and that Berg was not given notice of the proceeding. Thus, the district court vacated the Dakota County order adopting the stipulated agreement, and found that "there is no previous custody order to modify." The district court therefore treated the entire matter as an initial custody dispute between the natural parents and a third party.

In a detailed 49-page order, in which it undertook a thorough best interests analysis, the district court awarded Berg sole physical and sole legal custody of P.P. Vasquez was granted supervised parenting time every other weekend and one week in the summer, to be supervised by her new adoptive mother, Anna Vasquez. Parker was granted unsupervised visitation with P.P. one weekend per month (that is not one of Vasquez's weekends), plus any additional time as agreed to by Berg. This arrangement has continued since the district court's order in August 2011, and therefore P.P. has been living in Duluth with Berg since that time.

D E C I S I O N

I. Vacation of Stipulation

The district court found that Parker coerced and manipulated Vasquez to sign the 2007 stipulation giving sole physical and legal custody to Parker. Thus, the court found that Parker procured Vasquez's consent to the stipulation through misconduct. Parker contends that this finding was erroneous, Vasquez signed the stipulation of her own free will, and the district court erred in vacating the stipulation.

The agreement is entitled "Stipulation for Custody Pursuant to Minnesota Chapter 257C." Parker filed the stipulation in Dakota County district court on August 7, 2007, along with a "Petition for Custody Pursuant to Minnesota Chapter 257C." Chapter 257C is the mechanism by which a "de facto custodian" or "interested third party" can seek custody of a child. Minn. Stat. §§ 257C.01-.08 (2010); *see In re Kayachith*, 683 N.W.2d 325, 326 (Minn. App. 2004) (stating that the legislature enacted chapter 257C to address custody requests by nonparents), *review denied* (Minn. Sept. 29, 2004). The stipulation

appears to be a consent decree, which allows a parent to voluntarily "transfer legal and physical custody of a child" to a third party. Minn. Stat. § 257C.07. The district court may approve a consent decree if it finds the arrangement is in the best interests of the child. *Id.* Section 257C.07 is silent as to the circumstances under which the district court can vacate a consent decree.

Parker cites *Tomscak v. Tomscak* as setting forth the factors a court must consider in determining whether to vacate a stipulation. 352 N.W.2d 464 (Minn. App. 1984). However, in a later decision, the Minnesota Supreme Court recognized that once a court enters judgment on the parties' stipulation, the stipulation ceases to exist because it is "merged" into the resulting judgment, and that the only relief from the stipulated judgment comes from satisfying the requirements of Minn. Stat. § 518.145, subd. 2. *Shirk v. Shirk*, 561 N.W.2d 519, 522 (Minn. 1997). The *Shirk* court stated that the "sole" way to seek relief from a stipulation requires meeting the requirements of Minn. Stat. § 518.145. *Id.*; *see also Toughill v. Toughill*, 609 N.W.2d 634, 639-40 (Minn. App. 2000) (recognizing that *Tomscak* had been overruled by the 1988 amendments to section 518.145).

While *Shirk*'s holding only expressly addresses obtaining relief from a stipulated judgment and decree of dissolution, 561 N.W.2d at 523, we conclude that vacation of a chapter 257C consent decree is also governed by section 518.145 (2010). Unless otherwise specified, the provisions of chapter 518 apply to a proceeding under chapter 257C. Minn. Stat. § 257C.02(a) ("Chapters 256, 257, and 518 . . . apply to third-party and de facto custody proceedings [under chapter 257C] unless otherwise specified in this

chapter."). Chapter 257C does not otherwise specify a method for vacation of a stipulated judgment, and therefore, we must determine whether the district court's action complied with section 518.145, subdivision 2. That section provides:

> On motion and upon terms as are just, the court may relieve a party from a judgment and decree, order, or proceeding under this chapter, . . . and may order a new trial or grant other relief as may be just for the following reasons:
>
> > (1) mistake, inadvertence, surprise, or excusable neglect;
> > (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under the Rules of Civil Procedure, rule 59.03;
> > (3) fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party;
> > (4) the judgment and decree or order is void; or
> > (5) the judgment has been satisfied, released, or discharged, or a prior judgment and decree or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment and decree or order should have prospective application.
>
> The motion must be made within a reasonable time, and for a reason under clause (1), (2), or (3), not more than one year after the judgment and decree, order, or proceeding was entered or taken. . . . This subdivision does not limit the power of a court to entertain an independent action to relieve a party from a judgment and decree, order, or proceeding or to grant relief to a party not actually personally notified as provided in the Rules of Civil Procedure, or to set aside a judgment for fraud upon the court.

It is undisputed that there was no formal motion before the court to vacate the stipulation under Minn. Stat. § 518.145, subd. 2, and that Vasquez did not bring her original request to modify the stipulated judgment within one year of the entry of that

judgment.[3] Vasquez originally requested modification of the stipulated judgment based on a significant change in circumstances, rather than requesting that the judgment be vacated. However, her position at trial changed, and her post-trial submission to the district court states that she requested that the stipulated judgment be vacated for "fraud upon the court."

The district court's decision whether to vacate a judgment for fraud upon the court will be sustained absent an abuse of discretion. *Maranda v. Maranda*, 449 N.W.2d 158, 164 (Minn. 1989). "If there is evidence to support the district court's decision, an abuse of discretion will not be found." *Thompson v. Thompson*, 739 N.W.2d 424, 428 (Minn. App. 2007).

The statute does not explicitly require the district court to have a motion before it to set aside an order for fraud upon the court. Minn. Stat. § 518.145, subd. 2 ("This subdivision does not limit the power of a court . . . to set aside a judgment for fraud upon the court."). Further, vacating an order for fraud upon the court is not subject to the "not more than one year" provision that applies to other subsections of section 518.145. *See Thompson*, 739 N.W.2d at 428. Thus, Vasquez's failure to bring a proper motion within one year from entry of the stipulation did not preclude the district court's consideration of the issue.

Fraud upon the court has been described as "an intentional course of material misrepresentation or non-disclosure, having the result of misleading the court and

[3] The stipulation was entered on August 7, 2007, and Vasquez brought her motion to modify the stipulated judgment on August 8, 2008.

opposing counsel and making the [agreement] grossly unfair." *Id.*; *see also Maranda*, 449 N.W.2d at 165 (stating that fraud on the court requires a party to demonstrate egregious conduct involving an integral aspect of the judicial process); *In re Welfare of C.R.B.*, 384 N.W.2d 576, 579 (Minn. App. 1986) (describing fraud on the court as "[w]here a court is misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair" (quotation omitted)), *review denied* (Minn. May 29, 1986).[4]

Here, the district court found that Parker intentionally took advantage of Vasquez's youth and fragile mental state, and threatened her with not seeing P.P., to coerce her to sign the stipulation. It further found that Parker "abused the court process and misled the Dakota County Court." Parker presented misleading facts to the Dakota County court for its approval, including her reasons for wanting the custody transfer, and represented that Vasquez knowingly and voluntarily signed the stipulation, which the district court found she did not do. Further, the district court found relevant the fact that Parker knew Berg had an interest in P.P., but failed to notify him or seek his consent on the stipulation. Based on our review of the record, these findings are supported by the evidence.

Therefore, although the district court did not make the explicit finding that Parker committed fraud upon the court, we conclude that the finding can be inferred, especially since Vasquez argued such a theory in her post-trial submission to the court. *See*

[4]*Maranda* and *C.R.B.* analyze fraud on the court under Minn. R. Civ. P. 60.02. The 1988 amendment to section 518.145 added subdivision 2, the language of which is essentially identical to rule 60.02.

Warwick v. Warwick, 438 N.W.2d 673, 677-78 (Minn. App. 1989) (inferring a finding of bad faith despite the lack of an explicit finding where the referee, at the hearing, stated a child support obligor's conduct was "egregious," "outrageous," constituted contempt of court, and sentenced the obligor to the workhouse); *Vettleson v. Special Sch. Dist. No. 1*, 361 N.W.2d 425, 428 (Minn. App. 1985) (applying the clearly erroneous standard of review to an implicit finding of bad faith). The district court carefully considered all the evidence before it in deciding to vacate the consent decree, and it did not abuse its discretion in making that decision. Thus, we conclude that the district court properly vacated the stipulation, and there was no existing custody order in place at the time of trial.

II. Appropriate Standard

Parker next contends that the district court erred in applying a best-interests standard, rather than an endangerment standard, in making the custody determination in this case. The district court found that the facts of this case were similar to those in *Wallin v. Wallin*, 290 Minn. 261, 187 N.W.2d 627 (1971), and applied the best-interests standard as prescribed by that case.[5] Parker argues that the facts of this case are more

[5] In 2002, the legislature enacted most of what is now chapter 257C of the Minnesota Statutes. *See* 2002 Minn. Laws ch. 304 §§ 1–6 (enacting the bulk of what is currently chapter 257C). Chapter 257C addresses custody disputes between a parent and a person who is not a parent of the child at issue. This case involves a custody dispute between the parent of a child and a person who is not a parent of that child. Consistent with the arguments made to it, however, the district court based much of its decision on the supreme court's pre-chapter 257C opinion in *Wallin*. Also, consistent with the parties' failure to brief to the district court the effect, if any, of the enactment of chapter 257C on the *Wallin* line of cases, the district court did not address that question. Generally, appellate courts address only questions presented to and considered by the district

akin to those in *Westphal v. Westphal*, 457 N.W.2d 226 (Minn. App. 1990), and therefore the district court should have used an endangerment standard as did the court in that case. That is, Parker contends that Berg should have been required to show that P.P. was endangered in her custody. We conclude that the district court properly followed *Wallin* and did not err in applying the best-interests standard.

In *Wallin*, the paternal grandparents were originally appointed guardians of the minor child. 290 Minn. at 262, 187 N.W.2d at 628. Approximately two years later, after the parents divorced, the mother sought custody of the minor child and the grandparents opposed the motion. *Id.* at 262-64, 187 N.W.2d at 628-29. In reviewing the district court's decision denying the mother's motion, the supreme court identified two basic doctrines in determining custody between a parent and a nonparent. *Id.* at 264, 187 N.W.2d at 629. The first is the presumption that a natural parent is entitled to custody unless he or she is shown to be an unfit parent. *Id.* at 264, 187 N.W.2d at 629. The second is the best interests of the child, which is the "overriding consideration" in custody proceedings. *Id.* at 265, 187 N.W.2d at 630. Thus, the court concluded:

> [A]ll things being equal, as against a third person, a natural mother would be entitled as a matter of law to custody of her minor child unless there has been established on the mother's part neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish the child with

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court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because the question of the interaction, if any, between the *Wallin* caselaw and chapter 257C was not argued to the district court, was not addressed by the district court, and was not briefed to this court, we decline to address that question here.

In any event, given the high burden a de facto custodian or interested third party must meet to be entitled to custody under chapter 257C, our conclusion would likely be the same under that chapter.

> needed care, or unless it has been established that such custody otherwise would not be in the best welfare and interest of the child.

Id. at 266, 187 N.W.2d at 630 (citations omitted). The supreme court remanded the case to the district court for findings consistent with this standard. *Id.* at 268, 187 N.W.2d at 631-32.

In *Westphal*, an existing custody order granted custody of the minor child to the natural mother. 457 N.W.2d at 227. The child's paternal grandparents petitioned for custody, and the district court denied their petition without an evidentiary hearing. *Id.* at 228. In reviewing the decision, this court stated that the custody-modification provisions of Minn. Stat. § 518.18 applied, which required the grandparents to show that "the child's present environment endangers the child's physical or emotional health." *Id.*; *see also* Minn. Stat. § 518.18(d) (2010). The court stated that the best interests standard of section 257.025 only applies "where there is no prior order establishing custody." *Westphal*, 457 N.W.2d at 228. In *Westphal*, there was a prior order establishing the mother's custody, and therefore the endangerment standard applied. 457 N.W.2d at 228-29. According to the *Westphal* court, applying the endangerment standard squared with the holding in *Wallin*, because where the natural parent already has custody, the nonparent must show that the natural parent is unfit to have custody, which is akin to endangerment. *Id.* at 229; *see also Durkin v. Hinich*, 442 N.W.2d 148, 152 (Minn. 1989) (stating that the nonparent has the burden of proving that a natural parent is unfit).

We conclude that the district court did not err in determining that *Wallin* is apposite to this case and applying the best-interests standard. Here, as in *Wallin*, a

nonparent (Parker) had custody and a natural parent (Berg) sought custody. Parker thus had to show that Berg was unfit, or that retaining custody with Parker was in P.P.'s best interests. The district court concluded that Berg was a fit natural parent, and further found that it was in P.P.'s best interests that Berg have custody.

Further, because we conclude that the district court did not err in vacating the consent decree, there was no standing custody order in place at the time of trial and the district court properly applied the best interests standard. *See* Minn. Stat. §§ 257.025, 257C.04 (2010) (the best interest standard applies to custody determinations involving unmarried parents and third parties); *Westphal*, 457 N.W.2d at 228 ("Section 257.025 [prescribing a best-interests analysis] applies in situations where there is no prior order establishing custody of the child."). Parker's contention that the district court applied the wrong legal standard is therefore without merit.

III. Best Interests

Finally, Parker argues that the district court abused its discretion in finding that it is in P.P.'s best interests that Berg have sole custody. "Appellate review of custody determinations is limited to whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985); *see also Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). The law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000). "That the record might support findings other

than those made by the trial court does not show that the court's findings are defective." *Id.* at 474.

The district court undertook a thorough, 20-page analysis of the best-interest factors. It based its determination on the testimony of the parties and several experts, documents submitted in four different court files, and numerous exhibits including therapy records, medical records, and independent psychological evaluations of Parker, Vasquez, and Berg.

The court acknowledged that Parker has been P.P.'s primary caretaker since birth, and P.P. only began having visits with Berg about two years before trial. It also emphasized, however, that Parker's actions were the predominant reason that Berg had not been more involved in P.P.'s life. Specifically, the district court credited Wally Berg's testimony that when he spoke to Parker shortly after P.P.'s birth, she told him that the P.P. was a "child of color," which led him to believe that Berg was not P.P.'s father. While Parker disputes that she made this statement to Wally Berg, we must give deference to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

The main area of concern in transferring custody from Parker to Berg is the fact that P.P. has lived with Parker since birth, and Parker has been his primary caretaker. The district court gave due weight to this important fact, but found that it was still in P.P.'s best interests for Berg to have custody, for Vasquez to have parenting time, and for Parker to have grandparent visitation. As stated in *Wallin*,

> It is understandable that a change in surroundings of a child of tender years could be not only disruptive but, in some instances or circumstances, traumatic. . . .
>
> However, since a change of custody involving small children will be disruptive to some degree in almost all cases, we are reluctant to establish precedent which could prevent a parent from prevailing in a custody dispute for that reason alone.

290 Minn. at 267, 187 N.W.2d at 631. Therefore, the mere fact that the transfer of custody would be disruptive to P.P. is not sufficient to show that the district court abused its discretion in granting custody to Berg.

Moreover, the district court's finding that any shared legal custody between the parties would be untenable is well supported by the evidence. The district court looked at the past relationship among Parker, Berg, and Vasquez, and noted Parker's "consistent and unreasonable interference with [Berg's] relationship with [P.P.]." It also acknowledged the parties' failure to cooperate during the pendency of the current action and "lack of ability to resolve disputes amongst themselves," and concluded that it would not be in P.P.'s best interests for more than one of the parties to have legal custody. The evidence supports these findings.

We thus conclude that the district court did not abuse its discretion in weighing P.P.'s best interests and awarding sole legal and sole physical custody of P.P. to Berg. We therefore affirm the district court's order.

Affirmed.