STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1207

In re the Paternity, Custody and
Support of A.E.M.L. by J.D.E.,
Appellant,

and

S.M.L.,
Respondent.

Filed July 1, 2008
Affirmed in part and remanded
Connolly, Judge

Ramsey County District Court
File No. F9-05-50351

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Considered and decided by Toussaint, Chief Judge; Connolly, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

CONNOLLY, Judge

Appellant challenges the district court's judgment (1) granting sole physical custody to respondent; (2) changing the child's name back to A.E.M.L.; (3) not specifically allocating the tax exemption to either party; and (4) excluding one page of respondent's medical records at the trial as inadmissible hearsay. Because the district court did not abuse its discretion in its decisions regarding custody, the name change, and its evidentiary decision concerning the medical records, we affirm. However, on the issue of the tax-dependency exemption, we remand for further factual findings.

FACTS

Appellant J.D.E. and respondent S.M.L. met in September 2004 and learned that respondent was pregnant in December. Appellant testified that he was supportive of respondent's pregnancy, went with her to doctor visits during her pregnancy, and purchased maternity clothing for her. The parties ceased dating before the child was born.

A.E.M.L. was born on May 31, 2005. Appellant was not notified of, and was not present for, the birth. Two days later, respondent called appellant to notify him of their daughter's birth. Appellant went to the hospital to see his daughter. Respondent requested that appellant sign a recognition of parentage form, but appellant refused, stating that he had hired an attorney who had advised him not to sign the form. At appellant's request, both parties provided samples for a paternity test.

A week after the birth of his daughter, appellant filed a complaint and a petition for paternity, custody, and support. Appellant moved the district court (1) for an order that appellant be adjudicated the natural father of the minor child; (2) to refer the matter to court services to complete a legal-custody, physical-custody, and parenting-time evaluation, further requesting that the evaluator provide a recommendation concerning his request that the child's name be changed; (3) to reserve the issues of legal and physical custody and order that appellant be awarded liberal parenting time with the minor child; (4) to award a reasonable amount of child support to be paid by appellant to respondent; (5) for an order that respondent cooperate with appellant so that he could add the minor child to his health insurance; and (6) for an order that respondent cooperate with appellant so that he could enroll in parenting classes with the child.

In reply, respondent requested that the district court (1) adjudicate appellant the father of the minor child; (2) award her temporary sole physical and sole legal custody of the child; (3) refer the matter to court services to complete a legal-custody, physical-custody, and parenting-time evaluation; (4) award appellant parenting time every other weekend for one hour with increasing parenting time as respondent deemed appropriate; (5) order appellant to pay child support and medical-cost reimbursement to her and to Ramsey County; and (6) deny appellant's request for a name change of the minor child.

The district court issued an order for a custody/parenting-time evaluation and requested that both parties submit legal briefs on the issue of the minor child's name change. The district court subsequently issued a temporary order that (1) adjudicated appellant the natural father of the minor child; (2) awarded respondent temporary sole

legal and sole physical custody of the minor child; (3) reserved the issues of permanent physical custody and permanent legal custody pending the evaluation of court services; (4) referred the matter to court services for a full custody and parenting time evaluation; (5) awarded appellant parenting time with the minor child one day a weekend, every other weekend, from 4:00 p.m. to 6:00 p.m. and some limited holiday parenting time; (6) ordered appellant to pay respondent $297 monthly in child support, as well as provide health insurance through his place of employment; and (7) ordered the minor child's name be changed to A.E.M.E.[1]

A custody and parenting time evaluation was completed through court services and a report was submitted to the district court. Thereafter, appellant brought a motion requesting that the district court grant him permission to complete a private physical-custody and parenting-time evaluation. Respondent asked that the district court deny this motion and reconsider the minor child's name change. The district court granted appellant's motion for an independent custody and parenting time evaluation and set the matter for an evidentiary hearing.

At the hearing, the parties agreed that appellant should continue to pay child support in the amount of $297 per month and provide health and dental insurance to the minor child. The remaining issues in dispute included legal and physical custody, parenting time, the name change, and the allocation of the tax-dependency exemption.

[1] Respondent filed a notice of appeal with this court regarding the minor child's name change. This court, however, dismissed the appeal as taken from a non-final order.

The district court's judgment, in relevant part, (1) awarded respondent sole physical custody of the minor child; (2) awarded the parties joint legal custody of the minor child; (3) vacated the court's order establishing the child's name as A.E.M.E.; (4) reestablished the minor child's name as A.E.M.L.; (5) ordered appellant to pay child support in the amount of $297 per month; and (6) awarded appellant a graduated parenting-time schedule. At trial, the district court sustained respondent's motion objecting to one page of respondent's medical records. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by granting respondent sole physical custody of A.E.M.L.

A district court has broad discretion to provide for the custody of the parties' children. *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989); *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). Appellate review of custody determinations is limited to determining whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996); *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). A district court's findings of fact will be sustained unless they are clearly erroneous. *Pikula*, 374 N.W.2d at 710. Currently, the law "leaves scant if any room for an appellate court to question the trial court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000).

Custody determinations are based on the best interests of the child. The factors to be considered are set out in Minn. Stat. § 518.17, subd. 1 (2006). These factors include

> (1) the wishes of the child's parent or parents as to custody;
>
> (2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
>
> (3) the child's primary caretaker;
>
> (4) the intimacy of the relationship between each parent and the child;
>
> (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
>
> (6) the child's adjustment to home, school, and the community;
>
> (7) the length of time the child lived in a stable, satisfactory environment and the desirability of maintaining continuity;
>
> (8) the permanence, as a family unit, of the existing or proposed custodial home;
>
> (9) the mental and physical health of all individuals involved . . . ;
>
> (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion, or creed, if any;
>
> (11) the child's cultural background;
>
> (12) the effect on the child of the actions of an abuser, if related to domestic abuse as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and
>
> (13) except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the parent with the child.

Minn. Stat. § 518.17, subd. 1. "The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child." *Id.*

In addition to the 13 best-interests factors, when one parent is seeking joint custody, as here, the court has four additional factors to consider. Minn. Stat. § 518.17, subd. 2 (2006). These factors include (1) the ability of parents to cooperate in the rearing of their child; (2) the methods for resolving disputes regarding any major decision concerning the life of the child and the parents' willingness to use those methods; (3) whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing; and (4) whether domestic abuse has occurred between the parents. *Id.*

"There is neither a statutory presumption disfavoring joint physical custody, nor is there a preference against joint physical custody if the district court finds that it is in the best interest of the child and the four joint custody factors support such a determination." *Schallinger v. Schallinger*, 699 N.W.2d 15, 19 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005); *see Wopata v. Wopata*, 498 N.W.2d 478, 482 (Minn. App. 1993) ("Joint physical custody . . . is not a preferred arrangement."). Awarding joint physical custody is an abuse of discretion when the difficulties between the parents are so significant and pervasive as to preclude cooperation. *Wopata*, 498 N.W.2d at 483 (citing *Greenlaw v. Greenlaw*, 396 N.W.2d 68, 74 (Minn. App. 1986)). But, "[t]he court shall use a rebuttable presumption that upon request of either or both parties, joint *legal* custody is in the best interests of the child." Minn. Stat. § 518.17, subd. 2 (emphasis added).

The district court thoroughly evaluated each of the best-interests factors, as well as the joint custody factors, and concluded that it was in the best interests of the child to remain with her mother. Therefore, respondent was granted sole physical custody, and

the parties together were awarded joint legal custody. The district court, in evaluating the factors, focused primarily on the parties' inability to cooperate, appellant's failure to sign the recognition of parentage, appellant's refusal to leave the minor child with her maternal grandmother per respondent's wishes when respondent was in the hospital, appellant's independent evaluator's lack of credibility, the importance of the minor child's relationship with her brother who also lived with respondent, and the fact that respondent was the child's primary caretaker. The court concluded its analysis by stating:

> The court finds that [the court's evaluator] supported her recommendations by utilizing the 13 best interest factors and was a neutral objective examiner with no previous history with either party. Although [the evaluator] recommended joint legal custody it is apparent from the parties' testimony there continues to be anger and distrust which impairs their ability to co-parent. The police had to be called so that [appellant] would turn the child over to a caregiver. [Appellant] dropped the baby off at the hospital at 8:30 p.m. rather than follow the instructions of the mother. [Appellant] calls respondent's parenting style "lazy" which is offensive and not supported. It is clear from the record that the parties cannot communicate in a respectful manner in cooperating in rearing their child.

Although someone's refusal to sign a recognition of parentage form should generally play no part in the best-interests inquiry, the district court's thorough and comprehensive analysis supporting its decision indicates that it was not an abuse of discretion to grant sole physical custody to respondent.

II. The district court did not abuse its discretion by vacating the prior order changing the minor child's name to A.E.M.E.

Appellant argues that the district court abused its discretion by vacating the prior order that changed the minor child's name from A.E.M.L. to A.E.M.E. Respondent asserts that the initial name change from A.E.M.L. to A.E.M.E. was not in the child's best interests.

"[N]either parent has a superior right to determine the initial surname their child shall bear. However, once a surname has been selected for the child . . . a change in the child's surname should be granted only when the change promotes the child's best interests." *In re Saxton*, 309 N.W.2d 298, 301 (Minn. 1981). The Minnesota Supreme Court has articulated five factors to be considered when determining if a name change is in the child's best interests. *Id.* These factors include (1) the child's preference; (2) the effect of the change of the child's surname on the preservation and the development of the child's relationship with each parent; (3) the length of time the child has borne a given name; (4) the degree of community respect associated with the present and proposed surname; and (5) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname. *Id.* The district court's decision to grant or deny a name change is reviewed under an abuse-of-discretion standard. *In re Welfare of C.M.G.*, 516 N.W.2d 555, 561 (Minn. App. 1994).

The district court considered each of these five factors and determined that permanently changing the minor child's name to A.E.M.E. was not in her best interests.

A. The child's preference

The district court correctly determined that, based on her age, the minor child could not indicate a preference.

B. The effect of the change of the child's surname on the preservation and the development of the child's relationship with each parent

Next, the district court considered the effect of the name change on the preservation and the development of the child's relationship with each parent. The court stated that "[t]he child's preservation and development of a relationship with her father *could be* strengthened by granting the surname change to E. as he requests. The child's preservation and development of a relationship with her mother *would be* strengthened by establishing the surname of the child to be L." The basis for this finding is somewhat unclear, but the district court seems to rely on the fact that respondent has been the constant in the child's life, whereas appellant refused to even sign the recognition of parentage after the child's birth.

The district court inappropriately focused most of its name-change analysis on the fact that appellant refused to sign a recognition of parentage. Nevertheless, the court concluded that having the mother's name *would* strengthen the relationship between mother and child, whereas having the father's surname *might* strengthen the relationship between father and child. This finding is not clearly erroneous.

C. The length of time the child has borne a given name

The district court found that the child had borne the surname of L. from her birth until the court's order changing her name on November 28, 2005. This was approximately a six-month time span. From then on, however, her surname was established as E. Thus, between November 28, 2005, and the court's order changing her name back to L. on April 23, 2007, the minor child bore the surname of E. This was a

period of approximately 17 months. The district court fails to discuss this second time period, but rather states that "[t]he issue of the finality of the court's decision regarding the surname is being decided as a part of this paternity decision." But the difference between six and 17 months is not so great for us to conclude that the district court's finding is clearly erroneous.

D. The degree of community respect associated with the present and proposed surname

The district court focuses on the amount of community respect associated with respondent's surname, by stating that "[t]he mother has demonstrated her ability to continually provide for the best interests of the minor child. Those interests include the mother's integrating this child into her community where the child is known by the surname L." The district court then goes on to associate the community respect of father's name with his actions toward the minor child: "The father has not provided the primary caregiver duties or need regarding the minor child. Although it is true he has had *parenting time* with the child, that relationship does not address the needs of the minor child on a day-to-day basis." In evaluating this factor, the court's focus seems to be misplaced. Instead of looking at how the community views these two surnames, the court concentrates on the parties' parenting abilities.

The court only briefly addressed appellant's primary concern with the name change—that respondent has changed her name several times, and it seems likely that, if respondent ever marries, it will be changed again. The court stated that "[appellant] argues that the respondent has changed her own name many times, however, he makes no

demonstration that this action on the part of the respondent has been detrimental to the best interest of any of her children." We agree.

Although the district court did not properly analyze this factor, there is no evidence in the record to indicate that either surname lacks community respect.

E. The difficulties, harassment, or embarrassment that the child may experience from bearing the present or the proposed surname

The district court briefly summarizes its findings on this factor:

> The evidence before the Court supports the conclusion that the minor child, [A.E.M.L.], will not experience any harassment or embarrassment, bearing the surname of L. [Appellant] argues that it is possible that the child would, in the future, experience difficulties or embarrassment should the respondent change her own name. This argument calls for speculation on the part of the Court. No documentation has been submitted by the [appellant] to support this argument.

Nothing in the record indicates that either name would lead to difficulties, harassment, or embarrassment for the child.

After balancing the five factors, the district court granted respondent's request for a name change to A.E.M.L. Under our limited standard of review, we conclude that the district court did not abuse its discretion by finding that it was not in the child's best interests to have her name permanently changed to A.E.M.E.

III. The district court did not abuse its discretion by refusing to admit one page of respondent's medical records.

Prior to the evidentiary hearing, the parties stipulated to the admission of exhibits, but the district court refused to accept exhibits until adequate foundation had been established. The parties eventually agreed to admit all but one page of respondent's

medical records. Respondent objected to the admission of a note in her medical file pertaining to a third party as inadmissible hearsay. This note, referring to respondent's mother, stated: "Mother alive with hypertension, is an alcoholic, smoker and drug abuser." The district court sustained an objection to this document and refused to admit it into evidence. Appellant argues that this note is relevant as to why he refuses to leave the minor child with her maternal grandmother and should be admitted under the medical-diagnosis or business-records exception to hearsay.

Absent an erroneous interpretation of the law, the question of whether to admit evidence is within the district court's discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). The parties agree that the note in respondent's medical files is hearsay. Hearsay is inadmissible unless an exception to the hearsay rule applies. Minn. R. Evid. 802.

The medical-diagnosis exception includes "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Minn. R. Evid. 803(4). The business-records exception covers:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular

> practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Minn. R. Evid. 803(6).

There is a medical-diagnosis exception to hearsay because it is assumed that when a person seeks treatment or a diagnosis from a physician, she is more likely to be truthful. *Peterson v. Richfield Plaza, Inc.*, 252 Minn. 215, 227, 89 N.W.2d 712, 721 (1958). Here, however, the statement at issue involved respondent's *mother's* use of alcohol and drugs. This statement did not relate to respondent's treatment or diagnosis. Therefore, this exemption does not apply.

The business-records exception also exists due to the likelihood that these records will be reliable.

> Business records are presumed to be reliable because (1) the regularity of the records produces habits of precision in the record keeper, (2) the records are regularly checked, (3) employees are motivated to make accurate records because the businesses that employ them function in reliance on these records, and (4) employees are required to be accurate and risk embarrassment or dismissal if they fail.

In re Child of Simon, 662 N.W.2d 155, 160 (Minn. App. 2003).

Hospitals regularly create medical records to aid in the treatment of patients. But it is the patient who provides the information, not the hospital's employees, and there is no presumption of reliability when the information provided does not directly affect the patient's treatment or diagnosis. "Even regularly prepared business records are

inadmissible . . . when the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *Id.* (quotation omitted).

This note in respondent's medical file does not fit within the medical-diagnosis exception or the business-records exception to hearsay. Therefore, the district court did not abuse its discretion by refusing to admit this page of respondent's medical records into evidence.

IV. The district court abused its discretion by failing to make findings regarding the tax-dependency exemption.

Appellant argues that granting him the tax-dependency exemption would be in the child's best interests because he has the higher income. Respondent asserts that she, as the custodial parent, should continue to receive the exemption.

"The allocation of federal-tax exemptions is within the trial court's discretion." *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 449 (Minn. App. 2002). We review the district court's order to determine whether the court abused its discretion. *Id.*

Federal tax law presumes that upon the dissolution of a marriage the parent with primary physical custody of a child is entitled to claim that child as a dependent for tax purposes. 26 U.S.C. § 152(a), (c) (2006). "When attempting to allocate exemptions, a trial court must follow federal law, which awards the exemption to the custodial parent, unless there is a clear waiver of that right by the custodial parent." *Theroux v. Boehmler*, 410 N.W.2d 354, 358 (Minn. App. 1987). The district court may use its equitable powers to require that waiver in order "to safeguard the economic well-being of the family." *Id.* The district court may also properly consider the relative resources of the parties and the

financial benefits that will accrue from such a transfer. *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999).

The district court was informed by appellant's counsel that the tax exemption was a disputed issue between the parties. Nonetheless, the court made no findings on the exemption and did not explicitly allocate it to either party. It is presumed that the custodial parent will receive the exemption, but the district court must at least acknowledge that it intended to follow that presumption and explain a basis for its decision. Therefore, this issue is remanded so the district court may explicitly allocate the exemption and explain its rationale for doing so.

Affirmed in part and remanded.