STATE OF MINNESOTA
IN COURT OF APPEALS
A10-59

In re the Matter of:
Skye Sealand Wolff, petitioner,
Appellant,

vs.

Tim Daniel Ostergren,
Respondent.

Filed September 28, 2010
Reversed and remanded
Halbrooks, Judge

Ramsey County District Court
File No. 62-F1-99-001442

Valerie A. D. Arnold, Scott A. Rodman, Tuft & Arnold, PLLC, Maplewood, Minnesota (for appellant)

Tim D. Ostergren, St. Paul, Minnesota (pro se respondent)

Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and Collins, Judge.*

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

HALBROOKS, Judge

Appellant Skye Sealand Wolff (mother) challenges the district court's decision to award sole legal and sole physical custody of M.O. and E.W. to their father, respondent

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

Tim Daniel Ostergren (father). Because the district court used the incorrect legal standard to modify custody of M.O., we reverse and remand.

FACTS

Mother and father have never been married. M.O. was born in December 1995; in January 1996, mother was granted "sole legal and primary physical custody" of M.O. in a Jefferson County, Wisconsin paternity action. E.W. was born in December 1998. The Wisconsin order granting mother custody of M.O. was filed in Ramsey County in June 1999. Father sought joint custody of both children in November 1999, and a March 2000 order adjudicated father as E.W.'s biological father. In a June 2000 order, the district court reserved the custody issue pertaining to E.W. because mother and father were living together. The district court clarified that if mother and father ceased living together, either party could seek custody of E.W. by filing a motion and that the resulting custody determination would be considered an initial determination rather than a modification of custody; it did not address custody of M.O.

The parties ended their relationship in 2001, and from that point until September 2007, according to the district court, "the parties, without Court intervention, practiced a joint legal and joint physical custody arrangement with the children." But "[i]n September 2007, [mother] unilaterally, and without notice to [father], withdrew the children from the Saint Paul School District, enrolled them in the Osseo School District and began severely restricting [father]'s time and access to the children." In October 2007, Ramsey County moved for a determination of father's child-support obligation, and father was ordered to pay approximately $850 per month in child support. In

December 2007, father moved for immediate sole legal and sole physical custody of both children. Father's motion for custody alleged that the requirements of subdivisions (iii) and (iv) of Minn. Stat. § 518.18(d) (2006) (the standard for a modification of custody) had been met with respect to M.O., and that the requirements of Minn. Stat. § 518.17 (2006) (the best-interests-of-the-child standard for an initial determination of custody) had been met with respect to E.W.

In a January 2008 temporary order, the district court denied father's motion for an immediate modification of custody, appointed a guardian ad litem (GAL) and a custody evaluator, and allowed the GAL to require psychological evaluations of the parents. The district court also made a finding that the future determination of custody for both children would be made pursuant to the best-interests standard. Mother was represented by counsel at that time.

In June 2008, father moved the district court to enforce certain aspects of its January 2008 order and for clarification that the GAL and the custody evaluator should use the best-interests standard in making their recommendations for both children and not the modification standard found in Minn. Stat. § 518.18(d). Mother's attorney had withdrawn in March 2008, so she was unrepresented when father made this motion. Mother (pro se) responded to father's motion and also requested that the district court order the custody evaluator and the GAL to apply the best-interests standard in making their recommendations. After a review hearing, the district court ordered parenting time, but did not clarify which legal standard the GAL or the custody evaluator should use in making their recommendations. The custody trial was postponed several times for

reasons that are not clear from the record, but a two-day trial was ultimately held in January 2009. By the time of trial, mother was again represented by an attorney.

After trial, the parties submitted proposed findings. Mother's proposed findings were based on the best-interests standard. In a May 2009 order, the district court awarded father permanent sole legal and sole physical custody of both children after applying the best-interests standard. Mother subsequently made several posttrial motions and submissions. The district court denied all of mother's posttrial requests. This appeal follows.

D E C I S I O N

A district court has broad discretion to provide for the custody of parties' children. *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." *Goldman v. Greenwood*, 748 N.W.2d 279, 281–82 (Minn. 2008) (quotation omitted).

I. Custody of M.O.

Mother contends that the district court abused its discretion by applying the incorrect legal standard to the modification of custody of M.O. Because mother had been previously awarded sole legal and physical custody of M.O., father was required to seek a modification of custody, as opposed to an initial determination. *See State ex rel. Gunderson v. Preuss*, 336 N.W.2d 546, 547–48 (Minn. 1983) (requiring the application of Minn. Stat. § 518.18(d), even though the initial award of custody was through a paternity action as opposed to a dissolution); *see also Knutson v. Primeau*, 371 N.W.2d

582, 585–86 (Minn. App. 1985) (stating that the modification standard applied even when parties did not dispute or litigate the issue of custody through the paternity action initially awarding one party custody), *review denied* (Minn. Oct. 11, 1985).

Father moved for an immediate modification of custody of M.O. in December 2007. The standard for modification of custody is found in Minn. Stat. § 518.18(d). A district court shall not modify a custody order

> unless it finds, upon the basis of facts, including unwarranted denial of, or interference with, a duly established parenting time schedule, that have arisen since the prior order or that were unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custody arrangement or the parenting plan provision specifying the child's primary residence that was established by the prior order unless:
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> (i) the court finds that a change in the custody arrangement or primary residence is in the best interests of the child and the parties previously agreed, in a writing approved by a court, to apply the best interests standard in section 518.17 or 257.025, as applicable; and, with respect to agreements approved by a court on or after April 28, 2000, both parties were represented by counsel when the agreement was approved or the court found the parties were . . . aware of its implications;
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> . . . .
>
> (iii) the child has been integrated into the family of the petitioner with the consent of the other party; [or]
>
> (iv) the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to a child[.]

Minn. Stat. § 518.18(d). Father asserted in his motion that subdivisions (iii) and (iv) had been satisfied. But the district court denied father's request for an immediate

modification of custody in a temporary order and stated that the best-interests standard would apply to the custody determination of both children. As an initial matter, there does not appear to be any justification for the district court's finding in this temporary order that the best-interests standard applies to the modification of custody of M.O.[1] But by the time of the trial on the custody issue, both parties strenuously argued for the custody determination of both M.O. and E.W. to be based on the best-interests standard, and neither party objected to the application of this standard until mother's posttrial motions.

Father does not contend on appeal that the elements for a modification of custody under subsections 518.18(d)(iii) or (iv) have been met, but instead argues that the district court was entitled to use the best-interests standard—either based on the January 2008 order or because mother waived her opportunity to assert her rights by not objecting prior to trial. In denying mother's posttrial motions, the district court also cited the January 2008 order and mother's failure to object as authority for its use of the best-interests standard.

The January 2008 order was a temporary order. And according to Minn. Stat. § 518.131, subd. 9 (2006), "[a] temporary order . . . [s]hall not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding." Under Minn. Stat. § 518.18(d), a parent seeking a custody modification must prove that

[1] The transcript from the hearing preceding the January 2008 order suggests that the district court interpreted the 1996 Wisconsin paternity action as requiring the application of a best-interests standard to the modification of custody of M.O., and that this standard was therefore the "law of the case." Our review of the 1996 Wisconsin judgment does not support this interpretation.

such a modification is in the best interests of the child *and* that certain other conditions are met. Accordingly, a modification based on the best-interests standard alone presents a lower burden for the moving party than a modification of custody under Minn. Stat. § 518.18(d). *See Gunderson*, 336 N.W.2d at 548 (noting the difference between the two standards and concluding that the difference is "indicative of a legislative intent to impart a measure of stability to custody determinations in most circumstances"). Lowering father's burden in this manner without mother's consent was potentially prejudicial to mother's rights. Because temporary orders "shall not prejudice the rights of the parties" according to Minn. Stat. § 518.131, subd. 9, we conclude that the temporary order is insufficient as a matter of law to justify the application of the best-interests standard.

But there remains the issue of whether mother waived her right to request the application of the modification standard because she acquiesced to and endorsed the best-interests standard throughout trial and for the year preceding trial. First, we note that the January 2008 temporary order was not an appealable order. *See J.W. ex rel. D.W. v. C.M.*, 627 N.W.2d 687, 696 (Minn. App. 2001) (stating that temporary orders are generally not appealable), *review denied* (Minn. Aug. 15, 2001). Mother therefore did not have the opportunity to appeal the district court's conclusion that the best-interests standard would apply to the modification of custody of M.O. at that time.

Next, although we are convinced that the parties' advocacy for the erroneous standard almost certainly led to the district court's ultimate application of this standard, we cannot escape the conclusion that the district court must work within the confines of the statutory framework designed by our state legislature, regardless of what other

standard may be requested or endorsed by the parties. The supreme court relied on this principle in *Frauenshuh v. Giese*, stating that "we cannot allow parties to contravene the plain and unambiguous intent of the legislature to provide permanence and closure in child custody matters." 599 N.W.2d 153, 159 (Minn. 1999), *superseded by statute*, Minn. Stat. § 518.18(d)(i) (2000). In *Frauenshuh*, the issue was whether parties could agree by stipulation to the application of the best-interests standard in a modification of custody situation. *Id.* at 158. The supreme court concluded that the statutory framework did not allow the parties to circumvent the intent of the legislature. *Id.* at 159. *Frauenshuh* was superseded by Minn. Stat. § 518.18(d)(i), which now specifically allows parties to agree to the application of the best-interests standard to a custody modification. But the principle articulated in *Frauenshuh* still applies, and the parties were therefore required to adhere to the requirements of Minn. Stat. § 518.18(d)(i) before the district court could utilize a different standard for custody modification.

Minn. Stat. § 518.18(d)(i) requires that parties who agree to the application of the best-interests standard reflect that agreement in a court-approved writing at a time when both parties are represented. If the parties are unrepresented, the district court must find that they are aware of the implications of using the best-interests standard before the standard can be applied. Minn. Stat. § 518.18(d)(i). Although mother moved, pro se, for the district court to order the GAL and the custody evaluator to use the best-interests standard, there is nothing in the record to indicate that she was aware of the implications of using this standard. And although mother's proposed findings of fact and conclusions of law were based on the best-interests standard, and she was represented when they were

submitted to the district court, we conclude that this submission falls short of the court-approved writing agreeing to the application of that standard. Mother's acquiescence to the use of the best-interests standard in pretrial and posttrial submissions is insufficient in light of the clear requirements of section 518.18(d)(i).

Therefore, we conclude that the district court's use of the best-interests standard, as opposed to the section 518.18(d) criteria, to modify custody of M.O. was incorrect as a matter of law and an abuse of its discretion. *See Bauerly v. Bauerly*, 765 N.W.2d 108, 110 (Minn. App. 2009) ("Misapplying the law is an abuse of discretion."). We reverse the district court's determination of custody for M.O. and remand for consideration under the proper legal standard. The district court's findings of fact reflect a thorough and thoughtful consideration of the "best interests" factors. Nevertheless, the matter must be remanded for findings pertinent to modification. The district court may in its discretion reopen the record if it deems it appropriate to enable it to make the necessary findings.

II. Custody of E.W.

Mother does not allege that the best-interests standard was the improper standard to apply to the custody determination for E.W. Because the determination of custody of E.W. was an initial determination, not a modification, we agree that the best-interests standard should apply. But we note that in light of our decision to reverse the district court's decision to award father custody of M.O., the possibility exists that upon remand the district court will conclude that the standard for modifying custody under 518.18(d) has not been met and M.O. will remain in her mother's custody. In this event, the district court will need to reevaluate E.W.'s best interests in light of his sister's placement. *See*

Rinker v. Rinker, 358 N.W.2d 165, 168 (Minn. App. 1984) (noting the importance of considering the interrelationship of the siblings as required by Minn. Stat. § 518.17, subd. 1(a)(5), and that decisions to split custody of siblings will be "carefully scrutinized"). Accordingly, we remand the custody determination of E.W. for reconsideration in the event that M.O. remains in her mother's custody.

III. Mother's Posttrial Motions

Mother also argues that the district court erred by not granting her posttrial motions. In light of our decision to reverse and remand the district court's decision with respect to custody of M.O. and remand the decision with respect to custody of E.W., we need not consider mother's other assertions of error.

Reversed and remanded.