STATE OF MINNESOTA
IN COURT OF APPEALS
A10-860

In re the Marriage of:

Philip Matthew Swantek, petitioner,
Respondent,

vs.

Barbara Louise Swantek,
Appellant.

Filed November 23, 2010
Affirmed
Shumaker, Judge

Steele County District Court
File No. 74-FA-09-1187

Mark R. Carver, Dow, Einhaus, Mattison & Carver, Owatonna, Minnesota (for respondent)

Jennifer H. Chaplinski, Chaplinski Law Office, St. Cloud, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and Klaphake, Judge.

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

SHUMAKER, Judge

Appellant challenges the district court's denial of her motion to appoint a guardian ad litem for the parties' minor children in this marriage-dissolution proceeding, alleging

that such appointment is mandatory when there is reason to believe a child has been the victim of domestic abuse or neglect. Because the district court was not required to appoint a guardian ad litem and did not otherwise abuse its discretion in denying appellant's motion, we affirm.

FACTS

We are asked to decide whether the district court erred as a matter of law or otherwise abused its discretion when it declined to appoint a guardian ad litem for J.S., B.S., and G.S., the minor children of appellant Barbara Louise Swantek and respondent Phillip Matthew Swantek, in this marriage-dissolution proceeding. Each child requires special education, and J.S. and G.S. have been diagnosed as autistic.

Appellant made two pretrial motions for the appointment of a guardian ad litem. She supported her first motion with her own affidavit in which she alleged that, "My husband is an abuser and I think he should go through therapy before I would be comfortable with him seeing the kids alone." She included no specific information about the alleged abuse of the children. The district court denied the motion.

Thereafter, appellant renewed her motion for the appointment of a guardian ad litem, this time attaching the affidavit of women's shelter advocate Erica Scott and two "Teen Intake" forms that Scott completed during interviews with B.S. and J.S. Scott noted on B.S.'s form that B.S. said respondent had hit him several times with a belt but mostly with his hand, and had slapped and choked him. On J.S.'s form, Scott noted that J.S. stated she had seen respondent hit and slap B.S. In her affidavit, Scott noted that, because of the trauma the family had experienced, she referred the children to a child

psychiatrist who meets with shelter residents, and Scott related the children's reports of the difficulties they were having over the conflicts between their parents. Scott recommended the appointment of a guardian ad litem. Respondent denied the allegations of abuse of B.S.

During a hearing on cross-motions for temporary relief, appellant's counsel urged the district court to appoint a guardian ad litem. The court offered counsel an opportunity for an evidentiary hearing at which the children could testify, but appellant's attorney opted to rely on the affidavits and other evidence submitted with the motions, acknowledged that there were "competing versions" of certain events, and noted that the court's "job is judging credibility." Respondent's attorney challenged the credibility of the report of alleged abuse and noted information in the record tending to rebut the allegations. During the hearing, the court expressed concern over how a guardian ad litem would be paid and indicated that, "I've been instructed by supreme court administration not to appoint guardian ad litems in private dissolutions because we do not have money for same . . . ."

Ultimately, the court declined to appoint a guardian ad litem, and, after a trial, awarded sole legal and physical custody of all three children to respondent. This appeal followed.

D E C I S I O N

If the custody or visitation of a minor child is at issue in a marriage-dissolution proceeding, the district court has the discretion to appoint a guardian ad litem to represent the child's interests. Minn. Stat. § 518.165, subd. 1 (2008); *Reed v. Albaaj*, 723 N.W.2d

50, 59 (Minn. App. 2006). The court's failure to make a discretionary appointment of a guardian ad litem is reviewed on appeal for a clear abuse of discretion. *Reed*, 723 N.W.2d at 59. However, if the district court has reason to believe the child has been a victim of domestic child abuse or of neglect, as defined in Minn. Stat. § 626.556, subd. 2 (2008), the court must appoint a guardian ad litem. Minn. Stat. § 518.165, subd. 2 (2008).

Appointment of Guardian Ad Litem

Appellant argues she has shown "a threshold level of circumstantial evidence, or reason to believe" that respondent has committed domestic abuse against the children. *J.A.S. v. R.J.S.*, 524 N.W.2d 24, 27 (Minn. App. 1994). Child abuse within the purview of the statute mandating the appointment of a guardian ad litem is defined in Minn. Stat. § 626.556, subd. 2. "Physical abuse" can include both physical and mental injury, or threatened injury. Minn. Stat. § 625.556, subd. 2(g). "[S]triking a child with a closed fist" is among the physical acts defined as abuse. But abuse is not "reasonable and moderate physical discipline of a child . . . ." *Id.*

The evidence to which appellant points in support of her claim that respondent has committed domestic child abuse is her own affidavit and the affidavit of Erica Scott and Scott's intake notes attached as exhibits. Appellant's affidavit alleges no facts whatsoever regarding child abuse but rather simply asserts that respondent is an abuser. Generalized and unsubstantiated allegations of abuse do not require the appointment of a guardian ad litem. *See Abbott v. Abbott*, 481 N.W.2d 864, 870 (Minn. App. 1992); *see also Baum v. Baum*, 465 N.W.2d 598, 600 (Minn. App. 1991), *review denied* (Minn. Apr.

18, 1991). Nothing in appellant's affidavit supports the mandatory or discretionary appointment of a guardian ad litem.

Although Erica Scott's affidavit is specific about B.S.'s difficulties in dealing with his parents' marriage dissolution and respondent's "high expectations" for him, nothing in the affidavit pertains to any physical abuse by respondent. The affidavit also relates conversations Scott had with J.S., who reported that respondent once hugged her very tightly and that "made her feel very uncomfortable." Scott further indicates generally that "[a]ll the children were sad, and worried about how court was going."

On the intake forms attached to her affidavit, Scott had checked boxes purportedly describing respondent's behavior toward B.S. as hitting, slapping, name-calling, yelling, and choking. She included a note on B.S.'s form that "Dad has hit me several times with an object—belt—mostly w/hand." None of the allegedly abusive conduct disclosed on the intake forms is further described in the narrative of Scott's affidavit. Thus, the district court was given no details as to the circumstances or context of the alleged conduct. Nor does Scott describe any steps that might have been taken to substantiate or further investigate the alleged abuse. In short, there is a telling disconnection between Scott's affidavit and the intake checklists so that, together with respondent's rebuttal of the allegations, the district court was presented with genuine credibility issues. The court, left with bare allegations devoid of factual particularity, found no evidence that respondent had abused B.S. or any other child, thus resolving the credibility issue against appellant. We defer to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988); *Vangsness v. Vangsness*, 607 N.W.2d 468, 474

(Minn. App. 2000); *see also Straus v. Straus*, 254 Minn. 234, 235, 94 N.W.2d 679, 680 (1958) (stating that appellate courts defer to the district court's resolution of factual issues presented by conflicting affidavits).

Appellant relies on the cases of *Clark* and *Tischendorf* to support her argument that the court had reason to believe the children were victims of domestic abuse and which therefore mandated appointment of a guardian ad litem. *Clark v. Clark*, 358 N.W.2d 438 (Minn. App. 1984); *Tischendorf v. Tischendorf*, 321 N.W.2d 405 (Minn. 1982). *Clark* and *Tischendorf*, however, are of limited value here because, at the time these cases were decided, appointment of a guardian ad litem in custody disputes was always discretionary. It was not until 1986, when the legislature enacted subdivision 2 to Minn. Stat. § 518.165, that courts became statutorily required to appoint a guardian where there is reason to believe a child has been abused or neglected. *See* 1986 Minn. Laws ch. 469, subds. 1, 2. Because the relevant statutory provision did not exist when *Clark* and *Tischendorf* were decided, appellant's reliance on these cases as authority for when the court must appoint a guardian, under Minn. Stat. § 518.165, subd. 2, is misplaced.

Despite acknowledging that the court made no findings that respondent had abused any of the children, appellant argues that the allegations of abuse were sufficient to provide the court with reason to believe abuse had occurred. For that proposition, she posits that *J.A.S.*, 524 N.W.2d 24, "encourage[s] district courts to take into account base allegations as well as reasonable inferences that could be drawn from the evidence." But *J.A.S.* included more than mere allegations that a father had sexually abused his

stepdaughter. There were corroborative medical records and the observably violent reactions of the child when she was asked about the abuse. *Id.* at 26-27. There was no such evidence presented to the court here. Scott noted that B.S. "was crying and very nervous about the situation," but she described nothing that might even inferentially link B.S.'s emotional reactions to physical abuse.

Appellant also cites *J.E.P. v. J.C.P.*, 432 N.W.2d 483 (Minn. App. 1988), in support of her argument that the district court had reason to believe respondent had committed child abuse. In *J.E.P.*, this court held the district court had reason to believe abuse was occurring because the county had undertaken an independent criminal investigation; the mother and a therapist testified as to the children's descriptions of the father's sexually abusive acts and their expression of trauma through disturbed behavior; and the district court appointed an expert to investigate the abuse. *Id.* at 487. The present case lacks any comparable factors to those in *J.E.P.* that would merit appointment of a guardian ad litem.

Thus, we hold that the record appellant presented to the district court was not sufficient to trigger the application of the guardian ad litem mandate, and the district court did not abuse its discretion in declining to appoint a guardian ad litem. "An abuse of discretion occurs when the district court resolves the matter in a manner that is 'against logic and the facts on [the] record.'" *O'Donnell v. O'Donnell*, 678 N.W.2d 471, 474 (Minn. App. 2004) (quoting *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984)).

Appellant's alcohol abuse constituting neglect

The second issue is whether appellant's own abuse of alcohol constituted neglect for purposes of Minn. Stat. § 518.165, subd. 2, therefore mandating appointment of a guardian ad litem. Respondent argues that appellant did not raise this issue at the district court and waived it for purposes of this appeal.

This court ordinarily will not consider issues not raised before the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We may, however, review a matter "as the interest of justice may require." Minn. R. Civ. App. P. 103.04; *see Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 2002) (applying rule 103.04). Because this case merits consideration of matters relating to the welfare of the parties' children, we briefly address the issue.

"Neglect" includes "chronic and severe use of alcohol or a controlled substance by a parent or person responsible for the care of the child that adversely affects the child's basic needs and safety." Minn. Stat. § 626.556, subd. 2(f)(8). The district court made several findings regarding appellant's use and abuse of alcohol, including that, prior to the commencement of these proceedings, appellant was convicted of DWI with her children in the car. The court also found that appellant continued to drink alcohol while on probation in violation of an order to abstain from alcohol use; drank alcohol before picking up J.S. on two occasions (it is unclear if appellant was driving in these instances); drank alcohol once while J.S. was in her care; and continues to regularly drink alcohol. Appellant does not dispute these findings.

These undisputed facts about appellant's alcohol abuse gave the district court reason to believe the children were potential victims of neglect when in appellant's care. However, even if the district court erred in failing to appoint a guardian ad litem because of appellant's neglect, the error was harmless and, therefore, not grounds for reversal. To prevail on appeal, an appellant must show both error and prejudice resulting from the error. *Midway Ctr. Assocs. v. Midway Ctr., Inc*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975); *see Bloom v. Hydrotherm, Inc*., 499 N.W.2d 842, 845 (Minn. App. 1993) (stating that the appellant bears the burden of demonstrating that error is prejudicial), *review denied* (Minn. June 28, 1993).

As of the time of the trial, all three children were in respondent's custody, and the district court has since awarded sole legal and physical custody of the children to respondent, subject to appellant's right of parenting time. To protect against neglect of the children as a result of either parents' alcohol use or abuse, the court ordered that "[n]either party shall consume any alcohol or illegal controlled substance either while supervising the children or within 24 hours of commencing supervision of the children." The court then provided for an enforcement mechanism of this restriction through drug testing. Appellant's claim that a guardian ad litem was required because she would neglect the children during times that she abused alcohol is adequately addressed by the court's custody award and restriction on appellant's exercise of parenting time. Appellant has failed to show how the appointment of a guardian ad litem would have produced additional relevant information or might have led to an outcome other than the

custody award made and the restricted parenting time ordered through the judgment and decree.

Payment for Guardian Ad Litem Services

Appellant implies that the district court might have declined to appoint a guardian ad litem because the court believed it was prohibited from doing so unless the parties paid the cost of the appointment. Although the court commented on its belief that there is such a prohibition, appellant assured the court that the parties could pay for the guardian, and there is nothing in the record to show that the court's failure to make an appointment was related to its comment about such an assumed prohibition.[1]

Affirmed.

[1] There is no such absolute prohibition. Rather, a directive from the Conference of Chief Judges provides that a guardian ad litem may be appointed regardless of a party's ability to pay if the court determines that a child's welfare is at risk. Minn. Conf. of Chief Judges, Guardian Ad Litem Management Administration Policy 4 (July 18, 2003).