STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1824

In re the Matter of:
Ibraahim A. Abokor,
Respondent,

vs.

Nasra Hussein Jibrell,
Appellant.

Filed July 13, 2010
Affirmed in part, reversed in part, and remanded
Muehlberg, Judge[*]

Hennepin County District Court
File No. 27-PA-FA-000046759

Ibraahim A. Abokor, Richfield, Minnesota (pro se respondent)

William L. Lubov, Lubov & Associates, LLC, Golden Valley, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Hudson, 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 custody and parenting time appeal, appellant challenges the district court's orders denying her motion to move to Oman with I.I.A., her child with respondent, and

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

sua sponte modifying restrictions on respondent's parenting time, which were set in a prior proceeding for an order for protection (OFP).

Because the district court considered the statutory factors and the child's best interests, and because its conclusions are supported by the record evidence, we affirm the district court's order denying appellant's motion to relocate the child. But because the district court's sua sponte modification of respondent's parenting time did not provide appellant with an opportunity to submit evidence, we reverse the district court's order modifying respondent's parenting time from supervised to unsupervised, and remand to the district court for further proceedings.

FACTS

Appellant Nasra Hussein Jibrell and respondent Ibraahim A. Abokor were culturally married sometime before 2002 and were culturally divorced in 2003 in a Somali ceremony. The parties were not married civilly or legally and therefore there was no dissolution action.

The parties are the parents of a child, I.I.A., who was born December 8, 2002. After the parties' separation, respondent began an action to establish custody and parenting time. Although the parties shared joint legal custody, appellant was awarded sole physical custody. From 2002 until 2008, respondent had parenting time every other weekend and every Wednesday from noon until 6:00 p.m.

In 2007, appellant obtained an OFP against respondent, based on a threatening telephone call. This OFP did not order a change in parenting time. On August 22, 2008, appellant filed a petition for another OFP. She alleged that during the exchange of the

child, respondent had threatened her, had to be restrained by his cousin, and pulled the child by the collar, hurting and frightening him. An ex parte OFP was issued, but a hearing on the OFP was continued for various reasons from August 28 to November 12, 2008.

After the hearing on November 12, 2008, the district court stated in its findings that respondent denied the allegations but stipulated to a restraining order. The district court made no other findings about the incident. Respondent was ordered to complete an anger management program at the Domestic Abuse Project (DAP) and a parenting class at the Resource Center for Fathers and Families; the child was to receive individual therapy at the Washburn Child Guidance Center. Later, the parties and the child were to participate in family therapy with a therapist other than the child's individual therapist. Respondent was awarded supervised parenting time; unsupervised parenting time would commence once the therapists deemed it appropriate.

DAP refused to admit respondent into its program because he denied engaging in abusive behavior. He was referred instead to The Men's Center for an anger management class, which he completed. Respondent also finished the parenting education program. The child went to individual therapy, but because of language issues, an interpreter and his mother were present at all the sessions. The child professed fear of his father, but the district court's order in this matter expresses skepticism about the accuracy of and independent basis for these statements. Respondent participated in supervised visitation with the child at Perspectives, Inc. Each supervisor submitted a detailed record of the visits, including the type and quality of interaction between father

and child. From these records, respondent and the child appeared to be comfortable with one another. Neither family therapy nor individual therapy for the child was ever completed, and neither therapist issued a recommendation about parenting time.

Appellant was married in 2008 and has two more children with her husband, Ali Fatah. In July 2009, appellant moved the district court for permission to move the child to Oman, where she and Fatah want to live. Fatah, who is 55 years old, is retired and receives a government pension. Appellant and her husband wanted to move to Oman because of the large Somali community there and because Oman is a Muslim country. They believed that there would be good educational opportunities for the child and that their standard of living would be relatively higher in Oman than in the United States. Neither appellant nor Fatah has relatives there, although Fatah visited Oman three times.

In its July 31, 2009 order, the district court considered the best interest factors set forth in Minn. Stat. § 518.175, subd. 3 (2008). The district court concluded that these factors weighed against permitting appellant to remove the child to Oman. The district court also sua sponte modified the parenting time provisions of the current OFP and directed the parties to move toward implementing unsupervised visitation.

On August 11, 2009, appellant asked the district court for permission to file a motion to reconsider the amendments to the parenting time provisions. The district court granted permission, but before the motion was decided, appellant filed a notice of appeal to this court, challenging the July 31, 2009 order. On October 20, 2009, the district court issued an order denying appellant's request for reconsideration. On November 10, 2009,

this court ordered that the appeal would be taken from both the July 31 and October 20 orders.

D E C I S I O N

Motion for Removal to Oman

A parent who has physical custody of a child subject to a parenting time order may not remove the child to another state except upon a court order or with the consent of the noncustodial parent. Minn. Stat. § 518.175, subd. 3(a). If the move is an attempt to defeat parenting time, the district court shall not permit the move. *Id.* The district court must consider whether the move is in the child's best interests, using several different factors to make this analysis. *Id.*, subd. 3(b). If the person requesting the move has been the victim of domestic abuse, the party opposing the move has the burden of proving that the move is not in the best interests of the child. *Id.*, subd. 3(c). Because of the two orders for protection, the district court assigned respondent the burden of proof.

We review the district court's removal decisions for an abuse of discretion and the record in the light most favorable to the district court's findings. *Dailey v. Chermak*, 709 N.W.2d 626, 629-30 (Minn. App. 2006), *review denied* (Minn. May 16, 2006). Previously, it was presumed that a custodial parent could remove a child from the state unless the noncustodial parent proved that the move was not in the child's best interests. *See Auge v. Auge*, 334 N.W.2d 393, 399-400 (Minn. 1983) (analyzing Minn. Stat. § 518.175, subd. 3 (1982)). In *Goldman v. Greenwood*, 748 N.W.2d 279 (Minn. 2008), the supreme court noted that "our ruling in [*Auge*] has no remaining vitality because it has been superseded in its entirety by statute. Act of May 31, 2006, ch. 280,

§ 13, 2006 Minn. Laws 1103, 1110-11 (codified at Minn. Stat. § 518.175, subd. 3(b), (c)).” *Goldman*, 748 N.W.2d at 283 n.5. Thus, there no longer is a presumption that the custodial parent may remove a child from the state; the district court is required to determine if such a move is in the child's best interests. Minn. Stat. § 518.175, subd. 3(b). Under that statute, the district court must consider the factors listed therein but it is not limited to those factors. *Id*.

The district court here analyzed the statutory factors as follows:

1. The nature and quality of the relationship. The district court found that appellant has been the child's primary caretaker since birth and that the child would relocate with his stepfather and half-siblings, but that respondent has also been a constant in the child's life, as have both parties' extended families. The district court acknowledged that ordinarily this factor would weigh in favor of the primary caretaker, but balanced against this the lack of family or other ties to Oman. The district court also opined that appellant would be unlikely to move without the child. These findings are supported by the record.

2. Age, needs, and developmental stage of child. The district court found that the child's needs would be met either in Oman or in Minnesota.

3. Preserving the non-relocating parent's relationship. The district court found that if the child moved to Oman, his relationship with his father would be destroyed because respondent could not afford to travel there. The district court found that appellant's assertion that there was no meaningful relationship between father and son was not supported by the record. This made the district court suspect that appellant was

motivated in part to move to eliminate the bonds between father and child. This factor weighed in favor of not permitting the removal. The district court's findings are supported by the record.

4. Child's preference. Both parties agreed that the child was too young to express a preference.

5. Pattern of conduct thwarting relationship. The district court found that appellant and her husband appeared to be trying to thwart the child's relationship with respondent. The district court based this finding on appellant's insistence that respondent had no relationship with the child, which is not supported by the record. Respondent had unsupervised parenting time with the child for more than five years from 2002 to 2008, every other weekend and Wednesday evenings, and the supervised parenting records do not support the allegation of the lack of a relationship. Those records also show that appellant failed to deliver the child for a supervised visit on more than one occasion. The district court's findings are supported by the evidence; this factor supports not permitting removal.

6. Enhancing general quality of life and reasons for removal. The district court considered these factors together. The district court noted that appellant's reasons included wanting to live in a Muslim country with a large Somali population, but that the Twin Cities also has a large Somali population and that the child attends a Muslim school here. Although appellant claimed that her husband's pension would go further in Oman, the pension is sufficient to live in Minnesota. Finally, the district court noted that there was no compelling reason to move to Oman, because appellant and her husband have no

ties there; the reasons offered for moving were vague and discretionary. The district court was "left with the distinct impression, reviewing the record as a whole, that a proposed move to Oman is motivated in part by a desire to cut off [respondent] from the child." Again, the district court's findings are supported by the record.

Although the district court opined that appellant may be trying to interfere in the child's relationship with respondent, the district court confined its conclusion that removal should not be permitted due to a balancing of the statutory factors. The district court stated that there was little concrete evidence that the child's life would be better in Oman, but there was fairly substantial evidence that the child's relationship with respondent would be affected, which would not be in the child's best interests. The district court concluded that respondent sustained his burden of proof.

Because the district court carefully considered the evidence, its findings are supported by the record, and its conclusions are not contrary to the law, it did not abuse its discretion by refusing to permit removal of the child.

Parenting Time

We review the district court's determination regarding parenting time for an abuse of discretion. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). "A district court abuses its discretion when it makes unsupported findings of fact or improperly applies the law." *Dailey*, 709 N.W.2d at 629. Findings of fact are reviewed for clear error and the record is reviewed in the light most favorable to the district court's findings. *Id.* at 629-30. A substantial change in parenting time requires an evidentiary hearing; "[i]nsubstantial modifications or adjustments of

[parenting time] . . . do not require an evidentiary hearing and are appropriate if they serve the child's best interests." *Braith*, 632 N.W.2d at 721.

A modification from supervised to unsupervised parenting time is not insubstantial. According to the 2008 OFP, respondent's parenting time would be modified upon the recommendation of the family therapist and the child's therapist. Because of the district court's sua sponte order, appellant was not prepared to address modification or to offer the opinions of these professionals. The evidence presented in the record does not provide a sufficient basis for such a substantial change in parenting time. We therefore reverse the district court's order modifying respondent's parenting time from supervised to unsupervised and remand to the district court for a hearing that includes the recommendations of the family's and the child's therapists.

Affirmed in part, reversed in part, and remanded.