STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1548

In re the Marriage of: Darick Daniel Leach, petitioner,
Respondent,

vs.

Kara Grace Leach,
Respondent,

Kathleen Ditmanson Adams,
Appellant.

Filed August 24, 2010
Affirmed
Muehlberg, Judge[*]
Hon. Joseph T. Carter

Dakota County District Court
File No. 19WS-FA-08-571

Darick Daniel Leach, Richfield, Minnesota (pro se respondent)

Kara Grace Leach, Richfield, Minnesota (pro se respondent)

Kathleen Ditmanson Adams, St. Paul, Minnesota (pro se appellant)

Considered and decided by Toussaint, Chief Judge; Wright, Judge; and Muehlberg, Judge.

---

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

MUEHLBERG, Judge

Appellant, the maternal grandmother of the minor child at issue in this case, argues that the district court relied on faulty evidence, violated her due-process rights, and failed to properly apply third-party visitation-rights statutes when it denied her motions to restore her visitation rights to the minor child. Appellant also argues that she was prejudiced by judicial bias. We affirm.

FACTS

This appeal arises from a dispute over the custody of T.L., the minor child of respondent-father Darick Daniel Leach and respondent-mother Kara Grace Leach. Father and mother divorced on June 17, 2008, and were granted joint physical and legal custody of T.L. In October 2008, appellant Kathleen Ditmanson Adams, T.L.'s maternal grandmother, filed a petition for immediate third-party custody "on an emergency and ex parte basis." In this petition, appellant stated that mother had been arrested and incarcerated for driving while intoxicated, and alleged that father, a United States Marine, told appellant that he was unable to take physical custody of T.L., that it would be an indefinite period of time before he could do so, and that he wanted appellant to retain custody of T.L. Appellant further alleged that, before her arrest, mother threatened that appellant would never see T.L. again and that mother would take T.L. and "leave." Appellant asserted that T.L. "frequently resided" with her, that appellant was "one of [her] preferred caregivers," and that T.L. only spent portions of Sunday afternoons with father.

On the day the petition was filed, the district court granted joint legal and physical custody of T.L. to appellant and father, granted visitation rights to mother, appointed a guardian ad litem (GAL) to represent T.L., and scheduled a review hearing to be held seven days later. The district court also ordered Dakota County Child Protection Services (DCCPS) to investigate T.L.'s welfare, but because Hennepin County Child Protection (HCCP) had already received a referral concerning this case, HCCP instead of DCCPS conducted the investigation.

At the review hearing, the district court received HCCP's report, which concluded that there were no safety concerns regarding father being T.L.'s primary caretaker and that there was no evidence supporting the allegations that appellant made to HCCP of domestic violence between the parents, drug use or sale by the parents, and father's physical abuse of T.L. HCCP also reported that mother acknowledged her excessive drinking habits, but that she stated her intention to obey any order of the court, and that father was willing to be T.L.'s sole caretaker until mother attained sobriety. The GAL, after interviewing all parties involved except mother, recommended that father have sole legal and physical custody of T.L. Appellant submitted her own evidence at the hearing, which she claimed supported her allegations of mother's and father's drug abuse, violence, and improper treatment of T.L. After the hearing, the district court vacated his prior order and awarded temporary physical custody of T.L. to father. He awarded appellant the right to visit T.L. every other weekend, but decreed that appellant was no longer a party to the action and ordered her name removed from the case. He further ordered the GAL to recommend a permanent primary care provider for T.L., ordered all

parties to cooperate with Hennepin County Social Services and the GAL, and set an evidentiary hearing for December 18.

Before that hearing took place, appellant petitioned for an order for protection (OFP) in Hennepin County District Court on T.L.'s behalf, again alleging that father was abusing T.L. She immediately gained custody of T.L. upon filing the petition. The GAL attempted to contact appellant, but appellant told her that she would need to speak to appellant's attorney. The GAL visited T.L. at her school, however, and reported that T.L. was reluctant to speak with her, started crying, and said "I don't know which story I am supposed to tell you." T.L. told the GAL that her parents were "mean to her" but provided no specific information. The OFP petition was dismissed on December 4 after a hearing in Hennepin County District Court, at which appellant was unable to prove her allegations. Father had also petitioned for an OFP against appellant, and this petition was dismissed on December 4 as well. The Hennepin County District Court restored custody of T.L. to father. The GAL reported this information to the Dakota County District Court, and stated that she was concerned about appellant's interference with T.L.'s relationship with her parents.

The December 18 evidentiary hearing was held before a second judge of the Dakota County District Court who, after the hearing, again awarded temporary physical custody of T.L. to father, and granted mother "liberal parenting time with T.L." She also ordered T.L.'s therapist to determine what contact with appellant, if any, would be in T.L.'s best interests, and suspended appellant's visitation in the interim. Notably,

because appellant had been removed as a party to the case, she was not present at this hearing.

Appellant responded in February 2009 by moving the Dakota County District Court to reinstate her visitation rights and for a change of venue to Hennepin County, arguing that all parties now lived there. The second Dakota County district court judge, who presided over this hearing, observed that the original judge issued his initial order granting joint custody of T.L. to appellant "on the strength of one affidavit," and that, after he had the benefit of receiving information from disinterested parties, he vacated that order. The second judge also observed that the Dakota County District Court had expended significant resources in the case and determined that it was not a hardship for the parties to come to Dakota County for proceedings. However, after discussing the case with appellant and the parties in her chambers, the second judge announced that they had reached an agreement wherein appellant would submit to psychological testing, a plan would be developed in coordination with T.L.'s therapist to establish contact between appellant and T.L., the GAL would be vested with the authority to make recommendations concerning a schedule for contact between appellant and T.L., and another review hearing would be held. Subsequently, the second judge issued an order denying appellant's motions, restating that appellant was not a party to the action, ordering appellant's visitation rights to be determined after T.L.'s best interests were determined, and ordering that any interim contact between appellant and T.L. occur only at the recommendation of the GAL and T.L.'s therapist.

The next review hearing was held before the original judge once again. Mother, father, and appellant all participated at this hearing, although only father was represented by counsel. The GAL produced a final report and testified that mother and father were capable of making decisions in T.L.'s best interests, and that visitation between T.L. and appellant should be at mother's and father's discretion. After the hearing, the original judge issued findings of fact and an order, stating that appellant's "visitation with [T.L.] shall be at the discretion of the parties, the child's parents." This appeal follows.

D E C I S I O N

I.

In matters regarding visitation, a district court has broad discretion to determine what is in the best interests of a child, and its determination will not be reversed absent an abuse of that discretion. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). A district court abuses its discretion by making findings unsupported by the evidence or improperly applying the law. *Lenz v. Lenz*, 430 N.W.2d 168, 169 (Minn. 1988). We uphold the district court's findings unless they are clearly erroneous, Minn. R. Civ. P. 52.01, and we will only determine a finding to be clearly erroneous if we are "left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). Where the evidence supports more than one possible determination, an appellate court defers to the district court. *McCabe v. McCabe*, 430 N.W.2d 870, 873 (Minn. App. 1988), *review denied* (Minn. Dec. 30, 1988).

Appellant claims that the district court improperly relied upon the reports of the GAL and HCCP in its October 17 order and subsequent orders, and argues that those

reports were based on faulty evidence. In his October 17 order, the original judge cited HCCP's conclusion that there was "no evidence to support [appellant's] allegations of past domestic violence between [mother and father], past drug use or sale by [mother and father] and corporal punishment imposed by [father]," and also cited the GAL's recommendation that father should have sole physical and legal custody of T.L. In her final report, the GAL similarly recommended that father have sole physical custody of T.L. and share legal custody of her with mother. Appellant argues that both the GAL and HCCP ignored critical evidence in reaching these conclusions.

But appellant submitted much of the evidence that she claims was ignored by the GAL and HCCP to the district court.[1] In particular, appellant submitted third-party affidavits, along with numerous supporting documents, at the October 17 hearing. But the district court's reliance on HCCP's report constitutes an implicit determination that the information therein was more reliable and credible than appellant's evidence. *See In re Welfare of Child of S.S.W.*, 767 N.W.2d 723, 735 (Minn. App. 2009) (ruling that the district court's conclusion that the subject child was not in need of protection or services indicates that it "implicitly found the GAL's testimony credible and persuasive"). We defer to, and will not reassess, a district court's determinations of credibility. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

[1] We will not consider any evidence appellant provided in her brief that was not also provided to the district court. *See* Minn. R. Civ. App. P. 110.01 (providing that the record on appeal is limited to the "papers filed in the [district] court, the exhibits, and the transcript of the proceedings").

Appellant further faults the GAL for failing to "follow up with [her] as directed by the court," and for ignoring additional evidence. But in compiling her final report, the GAL interviewed several parties including appellant, mother, father, T.L., T.L.'s therapist, two of appellant's personal references, and the psychologist who evaluated appellant. The GAL stated in her report that, because appellant was not a party to the case, her contact with appellant was "limited by order," but that she did have "various phone conversations and email exchanges" with appellant. The GAL described her communications with appellant in her report, and opined that while appellant had provided love and care to T.L., the primary issue in this case was appellant's "interference with [T.L.'s] relationship with her parents." The GAL also reported that appellant's "multiple allegations of domestic violence, neglect and abuse in regards to T.L. . . . have [not] been substantiated by either party or by any outside agency, including law enforcement and Hennepin County Social Services." The reports from the GAL and HCCP reasonably support the district court's findings and conclusions, and we find no error in the district court's reliance on these reports after considering all the evidence before it.

II.

Appellant argues that the district court violated her due-process rights by depriving her of the visitation rights that it had initially granted her, and doing so after holding an evidentiary hearing in which appellant was not allowed to participate. Whether due-process rights have been violated is a question of law, which this court reviews de novo. *In re Child of P.T.*, 657 N.W.2d 577, 583 (Minn. App. 2003), *review*

denied (Minn. Apr. 15, 2003). The right to due process is guaranteed by both the United States and Minnesota Constitutions. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. Due process requires notice, a timely opportunity for a hearing, the opportunity to present evidence, the right to counsel and an impartial decision-maker, and the right to a reasonable decision based on the record. *Humenansky v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559, 565 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995).

But we do not agree that appellant was denied notice or an opportunity to be heard. While appellant was not present at the December 18 evidentiary hearing, she did participate in subsequent hearings before the district court and specifically argued her motion to reinstate her visitation rights. She also submitted evidence, which appears in the district court's record. In *Szarzynski v. Szarzynski*, we considered a former husband's argument that his due-process rights were denied because he was not given notice that a hearing on a motion to hold him in contempt would be evidentiary. 732 N.W.2d 285, 297 (Minn. App. 2007). But we observed that father "was afforded an opportunity to testify and be cross-examined, to call a witness, and to tender a proposed order to the court" at a subsequent hearing, and stated that father had failed to show why any deprivation of his due-process rights at the earlier hearing could not have been remedied at the later hearing. *Id.*; *see also Tamarac Inn, Inc. v. City of Long Lake*, 310 N.W.2d 474, 478 (Minn. 1981) (rejecting a due-process argument where a subsequent hearing had occurred). Likewise, although appellant was not allowed to participate in the December 18 evidentiary hearing, she received notice and an opportunity to be heard at two subsequent hearings.

Appellant further argues that her due-process rights were violated because she was not allowed to participate at an evidentiary hearing. But in *SooHoo v. Johnson*, the supreme court ruled that a district court is not required to conduct an evidentiary hearing solely on the issue of visitation, so long as the court considers evidence sufficient to form the basis of its decision on visitation rights. 731 N.W.2d 815, 826 (Minn. 2007). Here, the district court received evidence from appellant and heard her arguments at two separate hearings subsequent to the December 18 hearing that appellant did not attend. The district court also considered and relied upon evidence from the GAL and HCCP, which sufficiently supported its decision on whether to grant appellant visitation rights. Accordingly, appellant has not shown that her due-process rights have been violated.

III.

Appellant argues that the district court abused its discretion by failing to consider whether she is entitled to visitation rights under Minn. Stat. § 257C.08 (2008). While it did not expressly rule on the applicability of Minn. Stat. § 257C.08, subd. 2(a), the district court explicitly found that Minn. Stat. § 257C.08, subd. 3, did not apply in this case because appellant never made a claim that she lived with T.L. for 12 months or more. This court reviews de novo a district court's interpretation of a statute and its application of a statute to undisputed facts. *In re Welfare of Child of S.L.J.*, 772 N.W.2d 833, 842 (Minn. App. 2009).

Section 257C.08, subdivision 2(a), provides that a court "may, upon the request of the parent or grandparent" of a party, grant "reasonable visitation rights" to a minor child if it finds that: (1) visitation rights would be in the best interests of the child; and (2) such

visitation would not interfere with the parent-child relationship. But this subdivision states that the court *may* grant visitation rights upon request; it creates no entitlement to visitation rights, and does not require the court to consider whether visitation could be granted under the statute. *See* Minn. Stat. § 645.44, subd. 15 (2008) (providing that the word "may" in statutes is permissive); *Kemp v. Kemp*, 608 N.W.2d 916, 920 (Minn. App. 2000) (stating that the word "may" in a maintenance-modification statute implies that the district court has discretion to perform the activity allowed by the statute). Because Minn. Stat. § 257C.08, subd. 2(a), is permissive, the district court did not abuse its discretion in declining to consider whether it could have granted appellant visitation rights under the statute. *See Guyer v. Guyer*, 587 N.W.2d 856, 859 (Minn. App. 1999) (ruling, because a child-support-modification statute was permissively worded and therefore gave the district court discretion in retroactively modifying child support, the district court did not abuse its discretion in retroactively modifying child support).

Section 257C.08, subdivision 3, provides that, when a grandparent has resided with a minor child for "a period of 12 months or more, and is subsequently removed from the home by the minor's parents," the grandparent can petition the district court for an order granting them reasonable visitation rights, and the district court "*shall* grant the petition if it finds that visitation rights would be in the best interests of the child and would not interfere with the parent and child relationship." (Emphasis added.) In a September 30, 2009 order, the district court declined to apply this statute, noting that appellant "never made a claim that she has lived with the child for at least one year." Appellant did assert, in a June 19, 2009 memorandum, that T.L. lived with her "for a

period of 12 months or more." But this memorandum only appears in her appendix and does not appear anywhere in the record. *See* Minn. R. Civ. App. P. 110.01 (limiting the record on appeal to the "papers filed in the [district] court, the exhibits, and the transcript of the proceedings"). Moreover, it does not appear that appellant ever provided the district court with any evidence that she had lived with T.L. for 12 months or more. When a grandparent or other third party seeks visitation, "in order to afford due deference to the fit custodial parent, the burden of proof must be on the party seeking visitation, and the standard of proof must be clear and convincing evidence." *SooHoo*, 731 N.W.2d at 823. Having provided no evidence at any point to the district court that she lived with T.L. for 12 months or more, appellant could not have satisfied this burden of proof.

Finally, we address appellant's arguments that the district court erred in refusing to restore her visitation rights because (1) those rights were initially granted to her and then revoked; and (2) she agreed to submit to psychological testing and received an acceptable psychological report. But appellant provides no legal support for the proposition that visitation rights, once revoked, must be restored upon request without any additional determinations by the district court as to the best interests of the child and the preservation of the parent-child relationship. And the district court made no orders or statements that would entitle appellant to visitation rights based upon the outcome of her psychological assessment. Appellant has not shown that she was entitled, under statute or otherwise, to visitation with T.L., nor has she shown any abuse of discretion by the district court in denying her motion to restore her visitation rights.

IV.

Appellant argues that she was prejudiced by the original judge's bias against her.[2] An appellate court presumes that the judge discharged all judicial duties in a proper manner. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). And an appellate court objectively reviews the facts and circumstances surrounding a claim of judicial bias. *See State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008). "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of . . . proceedings[] do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* (quoting *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994)). An appellate court presumes that a district court judge "will set aside collateral knowledge and approach cases with a neutral and objective disposition." *Id.* (quotation omitted). This presumption may be overcome only if the party charging bias adduces evidence of favoritism or antagonism. *Id.* Adverse rulings are not a basis for imputing bias to a judge. *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986).

Appellant did not bring a motion at any point for new proceedings on the ground of judicial bias, or raise the issue of bias in any other manner to the district court. An appellate court considers "only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Gummow v. Gummow*, 375

[2] It is worthy of note that the original judge made the initial decision to grant visitation rights to appellant. The second judge made the later decision to terminate appellant's visitation rights. The original judge did, however, deny appellant's subsequent motion to restore her visitation rights.

N.W.2d 30, 34 (Minn. App. 1985) (observing that appellant raised no objections that the district court was biased against her and did not move the district court to recuse himself) (quotation omitted). A party's failure to raise a claim of judicial bias during the proceedings raises doubt about the timeliness of the issue. *Id.* And, unlike *Gummow*, the district court here never addressed allegations of bias in any order or memorandum. *See id.* (observing that the issue of bias was not properly raised, but addressing the issue nonetheless because the district court addressed it in its memorandum). We therefore conclude that appellant has waived this issue, especially since appellant's allegations of bias include unresolved factual questions, such as whether the original judge engaged in improper ex parte contact with father, whether he told father that he would "take care of that [appellant's] interference," and whether he made misstatements of fact that evidenced his bias against appellant. *See Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966) ("It is not within the province of [appellate courts] to determine issues of fact on appeal.").

Moreover, we do not agree that certain statements made by the original judge evidence judicial bias. Appellant first cites the October 17 review hearing, where the original judge stated that. "[k]eep in mind that he is the father of the child, and so I presume that you will ask that you have control over the child." But appellant did have temporary custody of T.L. at that time, and it was reasonable under the circumstances to presume that appellant would request that she have control, in the form of continued custody, over T.L. And indeed, when asked by the district court if she was advocating that she should have permanent care of T.L., appellant answered, "Yes." Appellant also

quotes the original judge's statement at the same hearing, that "You had your chance to raise a child. They have their chance to now raise a child." But he followed this by stating ."I commend you for intervening when [mother] was in trouble and thus the child was in trouble and I think you did the right thing." In context, these statements do not reflect animosity or bias against appellant.

Appellant further faults the original judge for stating, "[h]ere, the mother has recommended that the father have custody. And I think in our society, that's generally the natural order of things," and at a later hearing, "as a general rule, to see grandchildren, you have to get along with the parents." But in both instances, the original judge spoke in general terms rather than about appellant's case in particular, and these statements do not reflect antagonism toward or favoritism against appellant as required to support a claim of reversible judicial bias. *See Burrell*, 743 N.W.2d at 603. Finally, appellant cites the original judge's statement to appellant that, "You can't run into court if you're not getting along with the child's parents to see them. Everyone gets their turn. You had a turn to raise a child. Now, your children get a turn to raise their child." Notably, the district court was, at this point in the hearing, questioning appellant as to why she had filed a petition for custody in Hennepin County District Court while proceedings regarding her petition in Dakota County District Court for visitation were still proceeding. Moreover, the original judge preceded this statement by saying "I'm not sure what your relationship is like with your daughter and your grandchild's father, but if you're not getting along with them, then it becomes very difficult for you." Rather than indicating antagonism toward or favoritism against appellant, the context of the original

judge's statements indicate that they merely reflected concerns about appellant's relationship with mother and father and their effect on appellant's ability to visit T.L., which at that time was subject to mother's and father's discretion. Based on our objective review of the facts and circumstances surrounding this statement, appellant has not shown sufficient evidence to defeat the presumption of judicial neutrality. Accordingly, we reject appellant's argument that she was prejudiced by judicial bias.

Affirmed.