STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1941

Hennepin County on behalf of Mayde Vega,
Respondent,

vs.

Evelia Garcia Silva,
Appellant.

Filed August 31, 2010
Reversed
Halbrooks, Judge

Hennepin County District Court
File No. 27-FA-09-4393

Michael O. Freeman, Hennepin County Attorney, Calvin Giles, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County)

Keith S. Moheban, Kristin R. Sarff, Leonard, Street and Deinard Professional Association, Minneapolis, Minnesota (for appellant)

Mayde Vega, Minneapolis, Minnesota (pro se respondent)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

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

HALBROOKS, Judge

Appellant Evelia Garcia Silva challenges the decision of the child support magistrate (CSM) ordering her to pay child support to a third party, Mayde Vega.

Because we conclude that the relevant statutory provision does not permit a cause of action for child support against appellant, we reverse.

FACTS

Appellant and Jose Silva, her former husband, have two children, J.S. who is now an adult, and R.S. who is currently 17 years old. When their marriage dissolved, appellant was awarded sole physical custody of the couple's children, and Silva was ordered to pay appellant child support. The two children lived with appellant from the time of the dissolution until December 2008. In December, appellant sent R.S. to live with Silva for two weeks while R.S. participated in a treatment program. At that time, Silva did not have a place of his own, so he sent R.S. to Vega, who is Silva's adult daughter from another relationship. In December 2008 and January 2009, appellant gave Vega the child-support payments that she received from Silva.

R.S. continued to live with Vega. In June 2009, respondent Hennepin County (the county) filed a complaint and moved to establish appellant's child-support obligation. The CSM conducted a hearing. Vega testified that R.S. began living with her on December 22, 2008, and was still living with her as of the date of the hearing. According to Vega, appellant did not object to R.S. living with Vega. Vega also testified that she had been thinking about seeking custody of R.S. but had not done so. Appellant testified that she told the child-support agency that she would be giving Vega a portion of her child-support money in December, but that she had never consented to the living arrangement.

Following the hearing, the CSM issued his order, concluding that appellant is required to provide Vega with child support, regardless of whether R.S. is living with Vega without appellant's consent and without an order granting Vega physical custody of R.S. This appeal follows.

D E C I S I O N

The CSM ordered appellant to pay Vega child support under the authority of Minn. Stat. § 256.87, subd. 5 (2008). Appellant argues that the CSM erred in his interpretation of the statute, and we review issues of statutory construction de novo. *See Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007).

According to Minn. Stat. § 256.87, subd. 5,

> [a] person or entity having physical custody of a dependent child not receiving public assistance . . . has a cause of action for child support against the child's noncustodial parents. . . . This subdivision applies only if the person or entity has physical custody with the consent of a custodial parent or approval of the court.

Appellant argues that as the sole physical custodial parent of R.S., the plain language of the statute does not authorize a cause of action against her for child support. We agree. The express language of this statutory provision permits a third party to bring a cause of action only against a noncustodial parent. Appellant's status as the sole physical custodial parent of R.S. has never been modified. Thus, she remains the sole physical custodial parent and is not subject to a cause of action under this section.

Furthermore, appellant testified that she did not consent to the living arrangement with Vega, which is a requirement of the subdivision. While there was conflicting

testimony at the hearing on this issue, the CSM did not make a finding that Vega had custody of R.S. with appellant's consent. Because the statute would apply only if appellant gave her consent, the CSM also erred by applying the statute in this respect. The county did not file a responsive brief in this appeal, and we find no legal authority to support the CSM's decision.

In reaching his conclusion, the CSM relied on the definition of "primary physical custody" in Minn. Stat. § 518A.26, subd. 17 (2008). Primary physical custody is defined in that section as "the parent who provides the primary residence for a child and is responsible for the majority of the day-to-day decisions concerning a child." Minn. Stat. § 518A.26, subd. 17. The CSM was correct that primary physical custody is not determined with reference to a court order, but the language of section 256.87 distinguishes between "custodial" and "noncustodial" parents and does not refer to an individual providing "primary physical custody." Whether or not Vega is providing primary physical custody is not determinative of whether appellant owes Vega child support under section 256.87. Instead, the CSM should have looked to the original child-custody determination to ascertain the custodial parent for purposes of this section.

Because appellant is the custodial parent of R.S. and the CSM made no findings with regard to whether appellant consented to the living arrangement, we conclude that she is not subject to a cause of action for child support under Minn. Stat. § 256.87, subd. 5.

Reversed.