STATE OF MINNESOTA
IN COURT OF APPEALS
A10-370

In the Matter of the Welfare of the Children
of: T. M. S., M. J. B. and T. A. A., Parents.

Filed August 10, 2010
Affirmed
Halbrooks, Judge

Itasca County District Court
File Nos. 31-F8-02-50933, 31-JV-09-3373, 31-JV-09-3505, 31-JV-09-3508

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Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

HALBROOKS, Judge

Appellant challenges the district court's decision to award permanent physical custody of her son to his father and permanent physical custody of her daughter to her

daughter's paternal grandparents. Because we conclude that the district court did not abuse its discretion, we affirm.

FACTS

Appellant T.M.S. (mother) gave birth to B.E.S. in June 2002, when she and B.E.S.'s father, M.B., were in high school. M.B. was adjudicated B.E.S.'s biological father in March 2003, and mother was granted sole legal and physical custody of B.E.S. M.B. interacted with his son only a couple of times before leaving Minnesota for Navy boot camp in July 2003. M.B. has served in the Navy since 2003, and has been deployed to a number of overseas locations. M.B. has not lived in Minnesota since high school. M.B. has kept in touch with his son via telephone contact over the years, although his ability to maintain contact was often restricted by the conditions of his deployments and by the fact that mother did not always have a telephone. M.B. managed to have face-to-face visits with B.E.S. in between various deployments. The record reflects about seven to ten face-to-face visits between father and son over the years. M.B. currently lives in Brunswick, Maine and does not expect to be deployed overseas for another two to three years. M.B. is now married and has a five-year-old step-daughter.

Mother, meanwhile, struggled to care for B.E.S. She admitted to beginning daily intravenous drug use in April 2005. Mother gave birth to her second child, B.M.A., on April 12, 2005.[1] B.M.A.'s father, T.A., is not a party to this appeal. In October 2005, St. Louis County social services became involved with mother after B.E.S., then three

[1] The district court's memorandum and the parties' briefs refer to B.M.A.'s birth date as April 12, 2004, but it appears from the record that her birth date is actually April 12, 2005.

years old, was found wandering unattended in the hallway of mother's apartment building. Mother voluntarily placed both children with B.M.A.'s grandparents in December 2005. Mother continued to struggle with drug use and the children have been back and forth between her and B.M.A.'s grandparents several times, either as a result of voluntary or court-ordered placements. Consequently, both children grew very close to B.M.A.'s grandparents, and B.M.A. occasionally refers to them as "mommy" or "daddy."

In early 2007, after B.E.S. was removed from his mother's care for the second time, M.B. began inquiring about gaining custody of his son. In April 2007, mother regained custody of the children after completing in-patient chemical-dependency treatment. M.B. moved for custody of B.E.S. in May 2007, but later dismissed the matter in part because it appeared that mother was doing better. In November 2007, St. Louis County dismissed the child-protection matter.

But in spring 2008, and again in spring 2009, mother was arrested and charged with controlled-substance crimes. Mother had moved from St. Louis County to Itasca County at some point, and in July 2009, respondent Itasca County was alerted to mother's situation by St. Louis County social services and began attempting to locate her. In September 2009, M.B. again moved for a modification of custody under Minn. Stat. § 518.18(d) (2008). Mother was arrested and charged with a controlled-substance crime in October 2009. At this point, Itasca County initiated a petition alleging both children were in need of protection or services (a CHIPS petition) and permanency petitions for each child. The county petitioned for B.M.A.'s grandparents to be granted permanent physical and legal custody of B.M.A. and petitioned for M.B. to gain custody of his son,

B.E.S. B.M.A.'s grandparents were not willing to take permanent custody of B.E.S., who is not their biological grandchild.

Mother denied the permanency petitions, and the district court consolidated the four matters (M.B.'s motion to modify custody of B.E.S., the CHIPS petition, and the two permanency petitions) for an evidentiary hearing. Mother then served and filed an alternative permanency petition requesting that the children be placed with her maternal aunt, Gayle Gould, and Gayle's husband, Dean. This alternative petition was served on December 17, 2009—12 days before the scheduled evidentiary hearing.

At the end of a three-day evidentiary hearing, mother testified and conceded that the children are in need of a permanent placement and that she is not capable of parenting them. She acknowledged that the only decision before the district court was where the children should be placed, not whether or not they should remain in her care. The district court granted M.B.'s motion for sole physical and joint legal custody of B.E.S.; granted the county's petition to transfer custody of B.E.S. to M.B.; granted the county's petition to award sole physical custody of B.M.A. to her grandparents; but denied the county's petition to award sole legal custody of B.M.A. to her grandparents and instead granted B.M.A.'s grandparents and mother joint legal custody of B.M.A. The district court considered mother's alternative petition for permanency to be untimely, but indicated that it would have denied the petition had it considered it on its merits. This appeal follows.

D E C I S I O N

Mother claims on appeal that there is insufficient evidence to support the district court's finding that the transfer of custody is in the children's best interests and that the

district court erred by not granting her alternative petition. Mother is challenging the district court's ultimate conclusion rather than any specific findings. When an appellant challenges a custody determination by disputing the district court's ultimate conclusion, and the district court's factual findings are not challenged, the scope of appellate review is limited to the question of whether the district court abused its discretion. *Holmberg v. Holmberg*, 529 N.W.2d 456, 458 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). A district court has broad discretion to provide for the custody of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).

I. Custody of B.E.S.

M.B. moved for custody of B.E.S. pursuant to Minn. Stat. § 518.18(d). The county shortly thereafter petitioned to transfer custody of B.E.S. to M.B. pursuant to Minn. Stat. § 260C.201, subd. 11(d)(1) (2008).[2] The district court granted M.B.'s motion to modify custody of B.E.S. pursuant to Minn. Stat. § 518.18(d). According to this statute, a district court shall not modify custody

> unless it finds, upon the basis of facts . . . 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:
>
> . . . .

[2] Minn. Stat. § 260C.201, subd. 11(d), states that if a child in need of permanency is not returned home, the court must order one of five dispositions, including "(1) permanent legal and physical custody to a relative in the best interests of the child."

> (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).

Mother does not argue that the endangerment standard in subsection (iv) of this section has not been met, nor does she argue that there has not been a change in circumstances since the prior order granting her custody of B.E.S. Mother's only argument is that a change in custody is not in B.E.S.'s best interests because it results in separation from his half-sibling, B.M.A.

Before addressing the best interests of B.E.S., the district court reasoned:

> Although [mother] has conceded that she is incapable of properly parenting the children at the present time and has filed a petition in the CHIPS file asking that the children be placed with the Goulds, the Goulds do not stand in [mother]'s shoes for the purpose of determining what placement would be in [B.E.S.]'s best interest in the family law file because neither the Goulds nor [mother] filed a motion within the family law file seeking a transfer of custody to the Goulds as interested third parties. Accordingly, this Court's evaluation of the best interest factors looks at [mother] and [M.B.] as the two potential custodians.

We agree with this assessment. Parents have a constitutional right to raise their children. *In re Child of P.T.*, 657 N.W.2d 577, 588 (Minn. App. 2003), *review denied* (Minn. Apr. 15, 2003). A non-parent party seeking custody of a child vis-à-vis a parent must first establish that he or she is either a "de facto custodian" or an "interested third party." Minn. Stat. § 257C.03 (2008). Under Minn. Stat. § 257C.03, subd. 7(a)(1), a person wishing to be considered an interested third party must

> show by clear and convincing evidence that one of the following factors exist:
>
> (i) the parent has abandoned, neglected, or otherwise exhibited disregard for the child's well-being to the extent that the child will be harmed by living with the parent;
>
> (ii) placement of the child with the individual takes priority over preserving the day-to-day parent-child relationship because of the presence of physical or emotional danger to the child, or both; or
>
> (iii) other extraordinary circumstances[.]

To challenge M.B.'s motion for custody of B.E.S., the Goulds would have had to satisfy chapter 257C. The Goulds did not respond to M.B.'s motion, and mother's alternative petition for permanency did not establish that the Goulds should be considered interested third parties. We therefore agree that the two potential custodians of B.E.S. were his mother or his father.

The district court also reasoned that "as far as the family law file is concerned, [M.B.] is the only appropriate custodian for [B.E.S.]." The district court based its reasoning on the fact that mother conceded at trial that the children are in need of a permanent placement, and the only issue before the district court was where to place the children because they could no longer stay with her. The district court went on to conclude that "[e]ven if [mother] were seeking to retain custody of [B.E.S.], [M.B.] makes a strong case that it would be in [B.E.S.]'s best interests if [M.B.] had custody of [B.E.S.]." Although mother makes some vague arguments on appeal about her ability to parent her children, she admitted at trial that she is not capable of parenting her children and is not seeking to retain custody. Accordingly, the district court was correct in its

conclusion that M.B. is the only available custodian for B.E.S., and modification of B.E.S.'s custody to M.B. was appropriate if this was in B.E.S.'s best interests.

The district court concluded that it is in B.E.S.'s best interests to award M.B. custody. The law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000). Appellate courts are not meant to comb through the record to determine "best interests" because this involves credibility determinations. *In re Tanghe*, 672 N.W.2d 623, 625 (Minn. App. 2003). "'The best interests of the child' means all relevant factors to be considered and evaluated by the court. . . ." Minn. Stat. § 518.17, subd. 1(a) (2008) (listing 13 factors to be included in the district court's consideration). Mother claims that the district court failed to properly address the best-interests factors because it did not adequately consider the harm of splitting custody of the two half-siblings.

We agree that sibling relationships are an important factor to consider in a best-interests analysis. *See Rinker v. Rinker*, 358 N.W.2d 165, 168 (Minn. App. 1984). But we disagree with mother's claim that the district court abused its discretion by failing to adequately consider B.E.S.'s best interests. Contrary to mother's assertion, the district court carefully considered the harm involved in splitting up the half-siblings. With regard to custody of B.E.S., the district court found:

> Based upon [mother]'s inability to properly care for [B.E.S.], there is no question that the benefit of a change in custody outweighs any potential harm from the custodial change. Even if the benefit of the change were not great, and the evidence in this case suggests that a change in custody

> will be a significant benefit to [B.E.S.], the record establishes that [B.E.S.] is not likely to experience any harm as a result of a custody change other than an initial adjustment period. The Itasca County case worker, guardian ad litem, [B.M.A.'s grandparents], and [M.B.] all credibly testified that [B.E.S.] would not be substantially harmed if [M.B.] were awarded custody and that [B.E.S.] would substantially benefit from such a change.

The district court noted that "[t]he guardian feels that [B.E.S.] may have a difficult time initially adjusting to being away from his sister and living with his father, but that [B.E.S.] will benefit in the long term from being with his father and having a stable family unit." The district court specifically credited the testimony of B.M.A.'s grandmother who it found was "in as good a position as anyone involved in this case to evaluate the present relationship between [M.B.] and [B.E.S.]." The district court noted that B.M.A.'s grandmother opined "that [B.E.S.] would adjust to being separated from his sister." The district court also noted the case worker's opinion that B.E.S. would "not suffer any harm as a result of being separated from his sister and that [M.B.] has the ability to handle any issues that may arise." On this record, we cannot say that the district court's conclusion that it is in B.E.S.'s best interests to be in his father's custody was an abuse of discretion.

The district court also found that "[i]f [B.E.S.] is placed with [M.B.], both [M.B.] and [B.M.A.'s grandparents] are committed to taking reasonable steps to ensure that [B.E.S.] and [B.M.A.] can maintain a relationship." The district court concluded that "[M.B.] will help [B.E.S.] adjust to, and understand, the change of custody. [M.B.] will encourage [B.E.S.]'s continued relationship with his mother via telephone contacts and

occasional in-person visits." Ultimately, the district court concluded that although "[t]he separation of siblings, even half-siblings, is, and should be, discouraged, . . . this is an instance where the children's individual interests are served by their separation." M.B. and B.M.A.'s grandparents are both committed to maintaining a relationship between the siblings. The record supports that M.B. has a positive relationship with B.M.A.'s grandparents, and the district court did not foresee any obstacle to communication between the siblings. We therefore conclude that the district court's decision to separate the siblings is supported by the evidence and was not an abuse of discretion.

II. Custody of B.M.A.

The district court granted the county's petition to place B.M.A. with her grandparents, and declined to consider mother's alternative petition to place B.M.A. with the Goulds.

The district court concluded that mother's alternative petition to transfer custody of the children to the Goulds was not timely under the rules of juvenile protection. Minn. R. Juv. Prot. P. 33.02, subd. 4(b), states that "[i]f another party files a permanent placement petition in response to the county's petition, it must be filed and served at least fifteen (15) days prior to the date of trial." It is undisputed that mother's alternative petition was not filed and served according to this time limit, and mother makes no argument on appeal as to why this court should consider the merits of her alternative petition. The district court also concluded that dismissing the petition was a reasonable consequence of its untimeliness, because considering the late petition would prejudice the parties and in particular, would prejudice B.M.A.'s father, T.A.

T.A. entered into a settlement with his parents regarding B.M.A.'s placement on December 11, 2009. Although mother still could have filed a timely alternative petition after this date, she did not do so. Because mother's alternative petition was undisputedly untimely, and because mother makes no argument as to why it should be considered, we affirm the district court's decision to decline to consider the merits of her petition.

In addition, because of the district court's decision to grant M.B.'s motion, the primary reason behind mother's alternative petition (keeping B.E.S. and B.M.A. together) becomes moot. If B.E.S. is moving to Maine with his father, there is no opportunity for the siblings to remain together. The record is clear and the district court found that B.M.A. is very close to her grandparents, to the point that she occasionally calls them "mommy" and "daddy." The record is also clear, and the district court found, that B.M.A. has either been in her mother's care or her grandparents' care for her entire life. Indeed, she has spent almost one-half of her life with her grandparents, and only the occasional weekend with her great aunt and uncle. If B.E.S. is placed with his father, it is clear that it is in B.M.A.'s best interests to be placed with her grandparents.

Mother also argues that the county failed to make a reasonable relative search, as required by statute, but she did not make this argument to the district court, and therefore it is not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). In addition, the county had identified relatives (or in B.E.S.'s case a parent) that were willing to serve as permanent options for the children. The statute does not require the county to continue to search for relatives after identifying viable options. *See* Minn.

Stat. § 260C.212, subd. 5(a) (2008). Accordingly, we do not find mother's argument to have merit even if we were to consider it.

Affirmed.