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STATE OF MINNESOTA

IN COURT OF APPEALS

C4-93-1233

C5-93-1788

Hennepin County
District Court File No. 159283

Peterson, Judge

In Re the Marriage of:

Mark Jude Collins, petitioner,
Respondent,

Pro Se
6433 Cloverdale Avenue North
Crystal, MN 55428

vs.

Holly Ann Collins,
Appellant.

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Filed April 5, 1994
Office of Appellate Courts

Considered and decided by Kalitowski, Presiding Judge,
Peterson, Judge, and Harten, Judge.

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

PETERSON, Judge.

Holly Collins appeals from various district court orders granting physical and legal custody of the parties' minor children to respondent Mark Collins, arguing that there has not been a significant change of circumstances since the initial custody order and that a modification of custody is not in the best interests of the children. She further argues that the district court erred by refusing her request for expert witness fees, by granting her only supervised visitation with the children, and by restraining the parties from disseminating information regarding the children to third parties. Respondent appeals the district court's finding of domestic abuse between the parties. We affirm in part and reverse in part.

FACTS

Mark Jude Collins (father) and Holly Ann Collins (mother) were granted a dissolution decree in October 1990. The decree awarded mother custody of the parties' two minor children. Father was awarded unsupervised visitation with the children.

Approximately nine months later, mother obtained permission to move with the children to Massachusetts. Father opposed the move and maintained that mother's primary purpose was to deny him access to the children. The record indicates that mother started withholding visitation after she obtained the order permitting the move. Once in Massachusetts, mother continued to deny visitation, alleging that father deliberately endangered the children by

feeding them foods to which they were allergic, physically abusing them, and failing to provide necessary asthma medication. Mother also alleged that the children were too sick to travel to visit father and that the older child displayed suicidal behavior after he was told that he must visit father.

Because mother continued to deny visitation, father moved for a modification of the original custody award. The district court continued father's motion and ordered mother to cooperate with the visitation schedule. On the first day of father's spring visitation, mother denied visitation and filed for a protection order in Hennepin County. Pending a hearing on the protection order, the district court granted father supervised visitation. The court also ordered a custody evaluation and hearing, and ordered the children to reenter counselling.

Approximately three weeks before the custody hearing, mother requested that Hennepin County pay the costs of expert witnesses in Massachusetts who had treated the children and her. The district court denied her request because the statute permitting payment for witnesses does not extend to witnesses outside Minnesota. The court also noted that the Massachusetts professionals had not seen the children in over six months and had not met father.

After an investigation, Hennepin County Family Court Services and the guardian ad litem recommended that father be granted legal and physical custody of the children and that mother be granted supervised visitation. The evaluation concluded that mother's relationship with the children was unhealthy and that her

allegations that father failed to properly medicate the children were groundless.

In its December 23, 1992 order, the district court awarded legal and physical custody to father, granted mother two hours of supervised visitation per week, and concluded that there had been domestic violence between the parties during the marriage. The record indicates that the children have adjusted well to the new custody arrangement, that there have been no further allegations of child abuse, and that the children's health has improved. A later order prohibited the parties from discussing the children with third parties. This consolidated appeal is taken from seven orders filed between June 30, 1992 and August 5, 1993.

D E C I S I O N

A trial court's determination in custody matters will not be reversed unless an abuse of its broad discretion is found. An abuse of discretion will be found if the trial court makes findings unsupported by the evidence or improperly applies the law.

Elgard v. Dudley, 471 N.W.2d 681, 684 (Minn.App. 1991) (citations omitted).

The district court may modify a prior order for custody only if

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 established by the prior order unless:

* * * *

(iii) 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 the child.

Minn. Stat. §§ 518.18(d) (1992).

Following an evidentiary hearing, the district court specifically found that

the minor children are at great physical and emotional risk if they remain in the custody of [mother]. Their safety and long-term emotional development appear best protected by being in the custody of [father] and the harm to the children caused by a change in custody is outweighed by the long term advantages to the children.

Mother first argues that there has been no significant change in circumstances. Although the trial court did not specifically find that there had been a significant change in circumstances since the existing custody order was granted, its extensive findings explicitly address changes that have occurred since mother moved to Massachusetts with the children. These changes include: the children's health and well-being have suffered; the older child began demonstrating suicidal behavior, and the younger child was hospitalized due to psycho-social problems; and mother became preoccupied with the children's health, refused to comply with the visitation schedule, instilled fear of father in both children, revived allegations of father's abuse against her and the children, and made unsubstantiated new allegations of abuse.

The substance of mother's argument is that the district court improperly weighed the evidence presented. It is not the role of an appellate court to reweigh the evidence and find its own facts.

Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn. 1988). The trial court's findings must be upheld unless clearly erroneous and deference must be given to the trial court's opportunity to assess the witnesses' credibility. Id. Although there was evidence presented that conflicted with some of the district court's findings, the findings are supported by other evidence in the record and the district court properly concluded that modification of custody was permitted.

Mother next argues that the district court failed to conduct the custody analysis required by Minn. Stat. § 518.17 (1992) and erred in concluding that modification of custody is in the best interests of the minor children. Again, the substance of mother's argument is that the district court improperly weighed the evidence presented. Although in its order the district court presented its findings in a sequence that addressed the individual allegations of the parties one by one rather than a sequence that specifically addressed the Minn. Stat. § 518.17 criteria one by one, the findings do address the relevant statutory criteria.

Furthermore, the court's findings and memorandum clearly show that the court reached its conclusion that a custody modification was necessary because the children's environment endangered their physical and emotional health. The court concluded that (1) mother suffers from a personality disorder, which may include a disorder in which a parent invents, induces or exaggerates medical symptoms in a child, (2) mother has subjected the children to extensive allergy tests by three allergists, (3) mother has taken the children to a number of pediatricians and therapists, (4) the

children use their inhalers too often and may be over-medicated in general for their asthma while in mother's care, and (5) one of the children continued presentation of suicidal behavior as described by mother only while in mother's care. These findings are supported by evidence in the record. The district court's finding that the children's environment endangered their physical and emotional health was not clearly erroneous.

Mother next argues that the district court erred by denying her request for transportation costs and witness fees for witnesses in Massachusetts under Minn. Stat. § 563.01, subd. 5 (1992), the in forma pauperis statute. The district court found that the court had no authority under the statute to order payment for witnesses outside Minnesota.

Minn. Stat. § 563.01, subd. 5 provides:

If the court finds that a witness, including an expert witness, has evidence material and necessary to the case and is within the state of Minnesota, the court shall direct payment of the reasonable expenses incurred in subpoenaing the witness, if necessary, and in paying the fees and costs of the witness.

(Emphasis added.)

Under the unambiguous language of the statute the district court has no authority to order payment of witness expenses when the witness is not within Minnesota. The district court properly denied the request for payment of expenses of witnesses in Massachusetts.

Mother also sought payment of expenses for bringing the children to a doctor in Minnesota for evaluation or, in the alternative, for providing testimony based on that doctor's review

of the file. The district court found that there was no showing that the doctor had evidence material and necessary to the case. The district court properly denied payment under the statute because the doctor had not evaluated the children or reviewed their files and did not have evidence material and necessary to the case.

Mother next argues that it was reversible error for the district court to rely on the court services report because the report was given to counsel and the parties after the first witness had testified rather than ten days before the hearing as required by Minn. Stat. § 518.167 , subd. 3 (1992). The record does not indicate that mother objected to admission of the court services report. Assignments of error in the admission of evidence "that have not been presented to the trial court for consideration will not be reviewed on appeal." Gruenhagen v. Larson, 310 Minn. 454, 457-58, 246 N.W.2d 565, 568 (1976).

Mother next argues that the district court abused its discretion by limiting her to supervised visitation. In reviewing matters of visitation, the district court's decision may not be disturbed absent an abuse of discretion. Kuebelbeck v. Humphrey, 402 N.W.2d 202, 204 (Minn. App. 1987), pet. for rev. denied (Minn. Apr. 29, 1987).

[T]he court may not restrict visitation rights unless it finds that:

(1) the visitation is likely to endanger the child's physical or emotional health or impair the child's emotional development; or

(2) the noncustodial parent has chronically and unreasonably failed to comply with court-ordered visitation.

Minn. Stat. § 518.175, subd. 5 (1992).

The district court found that (1) mother refused to permit the children to travel to Minnesota for Thanksgiving visitation in November 1991, (2) father did not see the children for several months after mother and the children moved to Massachusetts, (3) mother was ordered to cooperate with the visitation schedule starting with spring visitation in 1992, (4) on the day spring visitation was to commence, mother filed a petition for an order for protection requesting suspension of visitation until further order of the court alleging that father and his current wife abused the children, and (5) the allegations of abuse were found to be without substance.

Although the district court did not expressly state in its findings that mother chronically and unreasonably failed to comply with court-ordered visitation, its findings reflect mother's chronic and unreasonable failure to comply with court-ordered visitation. It is not necessary for the district court to repeat or paraphrase the words of the statute in its findings; it is sufficient that the findings demonstrate that the court considered the statutory criteria for requiring that visitation be supervised. See Kuebelbeck, 402 N.W.2d at 204 (when findings were supported by record and showed court considered proper statutory criteria, restricting visitation was not abuse of discretion). The district court did not abuse its discretion in ordering supervised visitation.

Mother next contends that the district court erred in ordering the parties not to discuss the minor children with third parties.

Mother argues that the district court order violated her constitutional right of free speech. Because we decide this issue on other grounds, we do not address mother's argument that the order violates her constitutional rights.

Although neither party requested injunctive relief, the district court made the following orders:

Neither party nor their allies nor third parties on behalf of a party shall disseminate, circulate or publish any information about the minor children to any third party or uninvolved professional, regardless of whether such information is current or historical data.

* * *

Neither party nor their allies nor third parties on a party's behalf shall allow the presence of minor children or information about the minor children be circulated, recorded or publicized, whether by circulation of "family" photographs, video-taping of any kind, or publication of references to or disclosure of activities of the minor children with either parent to third parties outside this case, including but not limited to advocates and allies for either parent or news media.

It appears from the record that these orders were a response to attempts by mother to attract the attention of advocacy groups and the media to district court proceedings involving this case.

The granting of an injunction rests within the sound discretion of the trial court, "and its action will not be disturbed on appeal unless, based upon the whole record, it appears that there has been an abuse of such discretion."

Howe v. Howe, 384 N.W.2d 541, 544 (Minn. App. 1986), (quoting Cherne Indus., Inc. v. Grounds & Assocs., Inc., 278 N.W.2d 81, 91 (Minn. 1979)).

Injunctive relief should be awarded only in clear cases, reasonably free from doubt, and when necessary to prevent great and irreparable injury.

AMF Pinspotters, Inc. v. Harkins Bowling, Inc., 260 Minn. 499, 504, 110 N.W.2d 348, 351 (1961). "The threatened injury must be real and substantial and the burden is on the moving party to establish the material allegations." Hideaway, Inc. v. Gambit Invs. Inc., 386 N.W.2d 822, 824 (Minn. App. 1986).

Although the district court appears to have issued these orders to protect the privacy rights of the minor children, it did not identify a real and substantial threatened injury to be prevented by its order. Although we share the district court's concern that mother's media activities deflect

emotional energy and time away from her own therapy and efforts to be appropriately involved as a noncustodial parent for her children, without continued supervision of her contacts

we find that the district court abused its discretion when it ordered the parties not to release information about the children to third parties and we reverse the district court orders prohibiting either party or their allies or third parties on behalf of a party from (1) disseminating, circulating or publishing any information about the minor children and (2) allowing the presence of the minor children or information about the minor children from being circulated, recorded or publicized.

Finally, father argues that the district court erred by finding that there had been domestic abuse between the parties. This issue is not properly before this court because respondent

filed no notice of review with this court. See Minn. R. Civ. P. 106 (respondent may obtain review of adverse order by filing notice of review).

Notwithstanding this procedural defect, we conclude that the district court's findings of domestic abuse have a factual basis in the record. Therefore, it cannot be said that the district court clearly erred in finding that domestic abuse occurred between the parties.

Affirmed in part and reversed in part.

Randolph W. Peterson

March 30, 1994