STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2213

Christopher Morland Seaborn,
Appellant,

vs.

Rhea Canfield Merrill,
Respondent,

and Hennepin County,
Intervenor.

Filed November 7, 2011
Affirmed
Harten, Judge*

Hennepin County District Court
File No. 27-PA-FA-000051214

Charles T. Agan, Charles T. Agan, P.A., Edina, Minnesota; and

Edward F. Rooney, Rooney Law, Minneapolis, Minnesota (for respondent)

Walter W. Burk, Central Minnesota Legal Services, Minneapolis, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Harten, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving 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

HARTEN, Judge

The parties are the parents of a ten-year-old child of whom respondent mother has sole legal and physical custody. Appellant father, who was convicted of one count of terroristic threats against respondent, challenges the district court's reservation of his parenting time and its failure to hold an evidentiary hearing or to make findings on the best-interests factors set out in Minn. Stat. § 518.17, subd. 1(a) (2010).

FACTS

In September 2001, a daughter, A., was born to respondent Rhea Canfield Merrill and appellant Christopher Morland Seaborn. In February 2002, respondent obtained an order for protection (OFP) against appellant, who was convicted in March 2002 of one count of terroristic threats against her under Minn. Stat. § 609.713 (2000). He was placed on probation until April 2007.

In September 2004, when A. was three years old and living with respondent, appellant moved to establish joint legal and physical custody. Respondent countered by moving for sole legal and physical custody and requesting that appellant's parenting time be supervised at Perspectives, a visitation center. In October 2004, the district court issued an order granting respondent temporary sole legal and physical custody of A. The order permitted appellant to have parenting time supervised by his mother, L., a licensed daycare provider, at her home and required the parties to undergo a custody and parenting time evaluation at Family Court Services (FCS).

In February 2005, the district court issued an amended order noting that the FCS evaluator recommended that appellant's "parenting time be supervised visitation in an agency setting, since [appellant] has not had contact with child since June 2004," and ordered that appellant's parenting time be in an agency setting that FCS would help the parties to select.

In March 2005, appellant moved for an order requiring respondent to comply with the October 2004 (not the February 2005) order and granting him compensatory parenting time because he had not seen A. since June 2004. Respondent moved for enforcement of the February 2005 order "requiring supervision of all [appellant's] parenting time at an agency." In April 2005, following a hearing, the district court ordered supervised parenting time for appellant to occur three times a week at the Genesis agency and also ordered FCS to recommend a parenting time schedule, because no schedule was then in effect.

In July 2005, the district court issued an order, based on the parties' stipulation, that: (1) respondent have sole legal and physical custody; (2) appellant have weekly parenting time for four hours for two weeks; then for six hours for two weeks, supervised by L. at her home; then for 24-hour weekends, unsupervised, for a month; and then for 48-hour weekends and one weekday afternoon; and (3) exchanges would occur "between [respondent] and [L.] at a mutually agreed upon location."

In November 2005, when appellant's unsupervised parenting time was scheduled to begin, no parenting time took place. Appellant claims respondent denied him access to A.; respondent claims A. did not show up for visitation. The parties met with FCS and

agreed that appellant's parenting time would resume for the next three Sundays at L.'s home, under her supervision; that there would be overnight unsupervised parenting times for the following four weeks, and that parenting time would then increase to alternate weekends and two hours on alternate Wednesdays. This agreement was not confirmed by court order. Parenting time failed to occur by the end of November. A. was then four years old. With the possible exception of one visit in about January 2009, appellant did not see A. again until June 2010, when she was almost nine years old.[1]

There was no further court involvement until January 2010, when appellant moved for parenting time assistance and compensatory parenting time, including having exchanges of A. take place at a police station and, upon request of either party, having "law enforcement . . . enforce this parenting time schedule immediately." Respondent asked that appellant's parenting time begin with supervised time at Perspectives Safety Center. In May 2010, the district court appointed a guardian ad litem, concluded that "it is in the child's best interests to grant the Guardian [ad litem] the authority to re-implement and re-integrate the gradual parenting time schedule," and ordered that appellant's parenting time begin at Perspectives.[2]

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[1] Appellant claimed in his affidavit of January 2010 that he "last saw [A.] about one year ago [when respondent] allowed [L.] to pick up [A.] and bring her to see me." There is no documentation of this visit; respondent claims in her March 2010 affidavit that appellant "made no effort to see [A.] or contact her since 2005."

[2]The district court later suggested that this court ignore the May 2010 order because it misstated "the posture of the case" by asserting that a schedule of parenting time with appellant would be "in the child's best interests." The misstatement was attributable to the district court's failure to consider appellant's terroristic-threats conviction when it issued the May 2010 order.

Appellant and A. had two visits at Perspectives in June 2010. Based on their observations of those visits, Perspectives personnel concluded that the family "would be better served in a more therapeutic setting," took further visits off the schedule, closed the file, and said it "would consider re-establishing services upon the recommendations of a reunification therapist and/or the children's therapist(s)." In August 2010, the district court ordered reunification therapy assisted by a psychologist from FCS.

In September 2010, the psychologist interviewed the parties and A. She reported that A. "[did] not want to have anything to do with [appellant] under any circumstances," was uncomfortable being with appellant during the visits, remembered appellant yelling at and hurting respondent, and "[was] fairly intransigent about wanting no contact with [appellant]." The psychologist recommended a parenting time evaluation to explore whether visitation with appellant is in A.'s best interests and what, if any, parenting time would be appropriate in these circumstances.

In October 2010, based on the letter from Perspectives and the psychologist's recommendation, the district court reserved appellant's parenting time, having concluded that appellant's terroristic-threat conviction required him, under Minn. Stat. § 518.179 (2010), to show that his parenting time was in A.'s best interests and that appellant had not made this showing to overcome the statutory presumption against his having parenting time.

Appellant challenges the reservation of parenting time, arguing that Minn. Stat. § 518.179 does not apply to his motion for parenting time assistance and compensatory parenting time because he had already been granted parenting time and that, under Minn.

Stat. § 518.175, subd. 5 (2010), the district court erred by reserving his parenting time without granting him an evidentiary hearing or making findings on the 13 best-interests factors set out in Minn. Stat. § 518.17, subd. 1(a).

D E C I S I O N

1. Application of Minn. Stat. § 518.179

"Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on this court." *Davies v. W. Publ'g Co.*, 622 N.W.2d 836, 841 (Minn. App. 2001), *review denied* (Minn. May 29, 2001).

> Notwithstanding any contrary provision in section . . . 518.175, if a person seeking . . . parenting time has been convicted of [terroristic threats], the person seeking . . . parenting time has the burden to prove that . . . parenting time by that person is in the best interests of the child if . . . (3) the victim of the crime was a family or household member . . . .
>
> If this section applies, the court may not grant custody or parenting time to the person unless it finds that the custody or parenting time is in the best interests of the child. If the victim of the crime was a family or household member, the standard of proof is clear and convincing evidence.

Minn. Stat. § 518.179, subd. 1 (2010).

Appellant has not established by clear and convincing evidence that his parenting time is in A.'s best interests. Instead, appellant argues that Minn. Stat. § 518.179, pertaining to those "seeking . . . parenting time," does not apply to him because, in his January 2010 motion for parenting time assistance and compensatory parenting time, he

was not seeking parenting time but rather the enforcement of parenting time orders issued five years earlier.[3]

Appellant's motion asked the court to grant him "compensatory parenting time . . . for court-ordered parenting time that [he] was prevented from exercising since October 2008" and to modify the parenting time schedule. Appellant's claim that his motion was not an effort to seek parenting time is illusory; his motion is within the purview of section 518.179.

Appellant also argues that Minn. Stat. § 518.179 does not apply because he "met the burden of proof . . . in two previous orders in this case." But neither the 2004 order nor the 2005 order even mentions (1) whether appellant's parenting time is in A.'s best interests, (2) who has the burden of proof on this point, or (3) Minn. Stat. § 518.179. Appellant cannot claim that he "met the burden of proof" in 2004 and 2005.

As a practical matter, even assuming that appellant's parenting time was in A.'s best interests in 2004 and 2005 (when she was three and four years old), it may not be in her best interests at age ten to have parenting time with someone who has not seen her for years and whose presence disturbs her. With the exception of the conclusory statement in his affidavit supporting the 2010 motion that "[e]nforcing the current [i.e., 2005] parenting time schedule and making the two changes requested above [i.e., having exchanges at a police station and enabling either party the appeal to law enforcement], are in [A.'s] best interests," appellant makes no attempt to show that his parenting time is

[3] Appellant offers no legal support for his implication that a noncustodial parent may ignore a parenting time order for five years and then demand its enforcement.

in A.'s best interests. Nor does he address the decision of Perspectives to terminate visitation services or the psychologist's observation that A. is disturbed by appellant's presence and wants nothing to do with him, both of which arguably intimate that his parenting time might not be in her best interests.

The district court correctly determined that Minn. Stat. § 518.179 applies to this matter and that appellant has not met the best interests burden it imposes on him.

2. Application of Minn. Stat. § 518.175, subd. 5.

To support his argument that he was entitled to a hearing, appellant relies on Minn. Stat. § 518.175, subd. 5 ("If a parent makes specific allegations that parenting time by the other parent places the parent or child in danger of harm, the court shall hold a hearing at the earliest possible time to determine the need to modify the order granting parenting time."). But Minn. Stat. § 518.179, subd. 1, imposing on appellant the burden of proving that his parenting time is in A.'s best interests, applies "[n]otwithstanding any contrary provision in section . . . 518.175." Thus, the requirement of Minn. Stat. § 518.175, subd. 5, that the district court hold a hearing to deal with respondent's allegations that appellant's parenting time would harm A. is abrogated by Minn. Stat. § 518.179, subd. 1.

Appellant relies on *Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002) (holding that "[b]ecause the modification [of parenting time] was substantial, an evidentiary hearing was required") and *Courey v. Courey*, 524 N.W.2d 469, 472 (Minn. App. 1994) (holding that, under Minn. Stat. § 518.175, subd. 5 (1992), the district court abused its discretion by suspending, without an evidentiary hearing, the visitation rights

of a parent accused of a crime). Both cases are distinguishable. In *Matson*, "[t]he district court [without an evidentiary hearing] changed the parenting time schedule in a way that reduced mother's regular weekday and weekend parenting time to about one-half of that provided in the previous amended decree." 638 N.W.2d at 468. Here, the decision on appellant's parenting time was reserved; his parenting time was not reduced to any specific amount or by any specific percentage. In *Courey*, the parent had been only accused, not convicted, of a crime, and therefore Minn. Stat. § 518.179 did not apply. *See* Minn. Stat. § 518.179 ("Notwithstanding any contrary provision in section . . . 518.175, if a person seeking . . . parenting time has been *convicted of* [terroristic threats] . . . ." (emphasis added)). Appellant has not shown that he was entitled to an evidentiary hearing prior to the reservation of a decision on his parenting time rights.

Finally, appellant again relies on Minn. Stat. § 518.175, subd. 5, to argue that the district court erred by reserving his parenting time without making findings on each of the 13 best-interests factors set out, primarily with reference to custody, in Minn. Stat. § 518.17, subd. 1(a). Minn. Stat. § 518.175, subd. 5, provides that "[i]f modification would serve the best interests of the child, the court shall modify . . . an order granting or denying parenting time . . . ," but does not specify how the district court is to determine whether modification would serve a child's best interests. Once again, the district court did not modify an order granting or denying parenting time; it reserved the issue of appellant's parenting time, and, in any event, Minn. Stat. § 518.175, subd. 5, does not apply to appellant because he was convicted of terroristic threats. *See* Minn. Stat.

§ 518.179, subd. 1 ("Notwithstanding any contrary provision in section . . . 518.175, if a person seeking . . . parenting time has been convicted of [terroristic threats] . . . .").

Appellant provides no lawful basis for reversing the district court's reservation of his parenting time.

Affirmed.

Dated: _____

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James C. Harten, Judge