STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0072

In the Matter of the Welfare of the Children of: B. S. F.-J., Parent.

Filed July 1, 2024
Affirmed
Bratvold, Judge

Hennepin County District Court
File No. 27-JV-20-1731

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Considered and decided by Bratvold, Presiding Judge; Larkin, Judge; and Kirk, Judge.*

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this appeal from the district court's order denying appellant father's motion to modify an order transferring permanent sole legal and sole physical custody of three

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

children to respondent mother, father argues that the district court abused its discretion by denying his motion for visitation and a custody evaluation. We affirm.

FACTS

Respondent S. F.-J. (mother) and appellant B. S. F.-J. (father) were married in 2006 and are the parents of three joint children: child 1 (born in 2011), child 2 (born in 2013), and child 3 (born in 2015). The following summarizes the relevant procedural history and facts, much of which is included in a Minnesota Department of Human Services (DHS) decision reversing a maltreatment determination against father.

In 2019, respondent Hennepin County Human Services (the department) reported to local law enforcement that father physically abused child 1. Shortly after this, father moved out of the family home. Mother served a petition for dissolution on father in December 2019, and the district court dissolved the marriage in November 2020.

In March 2020, mother reported to law enforcement that father sexually abused child 3. Child 3 was interviewed at CornerHouse.[1] While no criminal charges were filed, in April 2020, the department made a maltreatment determination against father based on the sexual-abuse allegations. On father's request for reconsideration, the department reaffirmed its maltreatment determination. Father appealed to DHS, as discussed below.

Also in April 2020, the department filed a child-in-need-of-protection-or-services (CHIPS) petition and a petition to terminate father's parental rights with respect to all three children. The district court granted the CHIPS petition, the children remained in mother's

[1] CornerHouse is "a child advocacy center that often interviews children who are alleged victims of sexual abuse." *State v. Wembley*, 728 N.W.2d 243, 244 (Minn. 2007).

care, and the district court held a termination trial on April 7, 2021. In August 2021, the parties to the termination proceeding reached a stipulation and father agreed to voluntarily transfer sole legal and sole physical custody of all three children to mother.

The Transfer Order

The district court issued findings of fact and an order transferring permanent legal and physical custody to mother (transfer order). The transfer order summarized the parties' agreement regarding the voluntary transfer and their testimony in support of the transfer. The parties agreed that mother would have sole legal and sole physical custody of the three children. Father testified that "it is in the best interests of the children to transfer sole custody of the children" to mother. Father also testified that "he loves his children and wishes to reunify with them, but he also understands that his children are in therapy and that reunification is not possible for the immediate foreseeable future, and that this voluntary transfer of custody is considered a permanent transfer of custody." Father "was clear in his testimony that it is his goal to have visitation with the children at some future date when the children desire contact and the respective children's therapists recommend it." The parties agreed that "future visitation, parenting time and/or contact by any of the children" with father "must take into consideration the child(ren)'s wishes and input from their respective therapists."

The district court concluded that clear and convincing evidence showed that the transfer of sole physical and sole legal custody of all three children to mother is in the children's best interests. Accordingly, the district court ordered that custody be transferred

to mother, that the children would continue to reside with mother, and that father "retain[ed] the right of reasonable visitation/parenting time with the children."

The district court added that father's visitation was subject to several conditions, including (1) that father follow "the recommendations of his psychosexual evaluation and provide proof of completion upon request," (2) that father "complete a parenting education class with a boundaries component," and (3) that father complete all recommendations from his evaluation and class before visitation occurs.

The district court also ordered that father's visitation was subject to the recommendation of the children's therapists and the children's own wishes about visitation. The district court ordered that the "children's therapists will make recommendations as to whether visitation and/or contact is in the child(ren)'s best interests and should occur." The district court cited the settlement agreement and provided, among others, "the following conditions regarding the potential of future contact and/or visitation between the children and . . . father":

> a. *No visits, parenting time or contact shall occur* with the children through social media, telephone, mail, or in person *unless it is first recommended by a therapist*, and there is a plan for re-introducing the child(ren) to . . . father for future contact.
>
> b. If visitation or contact is recommended by the child(ren)'s therapist, *the parents will honor the child(ren)'s wishes for whether or not visitation and/or contact should occur*.
>
> c. If and when a therapist recommends that visitation or contact may commence between one or more of the children and . . . father, the initial session(s) shall be held at the child(ren)'s therapist's office.

(Emphasis added.)

The district court also discussed appointing a custody evaluator to assess father's visitation. The order indicated that

> [i]f a therapist is unwilling to make recommendations about [visitation], then either: (i) a new therapist will be sought for the child(ren), or (ii) [mother] shall seek the assistance of a custody evaluator to assess the situation and to make recommendations to both the therapist and [mother] to avoid potential bias/conflicts between the therapists and the children.

Appeal of Maltreatment Determination

As mentioned above, father appealed the department's maltreatment determination to DHS. The parties appeared before a human-services judge (HSJ) in October 2022 for an evidentiary hearing. On January 18, 2023, the HSJ issued a decision reversing the department's maltreatment determination. The HSJ noted that it was a "close case" but determined that the department failed to meet its burden of proof and that it was not more probable than not that maltreatment occurred.

Father's Motion

On November 9, 2023, father moved the district court for an order (1) "granting father parenting time, as deemed to be in the children's best interests," (2) "compelling the parties to participate in a custody evaluation," and (3) "clarifying that father is still a parent and is permitted to receive information about the children, from medical professionals, school, therapists, and other professionals." Mother opposed the motion; father and mother filed materials in support of their positions.

Following a hearing, the district court denied father's motion in an order dated December 22, 2023. Father appeals.

DECISION

I. The district court did not abuse its discretion by denying father's motion for visitation and for a custody evaluation.

"The juvenile court has original and exclusive jurisdiction in proceedings concerning any child who is alleged to be in need of protection or services . . . ." Minn. Stat. § 260C.101, subd. 1 (2022). A district court may order the transfer of permanent legal and physical custody of a child to a "fit and willing relative" consistent with certain requirements. Minn. Stat. § 260C.515, subd. 4 (2022).

Motions to modify an order dated on or after August 1, 2012, and transferring permanent legal and physical custody must be filed in juvenile court. Minn. R. Juv. Prot. P. 59.02. Motions to modify orders transferring custody to a relative are governed by Minn. Stat § 260C.521, subd. 2 (2022).[2] This statute provides that an "order for a relative to have permanent legal and physical custody of a child may be modified using standards under sections 518.18 and 518.185." *Id.*, subd. 2(a).

[2] We note that father's arguments and the transfer order in this juvenile-protection matter use the term "parenting time" to refer to father's access to the children. Chapter 260C, which governs juvenile-protection matters, does not contain the term "parenting time." Minn. Stat. §§ 260C.0001-.83 (2022). Section 260C.521, subdivision 2(a), under which father made his motion, states that "[a]n order for a relative to have permanent legal and physical custody of a child may be modified using standards under sections 518.18 and 518.185." Those sections address modification of custody rather than parenting time. Minn. Stat. §§ 518.18, .185 (2022). *But see* Minn. Stat. § 518.003, subds. 3(f) (stating that, for purposes of chapter 518 and 518A, "'[c]ustody determination' means a court decision and court orders and instructions providing for the custody of a child, including parenting time"), 5 (defining "parenting time" for purposes of chapters 518 and 518A) (2022). It is unclear whether the definitions in chapter 518 apply to a juvenile-protection matter. As a result, this opinion uses the term "parenting time" only where the transfer order did so and does not address whether "parenting time" as defined by Minn. Stat. § 518.003, subd. 5, applies in juvenile-protection matters.

Father argues that the district court abused its discretion in denying his motion, first, by applying the wrong statutory standard and, second, in its analysis. We discuss both arguments.

A. Although the district court incorrectly cited Minn. Stat. § 518.175, the error was harmless because the district court applied the correct standard.

Father contends that the district court erred by applying Minn. Stat. § 518.175 (2022), to determine whether modification of the transfer order was in the children's best interests. Mother and the department argue in their briefs to this court that the district court applied the correct legal standard. Determination of the applicable statutory standard is a question of law that we review de novo. *Christensen v. Healey*, 913 N.W.2d 437, 440 (Minn. 2018) (determining whether Minn. Stat. § 518.175, subd. 5(b) (2016), or Minn. Stat. § 518.18(d)(iv) (2016) applied to a parenting-time motion in a dissolution matter).

In denying father's motion, the district court said that "Minnesota Statutes §§ *518.175* and 518.18 govern motions for parenting time assistance arising from transfers of custody orders." (Emphasis added.) But Minn. Stat. § 260C.521, subd. 2, provides that the correct standard for such a modification is found in sections 518.18 and *518.185*.[3] To explain and as discussed more below, Minn. Stat. § 518.18 has several provisions for modifying custody or a parenting plan, including timing requirements and primary residence; Minn. Stat. § 518.185 requires that a party seeking modification of a custody

[3] We note that the district court's reference to Minn. Stat. § 518.175 may be a typographical error in the order. But the parties discuss the issue on the merits, assuming that the citation is not a typographical error, and so does this opinion.

order must submit an affidavit along with the moving papers. In contrast, Minn. Stat. § 518.175 generally provides that the district court *in dissolution proceedings* "shall, upon the request of either parent," grant parenting time and may modify parenting time upon specified conditions. Minn. Stat. § 518.175, subds. 1(a), 5. Caselaw has discussed the differences between the standard for modifying physical custody versus that for modifying an existing parenting-time order. *Bayer v. Bayer*, 979 N.W.2d 507, 510 (Minn. App. 2022).

This court addressed which of these statutory provisions applies to modification of an order transferring permanent custody to a relative in *In re Welfare of Child of A.H.*, 879 N.W.2d 1 (Minn. App. 2016). In *A.H.*, parents had permanently transferred legal and physical custody of their child to a relative during a termination trial. 879 N.W.2d at 3. The child's mother, A.H., later moved for changes to the visitation schedule, among other requests. *Id*. The child's legal guardians moved to reduce A.H.'s visitation, and the district court granted the guardians' motion. *Id*. On appeal, A.H. argued that the district court erred by failing to apply Minn. Stat. § 518.175 (2014). *Id*. at 5.

We rejected A.H.'s argument, noting that Minn. Stat. § 260C.521 (2014) "does not give the juvenile court authority to award, much less modify, visitation under Minn. Stat. § 518.175." *Id.* at 6. We concluded that, in deciding a modification motion after an order transferring permanent legal and physical custody to a relative, a district court "may apply the standards of Minn. Stat. §§ 518.18, .185" and should apply the best-interests standard from Minn. Stat. § 260C.511(a), which requires "all relevant factors to be considered and evaluated." *Id.* at 6 (quoting Minn. Stat. § 260C.511(a) (2014)) (other quotation omitted). We also concluded that, in denying A.H.'s motion, the district court "did not err by

applying the juvenile-protection standards rather than the family court standards of Minn. Stat. § 518.175." *Id*.

Here, the district court erred by citing Minn. Stat. § 518.175 (2022) in its order. *See id.* But the error was harmless because the district court's analysis turned on Minn. Stat. § 518.18 and tracked the best-interests standard in Minn. Stat. § 260C.511 (2022). Thus, we conclude that the district court followed the analysis set out in *A.H*. An appellant must show both error and prejudice to gain relief on appeal. *See Katz v. Katz,* 408 N.W.2d 835, 839 (Minn. 1987) (stating that appellate courts "will not reverse a correct decision simply because it is based on incorrect reasons); *A.H.*, 879 N.W.2d at 6 (applying this aspect of *Katz* in a juvenile-protection appeal). Accordingly, although the district court erred by citing Minn. Stat. § 518.175, the error does not warrant reversal.

B. The district court did not abuse its discretion by denying father's motions to modify the transfer order and to compel a custody evaluation.

Father argues that the district court erred in its analysis of his request to modify visitation as well as his request for a custody evaluation. Mother and the department urge us to affirm the district court's decision. Section 260C.521, subdivision 2(a), states that an order awarding a relative custody of a child "may be modified using standards under sections 518.18 and 518.185." The statute's use of "may" confers discretion on the district court. *See In re Welfare of Child. of J.D.T.*, 946 N.W.2d 321, 328 (Minn. 2020) (noting, when construing the statute addressing termination of parental rights, that the statute's use of "may" conferred "discretion" on the district court regarding whether to terminate parental rights); *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017) (noting a

district court's discretion in modifying "parenting time" in a dissolution proceeding). Appellate courts review a district court's best-interests analysis for an abuse of discretion. *A.H.*, 879 N.W.2d at 7.

A district court must make two determinations "on 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" before granting modification of custody under section 518.18: (1) that "a change has occurred in the circumstances of the child or the parties" and (2) that "modification is necessary to serve the best interests of the child." Minn. Stat. § 518.18(d).

In response to father's motion, the district court found, first, that "there ha[d] not been a change in circumstances of the children or the parties" and, second, that it was not "in the children's best interest to grant [father's] motion." Father appears to challenge the district court's analysis under both factors, which we address in turn.

1. Change in Circumstances

Father's argument about the change in circumstances is unclear. He appears to argue that there was a change in circumstances because he completed the conditions set out in the transfer order, which included completing a psychosexual evaluation, a parenting course for high-conflict divorces, and a course on "Touch and Boundaries."

The district court found that father completed "the conditions the court ordered him to complete before he could seek to have visits with his children." The district court also considered father's argument that "he was never charged with a criminal offense in this matter and that the original maltreatment findings against him was later reversed." The district court found that the transfer order "is silent with respect to whether and to what

extent" the district court should consider the lack of criminal charges or the maltreatment finding. The district court reasoned that "since neither of those factors are among the preconditions required before visits are considered," it gave them "little weight." We discern no abuse of discretion in this reasoning.

The district court also determined that other court-ordered conditions for initiating visitation had not been met—"[s]pecifically, the children's therapists are not recommending visits and the children have either expressed that they do not want visits or have not expressed any desire regarding visits with [father]." The district court therefore determined that there had not been a change in circumstances.

The record supports the district court's determination. First, the transfer order provides that "[n]o visits, parenting time or contact shall occur with the children . . . unless it is first recommended by a therapist." Second, the letters provided to the district court from the children's therapists did not recommend visitation. Child 1's therapist stated that the child "expressed no desire to have contact with her father" and that the therapist did "not recommend contact with father at this time." Child 2's therapist stated that the child "expressed ambivalence around the topic of reunification with his father" and specified that "he is not ready for reunification with father." Child 3's therapist stated that the child "has not engaged in conversations related to her dad" and that, "[w]hen the subject comes up, she doesn't show any emotions" and "will change the subject to avoid the topic." Neither the letters from the children's therapists nor any other evidence in the record suggests that the children have expressed a desire to have visitation with father.

Accordingly, the district court did not abuse its discretion by determining there was no change in circumstances under Minn. Stat. § 518.18.

2. Best Interests

Father argues that the district court abused its discretion in its best-interests analysis because it did not follow caselaw.[4] Father argues that the court should have applied the factors laid out in *In re Welfare of Child of S.B.G.*, 981 N.W.2d 224, 232 (Minn. App. 2022), *aff'd*, 991 N.W.2d 874 (Minn. 2023). In *A.H.*, this court noted that the best-interests standard for juvenile-protection cases is contained in Minn. Stat. § 260C.511(a), which provides that the "best interests of the child" means "all relevant factors to be considered and evaluated." 879 N.W.2d at 6. While *S.B.G.* applies Minn. Stat. § 260C.511, it discusses best-interests factors relevant to a termination of parental rights, not the modification of an order for permanent transfer of custody. 981 N.W.2d at 232 (citing Minn. R. Juv. Prot. P. 58.04(c)(2)(ii)). Accordingly, the district court did not abuse its discretion when it did not apply our analysis in *S.B.G. See In re Welfare of Child. of M.L.S.*, 964 N.W.2d 441, 452 n.6 (Minn. App. 2021) (noting that the meaning of "best interests" varies depending on context); *In re Welfare of Child. of J.C.L.*, 958 N.W.2d 653, 656-57 (Minn. App. 2021) (declining to apply the best-interests factors for a termination of parental rights in the context of a transfer proceeding), *rev. denied* (Minn. May 12, 2021).

[4] Because father's motion failed on the change-in-circumstances step, we need not consider the district court's analysis of best interests. But because the second step is the focus of father's arguments on appeal, we include it.

Father also appears to argue that the district court abused its discretion because it did not determine the best interests of the children without reference to the transfer order. This argument is unavailing. Father cites no legal authority for his position and ignores that Minn. Stat. § 260C.521, subd. 2, authorizes modification of an order for permanent transfer of custody, not the creation of a new transfer order.

The district court's best-interests analysis appropriately refers to the transfer order. The district court determined that a modification to grant father visitation was not in the best interests of the children because the children's therapists did not recommend visitation with father and the children did not express that they wanted visitation with father. The district court also rejected father's arguments that mother "is somehow influencing the therapists and/or the children" because "there was no evidence presented to the court that supports those allegations." The record fully supports the district court's conclusions.

Accordingly, the district court did not abuse its discretion by determining that modifying the transfer order and granting father visitation is not in the children's best interests.

C. Father's Request for a Custody Evaluation

Father finally argues that the district court erred by denying father's request for a custody evaluation. The district court determined that, based on the language in the transfer order, it may order a custody evaluation if "the therapists are unwilling to make a recommendation regarding visitation." The district court determined that the therapists were not unwilling to make recommendations about visitation and denied father's motion.

The transfer order supports the district court's decision because it provides that

> [i]f a therapist is unwilling to make recommendations about [visitation], then either: (i) a new therapist will be sought for the child(ren), or (ii) [mother] shall seek the assistance of a custody evaluator to assess the situation and to make recommendations to both the therapist and [mother] to avoid potential bias/conflicts between the therapists and the children.

Father lacks any support in the record for his argument that the children's therapists were unwilling to make recommendations about visitation Each therapist either expressly recommended against visitation with father or stated that the child was "not ready for reunification with father" or that the child would not discuss visitation with father. None of the therapists expressed or suggested that they are unwilling to provide recommendations about visitation with father. It is true that one therapist mentioned in an email that father's "best choice right now" may be a custody evaluation. But that comment does not satisfy the terms of the transfer order. As the district court reasoned, "At this time, [the custody evaluation] provision of the [transfer] order has not even been triggered because the therapists have made affirmative recommendations against [father] having visits with the children."

Accordingly, the district court did not abuse its discretion by denying father's request for a custody evaluation because the conditions required for a custody evaluation under the transfer order have not been met.

Affirmed.