STATE OF MINNESOTA
IN COURT OF APPEALS
A11-974

In re the Custody of: K. L. H. and J. L. H.

Kathleen Ann Krause, et al., petitioners,
Respondents,

vs.

Betsy Lou Harasyn,
Respondent (A11-974),
Appellant (A11-1197),

Michael Joseph Harasyn,
Appellant (A11-974),
Respondent (A11-1197).

Filed March 5, 2012
Affirmed
Hudson, Judge

Anoka County District Court
File No. 02-FA-10-1508

Robert A. Manson, Robert A. Manson, P.A., White Bear Lake, Minnesota (for respondents Krause)

Betsy Lou Harasyn, Fridley, Minnesota (pro se respondent (A11-974); pro se appellant (A11-1197))

Michael Joseph Harasyn, Crystal, Minnesota (pro se appellant (A11-974), pro se respondent (A11-1197))

Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

HUDSON, Judge

Appellants mother and father challenge the district court's grant of custody of their minor children to respondents, the children's aunt and uncle, as third-party custodians. Because the district court did not err by concluding that respondents had standing to seek custody, the grant of custody did not restrict father's parenting time, and the district court did not clearly err by finding that endangerment was established or that a preponderance of the evidence favored granting custody to respondents, we affirm.

FACTS

The district court dissolved the marriage of appellants Betsy Lou Harasyn (mother) and Michael Joseph Harasyn (father) in 2008 after a trial on the issue of custody of their two children, who were born in 1996 and 2001. The judgment granted mother sole physical and legal custody of the children, with supervised parenting time for father on alternating weekends on either Saturday or Sunday from 1:00 – 4:00 p.m. But it provided that if father successfully completed specified conditions, including obtaining a psychological evaluation, he would be allowed unsupervised "parenting time Saturday 9:00 a.m. to Sunday 7:00 p.m."

In 2010, respondents, the children's paternal aunt and uncle, sought custody of the children as interested third parties, alleging that the children had been subjected to abuse by mother; that both parents had mental-health issues impairing their ability to provide the children with a safe home; and that the children would be subject to physical and emotional danger in their parents' custody. Both parents contested the petition. Father

also moved for sole legal and physical custody; mother requested that father be denied additional parenting time. After an initial hearing, the district court determined that respondents had met their burden to assert facts sufficient to demonstrate a prima facie case that they were interested third parties under Minn. Stat. § 257C.03, subd. 7(a)(1) (2010), based on affidavits alleging that mother had abandoned, neglected, or exhibited disregard for the children's well-being, so that they would be harmed by remaining in her care, and that the children's best interests would be served by placing the children in respondents' custody under Minn. Stat. § 257C.03, subd. 7(a)(2) (2010). The district court ordered an evidentiary hearing and subsequently ordered that respondents retain Kathleen Fischer, a clinical social worker, to conduct a custody evaluation.

At the hearing, the district court received Fischer's custody report and testimony. Fischer testified that K.H., the oldest child, had expressed a clear preference to live with respondents, based on K.H.'s reports of mother's frequent mood changes and punitive disciplinary measures. Fischer testified that K.H.'s therapist had also relayed concerns that mother had unduly restricted K.H. from consuming food and called K.H. derogatory names referring to her weight. Fischer reported that J.H., the younger child, appeared quiet, but reported that she did not feel safe with her mother. Fischer indicated that J.H.'s school nurse had expressed concerns regarding J.H.'s hygiene and observed mother yell at J.H. Fischer testified that mother had processing delays, and, although she was well-intentioned and had help from a therapist, a psychiatrist, a social worker, and a worker to assist with skill-building, she was unable to follow through on parenting recommendations and appeared to lack empathy and nurturing behavior with the children.

She testified that mother's interaction with K.H. appeared "[n]onexistent" and that mother failed to note on the custody evaluation J.H.'s asthma and bee-sting allergy. She testified that she did not interview father because he did not have physical or legal custody. Fischer testified that, in respondents' home, the children appeared relaxed. She gave her opinion that the children would be emotionally and possibly physically endangered by remaining in mother's home and that a change of legal and physical custody was in their best interests.

J.J., the children's 24-year-old cousin, testified that she had a close relationship with K.H. and that one evening, when K.H. asked her to visit and mother was not home, she found J.H. sleeping on the floor with a fever and no blanket. J.H. would not drink juice from the refrigerator because her mother had told her not to, and she would not drink juice that J.J. brought because she was afraid that her mother would find out. J.J. stayed at the house for about two hours, but mother did not come home during that period. J.J. also testified that on another occasion, when she took K.H. out to lunch because K.H. was hungry, mother indicated that she had given K.H. popcorn for breakfast, but K.H. chose not to eat all of it. J.J. testified that despite K.H.'s receiving all As, mother expressed a belief that K.H. was not intelligent enough to participate in sports while keeping up with her school work.

Mother testified that she has major depression and anxiety, as well as post-traumatic stress disorder, which can build up until she feels confused and angry. She testified that she had a physical altercation with K.H. in June 2010, which resulted in K.H. calling police. She testified that she attempts to follow professional advice in

dealing with her children and if one strategy does not work, she tries another. She testified that the children do well in school, that she has participated in school activities, and that she provides healthy food. She testified that she has attempted to educate the children about hygiene, but they sometimes decide not to take showers. Mother testified that she had two meetings with Fischer, who did not observe her with J.H. and only observed her with K.H. attempting to agree on activities. She testified that she loves her children and hopes they stay in her care because she tries to provide them with a safe home.

Mother's case manager in the Partnership for Family Success program testified that she has known mother for five years and has observed normal interaction between mother and the children. The case manager testified that she had no problem with mother's parenting skills and that the children appear physically and emotionally healthy. She stated that she accompanies mother shopping for food, to doctors' appointments, and to appointments with mother's attorney, which fall within the range of normal duties of a social worker.

Respondent aunt Kathleen Krause testified that she began seeing the children frequently in about 2006, after mother and father separated. She testified that she and her husband have two adult children and that, although a stroke left her with some problems with aphasia, that condition would not affect her ability to care for K.H. and J.H. She testified that she and her husband took the children on numerous family activities, including camping and shopping and trips to a grandson's baptism and to Fargo to celebrate that child's birthday. She testified that the children had no behavior issues in

their home and were learning household chores. But she said that K.H. exhibited "rocking" behavior when troubled or anxious, once texted Krause that she wanted to "get out," and at one point when telling Krause about her situation was "shaking violently and crying." Krause testified that advanced-placement classes and appropriate activities for the children's interests were available in the Willmar schools, where respondents lived. Respondent uncle Gregory Krause testified that he requested custody because maintaining the children's current situation would impair their emotional development and that his wife's condition would not affect her ability to care for the children.

The district court granted the petition, determining that respondents had proved by a preponderance of the evidence that it was in the children's best interests to be placed in their custody under Minn. Stat. § 257C.03, subd. 7(a)(2). The district court evaluated the best-interests factors and concluded that eight of those factors weighed in favor of granting custody to petitioners, three factors were neutral, and one factor, that of the children's primary caretaker, weighed in favor of mother retaining custody. The district court also determined that the additional applicable factor of the petitioners' involvement with the children over their lifetime, under Minn. Stat. § 257C.03, subd. 7(b), showed that petitioners had been very involved in the children's lives. The district court rejected mother's request for joint legal custody, concluding that joint legal custody would be inappropriate because the parties had not demonstrated an ability to cooperate. The district court granted mother parenting time the first weekend of every month, three nonconsecutive weeks of summer parenting time, and additional specified holidays. The district court found that father's parenting time remained unchanged since the August

2010 order and interpreted that order as granting father parenting time on alternating weekends from 9:00 a.m. Saturday to 7:00 p.m. Sunday. We address mother's and father's consolidated appeals.

D E C I S I O N

I

Father argues that respondents lacked standing as third parties to petition for custody of the children. Establishing custody as an interested third party under Minn. Stat. § 257C.03 (2010) involves a two-stage process. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 569 (Minn. 2006). First, the party commencing a third-party custody proceeding must submit a valid petition and supporting affidavits which, if taken as true, satisfy the criteria of Minn. Stat. § 257C.03, subd. 7(a). *Id.* If this requirement is satisfied, the party seeking custody is entitled to an evidentiary hearing and must "prove by a preponderance of the evidence that it is in the best interests of the child to be in the custody of the interested third party" and "show by clear and convincing evidence" one of the three child-endangerment factors. Minn. Stat. § 257C.03, subd. 7(a)(1), (2). Whether a party has standing to sue presents a question of law, which we review de novo. *Longrie v. Luthen*, 662 N.W.2d 150, 153 (Minn. App. 2003), *review denied* (Minn. Aug. 19, 2003).

Father alleges that respondents failed to establish standing to seek custody because, although the petition alleged that the children resided in Minnesota, it did not specifically allege "the length of time each child has resided with the petitioner[s]." *See* Minn. Stat. § 257C.03, subd. 2(a)(8) (stating requirement in petitions filed under Minn. Stat. §§ 257C.01-.08 (2010)). The district court concluded that respondents satisfied the

requirement of submitting a petition alleging facts which, if true, would meet the criteria of Minn. Stat. § 257C.03, subd. 7(a). Therefore, the district court ordered an evidentiary hearing.

To address father's argument, we examine the plain language of the statutory provision, "draw[ing] from [its] full-act context." *Occhino v. Grover*, 640 N.W.2d 357, 359 (Minn. App. 2002), *review denied* (Minn. May 28, 2002); *see* Minn. Stat. § 645.16 (setting forth plain-meaning rule). Chapter 257C relates to child-custody matters involving either de facto custodians or interested third parties. *See* Minn. Stat. § 257C.01 (stating scope of chapter 257C as applying to de facto custodians and interested third parties). A de facto custodian means a person who has been the primary caretaker of a child who has "resided with the individual without a parent present and with a lack of demonstrated consistent participation by a parent" for certain defined periods of time. *Id*., subd. 2. On the other hand, an interested third party is defined as a person who can prove the existence of a child-endangerment factor listed in Minn. Stat. § 257C.03, subd. 7(a), with no reference stated to the child's residence with that person. *Id*., subd. 3(a).

Viewing the requirements of a custody petition under chapter 257C as a whole, we conclude that the required allegation of "the length of time each child has resided with the petitioner[s]" relates to a petition filed by persons as de facto custodians, who must already have cared for the child in their home. *See id*., subd. 2. That requirement, however, does not apply to persons such as respondents, who are seeking custody as

third-party custodians and need not establish that the child has resided with them. *See id*., subd. 3.

This interpretation is also consistent with our decision in *Kayachith*. In that case, we stated that

> the portions of Chapter 257C applicable to cases involving "interested third parties" require a petition for custody to detail the *existing* relationship between the petitioner and the child, and contemplate both that the petitioner-child relationship may have existed for the entirety of the child's life, and that the child's siblings, as well as the child him or herself, *may* be living with the petitioner.

In re Kayachith, 683 N.W.2d 325, 327 (Minn. App. 2004) (emphasis added), *review denied* (Minn. Sept. 29, 2004). Our analysis in *Kayachith* reflects the statutory directive that, under Minn. Stat. § 257C.03, a district court must consider "'the amount of involvement the interested third party had with the child during the parent's absence or during the child's lifetime.'" *Id.* (quoting Minn. Stat. § 257C.03, subd. 7(b)(1) (2002)). But as we indicated, consideration of a third-party custody petition contemplates that a child "may" live with the petitioner but does not require that the child in fact have lived with or be living with the petitioner. *Id*. We therefore reject father's argument and conclude that it was not necessary for the petition to allege, nor for the district court to find, that the children resided with respondents in order for them to seek custody as interested third parties.

Mother and father also argue that the district court erred by ordering an evidentiary hearing on custody because respondents' time spent with the children was insufficient to establish a substantial relationship. But the district court properly

considered Kathleen Krause's affidavit, which alleged that over the last two years, the children had spent at least a month in the summers with respondents, as well as school breaks and family trips. The district court did not err by ruling that the facts in the petition were sufficient to satisfy the requirements for a petition under Minn. Stat. § 257C.03, subd. 7(a)(1), (2). Therefore, the district court did not err in holding an evidentiary hearing on custody.

II

Father argues that the district court's order substantially modified his parenting time and amounted to a parenting-time restriction, which required an evidentiary hearing on the issue of reduced parenting time. A district court may modify an order regarding parenting time if modification would serve the child's best interests, but it may not restrict parenting time without a determination that parenting time is likely to endanger the child's health or impair the child's emotional development. Minn. Stat. § 518.175, subd. 5(1) (2010); *cf.* Minn. Stat. § 257C.05-.06 (2010) (applying standards of chapter 518 to district court's third-party custody orders). If modification results in a substantial change in parenting time, the district court must conduct an evidentiary hearing. *See Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002) (remanding for an evidentiary hearing where modification reduced parenting time by one-half of that in prior order).

The district court "has the power to implement or enforce the provisions of a judgment and decree so long as the parties' substantive rights are not changed." *Kornberg v. Kornberg*, 542 N.W.2d 379, 388 (Minn. 1996). The dissolution judgment

provided that father have supervised parenting time on alternating weekends on either Saturday or Sunday from 1:00 – 4:00 p.m., but if he successfully completed specified conditions, he would be granted unsupervised "parenting time Saturday 9:00 a.m. to Sunday 7:00 p.m." The district court interpreted that provision of the judgment as allowing father, once conditions are met, to have parenting time from Saturday 9:00 a.m. to Sunday 7:00 p.m. on *alternate* weekends, not on *every* weekend. We conclude that the district court's order does not amount to a substantial modification of father's parenting time and reasonably interprets the parties' dissolution judgment. *Id*.

Father also argues that granting parenting time to mother the first weekend of every month restricts his parenting time. But under the district court's order, father may still have parenting time two weekends per month. Because the district court's order does not restrict father's parenting time, no further evidentiary hearing is required on that issue.

III

Mother challenges the district court's grant of custody to respondents, arguing that endangerment was not established, that the best-interests factors did not support the award, and that the custody evaluator was biased against her. We review custody determinations for an abuse of discretion. *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002). A district court abuses its discretion in custody matters by making findings unsupported by the evidence or improperly applying the law. *Id.*

Endangerment

At an evidentiary hearing, parties petitioning for custody as third-party petitioners must show by clear and convincing evidence one of three child-endangerment factors. Minn. Stat. § 257C.03, subd. 7(a)(1). One of those factors is that "placement of the child with that [party] takes priority over preserving the day-to-day parent-child relationship because of the presence of physical or emotional danger to the child." *Id.*, subd. 7(a)(1)(ii). The district court found that the requirements of this subsection were met based on Fischer's report, as well as additional testimony relating to mother's treatment of the children while in her care.

Mother challenges this finding, arguing that she does not overly control the children's food, that she has attempted to ensure proper hygiene, and that her mental-health issues do not affect her parenting skills. This argument challenges the district court's determination that her evidence on these points was not credible. But we defer to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). And here, the district court found that mother was emotionally abusive, based on evidence including: K.H.'s therapist's report to Fischer that mother called K.H. derogatory names relating to her weight; J.J.'s testimony about her visit when J.H. was asleep on the floor with a temperature and mother was not home; K.H.'s report to Fischer that mother was emotionally abusive and at times she and J.H. were locked out of the apartment and did not know where mother was; and J.H.'s school nurse's report to Fischer that J.H. was observed at school with a dirty jacket and oily hair. Based on this record, the district court's findings of fact relating to emotional endangerment are not

clearly erroneous, and the district court did not err by finding that clear and convincing evidence of endangerment exists.

Best interests

Proposed third-party custodians must also prove by a preponderance of the evidence that it is in the child's best interests to be in their custody. Minn. Stat. § 257C.03, subd. 7(a)(2). The district court addressed the 12 best-interests factors enumerated in Minn. Stat. § 257C.04, subd. 1 (2010), and determined that this standard had been met. Mother argues that the district court's findings on several best-interest factors are clearly erroneous, including those relating to the older child's reasonable preference; the intimacy of mother's relationship with the children; her emotional health; the permanency of the existing home as a family unit; and the length of time that the children have lived in a stable environment.

Mother claims that K.H. is of insufficient age to express a preference as to custody. "The choice of an older teenage child is an overwhelming consideration in determining the child's custody or in deciding whether he is endangered by preserving the custodial placement he opposes." *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991). Although there is no bright-line rule regarding the age at which the preference becomes an "overwhelming consideration," caselaw supports giving consideration to the preference of a 14-year-old. *See Jones v. Jones*, 242 Minn. 251, 264, 64 N.W.2d 508, 516 (1954) (noting that a 14- and a 15-year-old were not too young to exercise judgment with respect to custody and that their desires were entitled to consideration). The district

court did not err by giving consideration to K.H.'s preference and did not clearly err in its findings on that factor.

Mother additionally challenges the district court's findings relating to the intimacy of her relationship with the children. Mother maintains that her psychiatrist states she has empathy and that although she sometimes loses her temper, it does not affect her parenting skills. But the district court was entitled to credit Fischer's testimony and report relating to the intimacy of mother's relationship with the children, and we will not disturb the district court's findings on this factor.

Mother also contests the district court's finding that the factor of the parties' emotional health weighed in favor of respondents, arguing that the district court did not understand the role of her case managers and gave undue weight to their influence in her life. The district court credited Fischer's report and testimony that mother relied too heavily on her case manager for support and did not make most parenting decisions without professional input. The district court also found that the case manager's testimony that the children listened to their mother conflicted with Fischer's testimony that mother stated they did not listen to her. We defer to the district court's credibility determinations on this factor.

We agree with mother that the district court may have clearly erred in its determination of two of the best-interests factors: the permanency of the existing custodial home and the length of time the children have lived in a stable environment. Mother persuasively argues that the district court was unduly critical of the fact that she resided in a three-bedroom apartment whereas petitioners live in a large house on a lake.

She also points out that she has lived in the same location with both children since 2007 and that her possible need to relocate if her housing assistance is reduced is not relevant to assessing the stability of her custodial home. But even if these factors were weighed in favor of mother, they would be insufficient to disturb the district court's overall assessment of the best-interests factors. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored). We conclude that the district court did not clearly err by concluding that a preponderance of the evidence favored granting custody to respondents.

Bias of custody evaluator

Finally, mother argues that the district court improperly relied on Fischer's custody evaluation and testimony. In a contested-custody proceeding, the district court may order a custody evaluation, which must address the best-interests factors and include a detailed analysis of all information considered in each factor. Minn. Stat. § 518.167 (2010).

Mother maintains that Fischer was biased in favor of respondents because they hired her; that Fischer did not contact mother's mental-health professionals; and that Fischer did not observe mother with J.H., and only observed mother with K.H. for about three hours. But although Fischer testified as respondents' witness, she was subject to cross-examination, which afforded mother the opportunity to respond to any adverse findings or expose any bias in the evaluation. *Cf. Scheibe v. Scheibe*, 308 Minn. 449, 450, 241 N.W.2d 100, 100 (1976) (stating that party is entitled to a new hearing if custody decision is based in part upon a custody-evaluation report without an opportunity to cross-examine the author). Fischer's report addressed each of the statutory best-

interests factors. She interviewed the parties and reviewed information from mother's case manager, J.H.'s therapist, K.H.'s therapist, J.H.'s school nurse, and the children's school. Although she requested, but did not receive, information from mother's mental-health professionals, that information was not directly relevant to the determination of custody because the focus of the evaluation was the children's best interests. The district court properly credited Fischer's report and testimony and did not abuse its discretion by granting custody to respondents.

Affirmed.