STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1206

In Re the Matter of: D. E. B. and D. M. B.
Anne Marie Gale, et al., petitioners,
Respondents,

vs.

Rachel Marie Voight,
Appellant,

Andre Emanuelle Buford,
Respondent.

Filed March 30, 2010
Affirmed
Minge, Judge

Itasca County District Court
File No. 31-FA-08-2818

Sara Swanson, Swanson Law Office, P.C., Grand Rapids, Minnesota (for respondents, Anne and Joe Gale)

Ellen E. Tholen, Elen E. Tholen Law Office, Bovey, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

MINGE, Judge

In this custody dispute, appellant-mother argues that (1) Minn. Stat. § 257C.01, subd. 2(d)(3) (2008), precludes the respondent-petitioners from being de facto custodians

entitled to custody; (2) even if not so precluded, the district court erred in determining that respondents had met their burden of proof that they were de facto custodians; (3) the district court failed to find the grave and weighty reasons necessary to deny custody to her as the natural parent; and (4) the district court abused its discretion in excluding certain custody-related evidence and failing to adequately weigh other evidence in reaching its conclusions. We affirm.

FACTS

Appellant-mother Rachel Marie Voight and respondents Anne Marie and Joe Wesley Gale are disputing custody of two minor children: D.E.B. and D.M.B. D.E.B was born on September 11, 2005; D.M.B., on August 22, 2006. Respondents[1] are not related to the children but were chosen by appellant to adopt her children.

Respondents met appellant in 2006 when she used respondent Anne Gale's daycare service. D.E.B. was in Anne's daycare in March and April 2006. During this time, D.E.B. also stayed overnight with respondents on two or three occasions as a part of crisis-nursery-care services provided by respondents. In October and November 2006, after D.M.B.'s birth, both children were in respondents' daycare and also spent two nights with the Gales through crisis-nursery-care services.

Respondents are the parents of two children. In 2006, they decided that they wished to adopt more children, and Anne told appellant of respondents' interest. On

[1] The heading for this proceeding also identifies Andrew Emmanuelle Buford as a respondent. He is the children's father. He did not contest custody of the Gales and has not made an appearance in this appeal. The use of the term "respondents" in this opinion refers only to the Gales.

January 15, 2007, appellant asked respondents if they would adopt her two children. Respondents responded the same day that they were willing to do so. Appellant dropped off her two children with respondents the next day. D.E.B. was about 16 months old and D.M.B. was less than 5 months old at that time. Appellant agrees that her intent in dropping off her children was for respondents to adopt them.

The day after the children's arrival, respondents contacted an attorney to obtain advice about the adoption process and their authority to arrange medical care. To address the medical-care question, the adoption attorney provided respondents with a delegation-of-powers form for appellant's signature. Appellant signed the form on January 19, 2007.

Nothing happened regarding the adoption for several months. The children continued to reside with respondents and appellant occasionally visited them. Then, in July 2008, appellant refused to sign a consent to the adoption and told respondents that she had changed her mind. Respondents filed a petition for custody under Minn. Stat. ch. 257C (2006). The district court awarded respondents temporary custody. In January 2009, a five-day evidentiary hearing was held on respondents' custody petition. The district court determined that respondents were de facto custodians under Minn. Stat. § 257C.01, subd. 2 (2008) and awarded them sole physical and legal custody. This appeal followed.

D E C I S I O N

I.

The first issue is whether Minn. Stat. § 257C.01, subd. 2(d)(3) precludes respondents from being adjudged de facto custodians of the children. "Appellate review of custody determinations is generally limited to determining whether the district court abused its discretion." *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006). But appellate courts review issues of statutory interpretation de novo as questions of law. *Id.*

The statutory impediment that has been identified provides that a "'[d]e facto custodian' does not include an individual who has a child *placed* in the individual's care . . . for adoption *under chapter 259*." Minn. Stat. § 257C.01, subd. 2(d)(3) (emphasis added). It is clear that appellant placed the children in respondent's care for adoption. The question is whether this placement occurred "under chapter 259."

Chapter 259 deals with placement of a child for adoption and requires prior court approval. Minn. Stat. § 259.47, subd. 3(a) (2008). Prior to respondents' pending custody petition, there had not been any court proceeding for placement of the children with the respondents or anyone else. Thus, the parties did not follow or act pursuant to Minn. Stat. ch. 259 by invoking the judicial system to place the children with respondents. The placement was voluntary and informal. As a result, we conclude that the district court did not err in deciding that respondents are not excluded from being de facto custodians under Minn. Stat. § 257C.01, subd. 2(d)(3).

II.

The second issue is whether the district court clearly erred in concluding that respondents had met their burden of proving that they were de facto custodians. A district court's findings of fact are not disturbed on appeal unless they are clearly erroneous. Minn. R. Civ. P. 52.01. "That the record might support findings other than those made by the [district] court does not show that the court's findings are defective." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). When appellate courts determine whether a finding is clearly erroneous, they view the record in the light most favorable to the district court's findings. *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002). Appellate courts defer to the credibility determinations of a district court. *Vangsness*, 607 N.W.2d at 472.

The statutes provide that under chapter 257C, an individual other than a parent may file a petition seeking custody of a child under the procedure to establish that a person is a de facto custodian. Minn. Stat. §§ 257C.01, .03, subds. 1, 6 (2008). To be a de facto custodian, a petitioner must have been the primary caretaker of a child and the child must have resided with the petitioner "without a parent present and with a lack of demonstrated consistent participation by a parent" for at least six months out of the 24 months prior to filing the petition for custody. Minn. Stat. § 257C.01, subd. 2(a).

> '[L]ack of demonstrated consistent participation' by a parent means refusal or neglect to comply with the duties imposed upon the parent by the parent-child relationship, including, but not limited to, providing the child necessary food, clothing, shelter, health care, education, creating a nurturing and consistent relationship, and other care and control

> necessary for the child's physical, mental, or emotional health and development.

Id., subd. 2(c). To determine whether there has been a "lack of demonstrated consistent participation," courts must consider these six factors:

> (1) the intent of the parent or parents in placing the child with the de facto custodian;
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> (2) the amount of involvement the parent had with the child during the parent's absence;
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> (3) the facts and circumstances of the parent's absence;
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> (4) the parent's refusal to comply with conditions for retaining custody set forth in previous court orders;
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> (5) whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence; and
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> (6) whether a sibling of the child is already in the petitioner's care.

Minn. Stat. § 257C.03, subd. 6(b). The petitioner must prove that (1) all of the preceding conditions have been satisfied by clear and convincing evidence; and (2) it is in the child's best interest to be in the custody of the petitioners. *Id.*, subd. 6(a).

Here, it is undisputed that respondents have been the children's primary caretakers since appellant dropped them off on January 16, 2007. When the custody petition was filed in August 2008, the children had resided with respondents for 19 consecutive months. So, it is also undisputed that the children have lived with respondents for at least six out of the 24 months before the petition was filed.

At the outset, appellant claims that the district court erred in concluding that she refused or neglected to comply with her parental duties because "there were two properly

executed Delegations of Powers [under Minn. Stat. § 524.5-211 (2008)] and an agreement by the parties that the Respondents were to provide the day-to-day care and control of the . . . children." Put another way, she argues that by giving her children to people who could care for them better than she could at that point in time, she acted responsibly, carried out her parental duties rather than refusing or neglecting to perform those duties, and thus, did not show a lack of demonstrated consistent participation. We consider this argument as we review the first of the six factors.

The first factor is the intent of the parent in placing the children. As just noted, appellant equates finding someone to parent her children with parenting her children herself. Although in both settings the children are parented, appellant's role in each is significantly different. Only in the second setting is appellant parenting. Section 257C.01, subdivision 2(c) provides that the "duties imposed upon *the parent* by the parent-child relationship[] includ[e] . . . providing the child necessary food, clothing, shelter, health care, education, creating a nurturing and consistent relationship, and other care and control necessary for the child's physical, mental, or emotional health and development." (Emphasis added.) The relevant question is whether a person is acting as a parent under the statute when one is not providing the food, clothing, shelter, and so on. Absent some extenuating circumstance, finding prospective adoptees to undertake those functions and to nurture and love a child on an indefinite basis may constitute acting in the best interests of the child but does not constitute parenting. Based on this, the district court did not err in finding for respondents on the first factor.

The second factor is "the amount of involvement the parent had with the child during the parent's absence." Minn. Stat. § 257C.03, subd. 6(b)(2). The district court found that appellant had very little involvement with the children once they were in respondents' care and that despite residing in the area, appellant visited the children at intervals that ranged from two to six weeks. This finding is supported by the report of the guardian ad litem (GAL) and the testimony of the parties. The district court specifically found that appellant's contrary testimony was not credible because she provided inconsistent answers under oath. We conclude that the district court did not clearly err in determining that appellant has had little involvement with the children after dropping them off on January 16, 2007.

The third factor is "the facts and circumstances of the parent's absence." *Id.*, subd. 6(b)(3). Under this factor, the district court found that (1) appellant intended to permanently give her children up for adoption; (2) she provided only nominal financial support; (3) she failed "to support the physical, mental or emotional health and development of the children"; and (4) she failed to create a nurturing relationship necessary for child development. Appellant concedes the first finding. As for the second finding, appellant only testified to minimal financial contribution over 19 months: $175, seven to eight pieces of clothing for each child, and milk and other food on one occasion. The last two findings are also implicitly supported by appellant's admission that she has not been able to be around her children enough to benefit them.[2] Respondents have been

[2] The record suggests that several of appellant's problems, including crime, drugs, and frequent moves, have also hindered her ability to address the needs of her children.

the undisputed caretakers of the children. The GAL's report directly supports these findings; it concludes that the children do not look to appellant for affection, guidance, or stability. We conclude the findings of the district court under the third factor are not clearly erroneous.

Because there are no claims of prior court orders regarding custody, domestic violence, or sibling placement, the last three factors are not applicable to this case.

We note that appellant argues that the district court's findings are deficient because they disregarded the testimony of certain witnesses. This five-day evidentiary hearing generated over 1,000 pages of transcript and involved 17 different witnesses. The fact that the district court did not name and summarize the testimony of every witness in its findings is not error. Moreover, because the district court is responsible for finding the facts and determining credibility, there will invariably be instances where it credits the testimony of some witnesses over others and finds and states the facts as what those witnesses testified, thus avoiding the need to refer to other witnesses. Many of appellant's favored witnesses disagreed with the GAL. The district court explicitly stated that it credited the GAL. We defer to this credibility determination. This deference extends to the district court's acceptance of the testimony of respondent Anne Gale despite appellant's claims that her testimony was inconsistent. Appellant also argues that the GAL did not spend enough time observing the children interact with each party. However, the GAL did have personal observations on which she could base her testimony and conclusions. Appellant also argues that there was no evidence of medical neglect while the children were in her care. This is irrelevant because the district court

did not base its decision on—or even mention—medical neglect of the children during the limited time they were in appellant's care.

In sum, viewing the record in the light most favorable to the district court's findings, we conclude that the findings are not clearly erroneous.

III.

The third issue raised by appellant is whether the district court erred by failing to expressly apply the presumption in favor of a biological parent. In child-custody disputes between parents and nonparents, Minnesota courts presume that the natural parent is entitled to custody. *N.A.K.*, 649 N.W.2d at 174 (citation omitted).[3] This presumption has been applied numerous times within our case law. *See, e.g.*, *id.*; *Wallin v. Wallin*, 290 Minn. 261, 264-65, 187 N.W.2d 627, 629-30 (1971); *Durkin v. Hinich*, 442 N.W.2d 148, 153 (Minn. 1989).

The judicial presumption in favor of the natural parent has been described as follows:

> The natural parent is entitled, as a matter of law, to custody of a minor child unless "there has been established on the [parent's] part neglect, abandonment, incapacity, moral delinquency, instability of character or inability to furnish the child with needed care, . . . or unless it has been established that such custody otherwise would not be in the best interest of the child." *Wallin*, 290 Minn. at 266, 187 N.W.2d at 630. Although the presumption favors [the natural parent], it may

[3] This judicially imposed presumption is said to be rooted in the fundamental rights of parents to make decisions regarding the care, custody, and control of their children, *N.A.K.*, 649 N.W.2d 166, 178 (Gilbert, J., concurring in part and dissenting in part), along with the policy maxim that children are best served in the custody of natural parents. *In re Welfare of A.R.W.*, 268 N.W.2d 414, 417 (Minn. 1978).

> be overturned if there are "grave and weighty reasons to separate a child from his or her natural parents." *Id.*
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> . . . [T]he essential question to be answered by the court is whether extraordinary circumstances of a grave and weighty nature exist to support the grant of permanent custody to a third party and not to a [natural] parent . . . .

N.A.K., 649 N.W.2d at 174-76 (quoting *Durkin*, 442 N.W.2d at 152-53). "Grave and weighty" reasons capable of overcoming the presumption have included parental unfitness, abandonment, or "special needs of the child that dictate conferring custody on individuals most able to care for the child." *Id.* at 174, 176. Earlier caselaw has not required district courts to expressly use the words "grave and weighty reasons." *Id.* at 177. The burden to disprove the parental presumption is on the party challenging it (i.e., the nonparent). *Id.* at 174.

Appellant argues that the district court erred by awarding custody to respondents without finding "clear and convincing evidence of grave and weighty reasons to do so." Chapter 257C, which deals with custody sought by a nonparent, was enacted after the supreme court's decision in *N.A.K.*[4] Appellant points out that chapter 257C incorporates

[4] In an opinion issued after the enactment of chapter 257C addressing a custody dispute between the father and the children's maternal aunt, the *only* reference to *N.A.K.* made by the supreme court was: "Appellate review of custody determinations is generally limited to determining whether the district court has abused its discretion. *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002)." *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006). The court in *Lewis-Miller* analyzed the issue under the statutory provisions of chapter 257C without even mentioning the parental presumption. *Id.* at 568-70. Thus, the parental presumption that had such a high profile in *N.A.K.* was conspicuously missing from the supreme court's post-257C *Lewis-Miller* opinion, and was missing despite the fact that the *Lewis-Miller* opinion otherwise cited *N.A.K.*

the presumption in *N.A.K.* and that there is a conceptual similarity between the phrase "grave and weighty reasons" which our court decisions state is the threshold needed to rebut the parental presumption and the requirement of chapter 257C that a de facto custodian show the parent's "lack of demonstrated consistent participation" in the child's life by clear and convincing evidence. *See* Minn. Stat. §§ 257C.01, subd. 2(a) (requiring a person alleging de facto custodian status to show the parent's "lack of demonstrated consistent participation" in the child's life); .03, subd. 6(a)(1) (requiring showing required by Minn. Stat. § 257C.01, subd. 2(a) to be by clear and convincing evidence). We conclude that section 257C.01 functionally codifies the parental presumption and that the district court implicitly applied the parental presumption by finding that the strictures of chapter 257C had been met.

IV.

The fourth issue raised by appellant is whether the district court abused its discretion in not admitting exhibit 26 or allowing a certain witness to testify. Respondents argue that the exhibit was not part of the record and ask this court to strike the exhibit and portions of appellant's brief that refer to it and to impose sanctions.

Appellate courts affirm evidentiary rulings unless the district court clearly and prejudicially abuses its discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Irrelevant evidence is not admissible. Minn. R. Evid. 402.

Exhibit 26 contained, among other things, sexually explicit pictures of respondent Anne Gale and others unrelated to this litigation. The witness offered was a county human services employee who could testify regarding the investigation into the Gale's

daycare license. During cross-examination of Anne Gale, appellant's attorney attempted to offer exhibit 26 into evidence for impeachment purposes. The district court declined to receive the exhibit because (1) the substance of the impeachment effort is of record and was admitted by respondent Anne Gale as a witness; (2) testimony established that the pictures in and activities raised by the exhibit had nothing to do with any children; and (3) the activity represented by the pictures and the exhibit had ended before the children whose custody is at issue came under respondents' care. The district court further determined that the implications arising out of the impeachment effort were not material to its decision because the representative of Itasca County Health and Human Services (ICHHS) testified that ICHHS had conducted an evaluation of respondents and the complained-of activities, had found no evidence of abuse or neglect of any children, and decided not to take any action to limit respondents' daycare licensure. Based on the offer of proof, the district court determined that the witness's testimony was not relevant because it would be repetitious of other testimony that the investigation of the Gales by ICHHS found no evidence of abuse or neglect of children. Appellant did not and on appeal does not challenge any of these findings or determinations.

The ultimate issue in the case is which party should be awarded custody. Section 257C.04, which governs the best-interests analysis, provides in subdivision 1(g) that "[t]he court must not consider conduct of a proposed custodian that does not affect the custodian's relationship to the child."[5] As presented by appellant, the excluded evidence

[5] The best-interests analysis is the point in a custody proceeding under the de-facto-custodian procedure where the characteristics of the proposed custodian are evaluated,

and testimony did not relate to the fitness of respondents as parents. Based on the record and the verbal offer of proof, we conclude that the district court did not abuse its discretion by declining to admit exhibit 26 or the witness's testimony.

Appellant attached exhibit 26 to her brief before this court. Although appellant's offer of proof preserved the evidentiary issue regarding the exhibit for appeal, the exhibit was not filed as part of that offer and is not part of that court file. Because exhibit 26 was not received into evidence and is not part of the court file, it is not part of the record on appeal. Minn. R. Civ. App. P. 110.01. Furthermore, appellant did not seek to make this exhibit part of the record on appeal by taking the appropriate steps set forth in Minn. R. Civ. App. P. 110.05. Because the exhibit is not part of the record, we strike the exhibit from her brief and instruct the clerk of appellate courts to delete the proposed exhibit 26 and accompanying internet material from the briefs on file. However, we decline to award sanctions because respondents have not filed a motion seeking sanctions as required by Minn. R. Civ. App. P. 127.

V.

The final issue raised by motion by respondents is whether two district court orders should be considered on appeal. One court order denied appellant money to obtain a transcript of respondent Anne Gale's testimony. The other court order confirmed that appellant has monthly visits with the children. These court orders are listed as part of the

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rather than the characteristics of the natural parent. Minn. Stat. §§ 257C.01, subd. 2, .03, subd. 6, .04.

case file in the receipt of items sent from the district court to this court for this appeal. Because the district court file includes these orders, they are part of the record on appeal. Minn. R. Civ. App. P. 110.01. Accordingly, the respondents' motion to strike and for sanctions relating to these orders is denied.

Affirmed.

Dated: