STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0990

In Re the Custody of: N.S.V., L.J.V., E.T.V.,
Terri Ann Bischoff,
Appellant,

vs.

Linda J. Vetter,
Respondent.

Filed September 16, 2019
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-FA-16-478

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Considered and decided by Halbrooks, Presiding Judge; Hooten, Judge; and Klaphake, Judge.*

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

HALBROOKS, Judge

Appellant challenges the denial of her petition to be adjudicated the parent of three minor children under the Minnesota Parentage Act, Minn. Stat. §§ 257.51-.74 (2018), arguing that the district court erred in determining that no presumption of parentage applies to her, that the parentage act is unconstitutional, and that the district court erred in denying her request to be granted third-party custody of the children. We affirm.

FACTS

Appellant Terri Ann Bischoff and respondent Linda J. Vetter were in a romantic relationship from approximately 2002 until 2010. Vetter became pregnant in October 2004, and gave birth to N.S.V. in June 2005. The parties lived in Madison, Wisconsin at the time and owned a bookstore where Bischoff worked. After Vetter returned to work following maternity leave, Bischoff brought N.S.V. with her to the bookstore during the day and cared for him there. This continued for approximately one year, at which time N.S.V. began attending daycare 2-3 times per week.

Shortly after N.S.V. was born, the parties decided that they wanted him to have a sibling. Vetter started the artificial-insemination process again and ultimately became pregnant with twin boys. The twins, L.J.V. and E.T.V., were born in September 2007. The

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

parties sent out a birth announcement that listed Vetter and Bischoff as the "proud parents." All three children were baptized into the Moravian Church, which Bischoff grew up attending, and have godparents from both sides of the parties' families. Each child also has family names from both sides incorporated into his name.

In September 2008, the parties sold the bookstore and moved to Champlin, Minnesota. In 2010, the parties ended their relationship. Following the parties' separation, the children lived with Vetter. By agreement of the parties, Bischoff paid Vetter $500 a month for what the parties characterized as child support. The parties also established an informal parenting-time schedule in which Bischoff had the children for one overnight per week and every other weekend. There was no agreement regarding holidays or vacation.

The child-support payments and parenting-time schedule were in place from the time the parties ended their relationship in 2010 until the spring of 2015. During that time, Bischoff continued to be listed as a parent contact on the children's medical and school records. In the spring of 2015, Vetter removed Bischoff's name from the children's records after discovering that Bischoff had begun a relationship with A.S. Vetter believed that A.S. had a concerning history of violent behavior and requested that Bischoff keep her away from the children.

In December 2015, Bischoff commenced this action to establish custody and parenting time. Bischoff requested that the district court adjudicate her as the "intended and legal parent" of the children, order that the parties share joint legal and physical custody of the children, and establish a parenting-time schedule. Vetter filed an answer denying many of the factual allegations in Bischoff's petition and moved to dismiss the petition for

failure to state a claim upon which relief can be granted. The district court denied the motion and ordered a custody and parenting-time evaluation.

Bischoff filed an amended petition to establish parentage, custody, and parenting time. The petition alleged that she qualified as a parent and had standing to pursue custody and parenting time under the parentage act because she had received the children into her home and held them out as her own. She asserted that if the district court determined that she did not have standing to bring a parentage action under the parentage act, then the act was unconstitutional. In the alternative, she argued that she was an interested third party entitled to custody and parenting time under Minn. Stat. § 257C.03, subd. 7 (2018), or that she was entitled to third-party visitation under Minn. Stat. § 257C.08, subd. 4 (2018).

Following a court trial, the parties submitted a six-page stipulated statement of facts. The district court issued an order denying Bischoff's request to be adjudicated the parent of the minor children, determining that the parentage act is constitutional, denying her request to be granted third-party custody of the children, and awarding her third-party visitation. This appeal follows.

D E C I S I O N

I.

Bischoff argues that the district court erred in determining that no presumption of parentage applies under the parentage act. The interpretation and application of statutes present questions of law and are reviewed de novo. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006). The goal of statutory interpretation is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2018). "When the language of a statute

is plain and unambiguous, it is assumed to manifest legislative intent and must be given effect." *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 210 (Minn. 2001). Words and phrases are construed according to their plain and ordinary meaning. *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001).

The parentage act defines the parent-child relationship and delineates how parentage may be established. The act defines the "parent and child relationship" as "the legal relationship existing between a child and the child's biological or adoptive parents" and provides that the relationship "includes the mother and child relationship and the father and child relationship." Minn. Stat. § 257.52. The act provides that "the biological mother may be established by proof of her having given birth to the child" or under another provision of the parentage act. Minn. Stat. § 257.54(a). A woman alleging herself to be the mother of a child may bring an action to declare the mother and child relationship under Minn. Stat. § 257.71, which provides that "[i]nsofar as practicable, the provisions of [the parentage act] applicable to the father and child relationship apply." Minn. Stat. § 257.55 establishes when a presumption of paternity may be applied. Relevant to this action, the statute provides that "[a] man is presumed to be the biological father of a child if . . . while the child is under the age of majority, he receives the child into his home and openly holds out the child as his biological child." Minn. Stat. § 257.55, subd. 1(d). The presumption is rebuttable by clear and convincing evidence. *Id.*, subd. 2.

Bischoff argues that the district court erred in determining that the holding-out presumption does not apply to her and create a presumption of parentage. She argues that because the provisions of the parentage act that apply to the father and child relationship

apply to the mother and child relationship, the holding-out provision applies to her because she welcomed the children into her home and held them out as her own. The district court acknowledged, and the record supports, that the children consider Bischoff to be one of their parents and that she considers them to be her sons. But it went on to determine that it is undisputed that Bischoff is not the biological parent of the children and never adopted the children and therefore does not have a parent-child relationship within the meaning of the statute because it defines the parent-child relationship as "the legal relationship existing between a child and the child's biological or adoptive parents." Minn. Stat. § 257.52.

Bischoff argues that the district court erred in determining that the holding-out presumption does not apply to her because she is not a biological parent of the children. She argues that the purpose of Minn. Stat. § 257.55, subd. 1(d), is to create a path to establish legal parentage independent of a biological or adoptive relationship. We disagree. This court has described the goal of the presumptions of paternity as to "create a functional set of rules that point to a likely father." *In re Welfare of C.M.G.*, 516 N.W.2d 555, 558 (Minn. App. 1994). We further noted that the act was adopted in an effort "to find the biological father and then to adjudicate that person the legal father." *Id.* at 560 n.8. This court urged the legislature to "remove these traces of the original lodestar of the parentage act—that is, biological." *Id.* But the legislature has not amended the parentage act to redefine the parent-child relationship to include a relationship other than a biological or adoptive one.

Additionally, Minn. Stat. § 257.55, subd. 1(d), applies only when a man receives a minor child into his home and "holds out the child as his *biological* child." (Emphasis

added.) This reinforces this court's observation that the parentage act and presumptions of paternity were adopted in an effort "to find the biological father." *Id.* Finally, we note that the presumption is rebuttable by clear and convincing evidence. Minn. Stat. § 257.55, subd. 2.

Bischoff has never asserted that she is a biological parent of the children and indeed stipulated that she is not. The provision of the parentage act that applies to the father and child relationship applies to the mother and child relationship only "[i]nsofar as practicable." Here it is not practicable to apply a rebuttable presumption that Bischoff is a biological parent of the children when she has never claimed to be and has stipulated that she is not. On this record, we conclude that the district court did not err in determining that the holding-out presumption does not apply to Bischoff and that she cannot establish legal parentage under the parentage act.

II.

Bischoff argues that the district court erred in determining that the parentage act is constitutional. The constitutionality of a statute is a question of law that we review de novo. *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014). The supreme court has held that it exercises great caution in declaring statutes unconstitutional and will do so only when absolutely necessary. *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007). The supreme court will not declare an act unconstitutional unless the challenging party demonstrates that it is unconstitutional beyond a reasonable doubt. *Id.* Bischoff argues that the statute violates the Equal Protection Clause of the United States and Minnesota Constitutions because it discriminates against her based on her gender and marital status.

We apply intermediate scrutiny to gender-based claims and must determine if the statute serves an important government interest and is substantially related to serving that interest. *State ex rel. Forslund v. Bronson*, 305 N.W.2d 748, 750 (Minn. 1981). We first note that establishing the legal relationship between a parent and child serves an important government interest. As noted in the parentage act, the parent and child relationship is a legal relationship that imposes "rights, privileges, duties, and obligations." Minn. Stat. § 257.52. Establishing a process by which an individual can be declared the legal parent of a child ensures that those "rights, privileges, duties, and obligations" can be enforced, which protects the welfare of the child. *See Soohoo*, 731 N.W.2d at 822 (stating that the government has a compelling interest in protecting the general welfare of children); *see also Machacek v. Voss*, 361 N.W.2d 861, 864 (Minn. 1985) (stating that the government has an interest in avoiding large public expenditures by ensuring that children are being supported by their natural parents). Accordingly, the parentage act serves an important government interest.

We must next consider whether the parentage act is substantially related to serving the government's interest. We conclude that it is. The parentage act defines the parent and child relationship and creates a comprehensive set of procedures by which legal parentage may be established. The parentage act does include separate procedures by which the biological mother and biological father may be established. But this is because, in most cases, the biological mother is easily identified because she gave birth to the child. Minn. Stat. § 257.54(a). The biological father may not be as easily identified, which is why the presumptions were established to "create a functional set of rules that point to a likely

father" until a court can adjudicate him as such. *C.M.G.*, 516 N.W.2d at 558. And the provisions that apply to the father and child relationship apply to the mother and child relationship "[i]nsofar as practicable." Minn. Stat. § 257.71. Accordingly, the procedure established by the parentage act is substantially related to serving the government's interest because it creates a system by which those having a legal relationship with the child may be identified and declared the parent of the child, which allows for the enforcement of the legal duties and responsibilities imposed by the parent and child relationship.

Bischoff also argues that the parentage act is unconstitutional because it discriminates against her based on marital status. We apply a rational-basis test to classifications based on marital status. *State v. Benniefield*, 678 N.W.2d 42, 46 (Minn. 2004). The test requires that the classifications "must not be manifestly arbitrary or fanciful but must be genuine and substantial" and that there is a clear connection between the classifications and the purpose of the law. *Id.*

As discussed above, the state has an interest in defining the parent and child relationship and in imposing the obligations that go along with it. The goal of the presumptions of paternity in the parentage act is to identify a likely father and establish a process by which that individual can be adjudicated the parent. *C.M.G.*, 516 N.W.2d at 560 n.8. Accordingly, the goal of the presumptions of paternity is to assist the state in establishing the legal parent and child relationship. The parentage act includes certain presumptions of paternity that apply to married couples, including that a man is presumed to be the father if he is married to the biological mother of the child and the child is born within a certain time frame of the marriage. Minn. Stat. § 257.55, subd. 1(a)-(c). These

presumptions are not arbitrary or fanciful, but rather recognize that when a married woman gives birth to a child, it is reasonable to presume that her husband is the father of the child. And the parentage act includes additional presumptions that apply to unmarried persons. Minn. Stat. § 257.55, subd. 1(d)-(h). Accordingly, the parentage act does not discriminate based on marital status.

III.

Bischoff argues that she is entitled to third-party custody of the children because she qualifies as an interested third party under Minn. Stat. § 257C.03, subd 7. We review a district court's third-party custody determination for an abuse of discretion. *Lewis-Miller*, 710 N.W.2d at 568. A district court abuses its discretion "by making findings unsupported by the evidence or by improperly applying the law." *In re Custody of A.L.R.*, 830 N.W.2d 163, 166 (Minn. App. 2013) (quotation omitted). Minn. Stat. § 257C.03, subd. 7, establishes three ways in which an individual can demonstrate that they are an interested third party. The party must show that the custodial parent has "abandoned, neglected, or otherwise disregarded the child's well-being," that placement with the individual seeking custody "takes priority over preserving the day-to-day parent-child relationship" because of physical or emotional danger to the child, or "other extraordinary circumstances." Minn. Stat. § 257C.03, subd. 7(a)(1). In addition, the party 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." Minn. Stat. § 257C.03, subd. 7(a)(2).

Bischoff argues that she is entitled to third-party custody because she has established "other extraordinary circumstances." She argues that "extraordinary

circumstances" exist because she has a substantial and deeply bonded relationship with the children. The district court acknowledged that Bischoff and the children have a strong emotional connection and that the children view Bischoff as one of their parents, but determined that such circumstances did not meet the definition of "extraordinary circumstances" established by this court. This court has previously interpreted the phrase "extraordinary circumstances" in the context of Minn. Stat. § 257C.03, subd. 7(a)(1)(iii), and determined that it "refers to circumstances of a grave and weighty nature, which encompasses situations when a child has been abused or neglected, as well circumstances when the child has special needs." *A.L.R.*, 830 N.W.2d at 170.

The district court determined, based on the requirement that the "other extraordinary circumstances" must be of "a grave and weighty nature," that Bischoff could not establish that she is entitled to third-party custody of the children. Bischoff relies on *Soohoo* to support her argument that there can be finding of "extraordinary circumstances" without a finding of abuse or neglect. 731 N.W.2d at 815. But *Soohoo* addressed third-party visitation, not third-party custody. *Id.* at 818. In *Soohoo*, the parties were involved in a same-sex relationship for 22 years. *Id.* During the relationship, Johnson adopted two children. *Id.* Soohoo did not adopt either child, but the parties co-parented the children, considered themselves to be a family unit and held themselves out to others as such, and the children considered Soohoo to be one of their parents. *Id.* at 818-19. After the relationship ended, Soohoo petitioned for custody of the children as an interested third party. *Id.* at 819. The district court denied the petition for custody, but granted Soohoo third-party visitation under Minn. Stat. § 257C.08, subd. 4. *Id.* Soohoo did not appeal the

denial of her petition for custody, and thus the only issue on appeal was the award of third-party visitation. *Id.*

Here, the district court similarly denied Bischoff's petition for third-party custody but granted her petition for third-party visitation. And Bischoff's argument that she is entitled to third-party custody because she has established strong emotional ties with the children is more consistent with the criteria to establish third-party visitation under Minn. Stat. § 257C.08, subd. 4. That statute allows for a third party to be granted visitation when a minor child has resided with the party for at least two years, and the individual and the child have "established emotional ties creating a parent and child relationship." Minn. Stat. § 257C.08, subd. 4. To be awarded third-party custody, a party must show more than a strong emotional connection that creates a parent-child relationship; the party must show that the natural parent has abandoned or neglected the child, that the child is in physical or emotional danger, or "other extraordinary circumstances." Minn. Stat. § 257C.03, subd. 7(a)(1).

Our caselaw supports the district court's determination that Bischoff failed to establish "other extraordinary circumstances." As discussed above, this court determined in *A.L.R.* that "other extraordinary circumstances" are "those of a grave and weighty nature," such as "situations when a child has been abused or neglected, as well as circumstances when the child has special needs." 830 N.W.2d at 170. And in *Lewis-Miller*, the supreme court referred to the three factors listed in Minn. Stat. § 257C.03, subd. 7(a)(1), as the "child-endangerment factors" and noted that the district court is required to dismiss a petition for third-party custody "if the petitioner fails to establish an

endangerment factor." 710 N.W.2d at 568. Accordingly, the strong emotional ties between Bischoff and the children are insufficient to establish that Bischoff is an interested third party. There must be some showing of endangerment. On this record, the district court did not abuse its discretion in denying Bischoff's petition for third-party custody.

Affirmed.