STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0067

James Vernon Larsen, et al.,
Appellants,

vs.

Heather Cross, et al.,
Respondents.

Filed October 28, 2019
Affirmed
Rodenberg, Judge

Hennepin County District Court
File No. 27-FA-18-4034

Justin P. Weinberg, Scott M. Flaherty, Briggs and Morgan, P.A., Minneapolis, Minnesota; and

Mary Pat Byrn, Viitala Law Office PC, Minneapolis, Minnesota (for appellants)

Zachary P. Marsh, Marsh PLLC, Minneapolis, Minnesota (for respondents)

Considered and decided by Rodenberg, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

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

RODENBERG, Judge

In their appeal from the district court's order dismissing their petition for third-party custody and their alternative request for grandparent visitation, appellants argue that the district court erred in dismissing their petition for third-party custody because of the res

judicata effect of an earlier dismissal of a similar petition. They also argue that the district court abused its discretion in finding they lacked standing under the third-party custody statute and misapplied the grandparent-visitation statute. We affirm.

FACTS

J.K.C. is the minor son of respondent-mother, Heather Cross, and respondent-father, Darcy Cross. Appellant-grandfather, James Larsen, is the father of respondent-mother. Appellant-step-grandmother, Therese Ross-Larsen, is the step-mother of respondent-mother. Respondents were married in March 2007 and respondent-father adopted J.K.C. in August 2009. Respondents have physical and legal custody of J.K.C. as his parents.

In October 2017, respondents took J.K.C. to The Bridge for Youth (The Bridge), a residential shelter, while waiting for space to open for J.K.C. at an inpatient substance-abuse treatment facility.

On November 8, 2017, appellants filed a petition for third-party custody of J.K.C. under Minn. Stat. § 257C.03 (2018). Appellants asserted standing as interested third parties, based primarily on J.K.C. having been placed at The Bridge. Appellants also alleged that respondent-father had previously abused J.K.C. The district court dismissed the petition without prejudice, determining that appellants did not have standing as interested third parties.

On June 13, 2018, appellants filed a second petition seeking third-party custody and, in the alternative, requesting grandparent visitation under Minn. Stat. § 257C.08, subd. 2 (2018). Appellants asserted standing as interested third parties entitled to third-party custody for substantially the same reasons recounted in their first petition, and they

included the additional allegation that they did not know where J.K.C. was living, whether he was receiving treatment, or whether he was institutionalized. Appellants' alternative request for grandparent visitation alleged that visitation was in J.K.C.'s best interest for the same reasons. Concerning third-party custody, the district court found that the second petition's allegations were identical to those of the first petition, and the second petition was therefore barred by res judicata. The district court also reasoned that, even if not barred by res judicata, appellants' second petition was unsupported by allegations of abandonment, neglect, or disregard of J.K.C's well-being as required to establish appellants as interested third parties under Minn. Stat. § 257C.03, subd. 7. Concerning grandparent visitation, the district court found that appellants lacked standing. It dismissed the petition.

This appeal followed.

D E C I S I O N

The district court erred in giving res judicata effect to the earlier dismissal of appellants' first petition.

Appellants argue that the district court erred in giving res judicata effect to the dismissal of their first petition for third-party custody, because that petition was dismissed without prejudice and there was no final judgment on the merits.

The question of whether the elements of res judicata are met is a question of law that is reviewed de novo. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). If the elements of res judicata are met, we review the district court's decision to apply the doctrine for abuse of discretion. *Dixon v. Depositors Ins. Co.*, 619 N.W.2d 752, 755 (Minn. App. 2000). Despite the strong policies supporting res judicata, courts will not apply the

doctrine rigidly, but will decline to apply the rule when its application contravenes an overriding public policy. *See AFSCME Council 96 v. Arrowhead Reg'l Corr. Bd.*, 356 N.W.2d 295, 299 (Minn. 1984). "[T]he availability and application of res judicata . . . in family matters is limited" but its underlying principles still apply. *Maschoff v. Leiding*, 696 N.W.2d 834, 838 (Minn. App. 2005).

A subsequent claim is barred by res judicata if: "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter." *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 220 (Minn. 2007) (quotation omitted). Res judicata is applied "in light of the facts of each individual case." *G.A.W., III v. D.M.W.*, 596 N.W.2d 284, 288 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999). All four elements must be met. *Hauschildt*, 686 N.W.2d at 840.

The district court erred in applying res judicata. The earlier petition did not result in a final judgment on the merits. The third element of res judicata was not present here.

Appellant's second petition also requested additional and different relief when compared to their earlier petition. The second petition also sought grandparent visitation. Moreover, the facts had changed since the first petition was filed. Notably, J.K.C. was no longer at The Bridge; he was at an inpatient treatment facility. And the allegations of abuse were even more remote at the time of the second filing than they had been at the time of the first petition.

Because appellants' second petition was not barred by res judicata, we turn to the district court's alternative conclusion that appellants are not interested third parties under section 257C.03, subd. 7.

The district court did not abuse its discretion in ruling that appellants failed to make even a preliminary showing that they are interested parties under the third-party custody statute.

Although the district court erred in its application of res judicata, we see no reversible error in the district court's dismissal of the second petition. The record supports the district court's determination that appellants' second petition fails to allege clear and convincing evidence satisfying any one of the three requirements to establish that appellants are interested third parties under the third-party custody statute.

Appellate courts review a district court's third-party custody determination for abuse of discretion. *In re Custody of A.L.R.*, 830 N.W.2d 163, 166 (Minn. App. 2013). A district court abuses its discretion "by making findings unsupported by the evidence or by improperly applying the law." *Id.* (quotation omitted). The findings of the district court will not be set aside unless they are clearly erroneous. *Id.*

Appellants petitioned for third-party custody under Minn. Stat. § 257C.03. The interested-third-party subdivision of the third-party-custody statute explains that a petitioner for third-party custody must show by clear and convincing evidence that one of the following factors exist:

> (i) the parent has abandoned, neglected, or otherwise exhibited disregard for the child's well-being to the extent that the child will be harmed by living with the parent;
>
> (ii) placement of the child with the individual takes priority over preserving the day-to-day parent-child

> relationship because of the presence of physical or emotional danger to the child, or both; or
>
> (iii) other extraordinary circumstances.

Minn. Stat. § 257C.03, subd. 7(a)(1)(i)-(iii). The district court determined that appellants' petition failed to make even a preliminary showing of clear and convincing evidence that any of the three requirements were present.[1] The record supports the district court's determination.

The district court has "discretion to dismiss a third-party custody petition without an evidentiary hearing if the petition and accompanying affidavits alleged facts which, if taken as true, would not be sufficient to satisfy the criteria" of the third-party custody statute. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 569 (Minn. 2006).

Appellants alleged that J.K.C. was "abandoned" when respondents "dropped him at The Bridge, an unlocked homeless shelter and left him there for several weeks." Appellants took issue with respondents' decision to take J.K.C. to The Bridge while looking for a placement for him at a chemical-dependency treatment facility. They alleged that J.K.C. "has only seen one medical provider related to his alleged substance abuse," and believed that "[t]he doctor did not diagnose J.K.C. with chemical dependency or recommend treatment for chemical dependency." The district court reasoned that "it appears Respondents were proactively attempting to obtain treatment for their child" when they placed J.K.C. at The Bridge, and that "placement at an in-patient facility does not

[1] The district court couched its determination in terms of a lack of "standing." The statute does not use that term. But as noted above, only an "interested third party" may petition for third-party custody, and the interested-third-party statute requires clear and convincing proof of one of the three enumerated factors.

establish that Respondents have abandoned, neglected or exhibited disregard for the child's well-being." The district court's reasoning appears sound. Appellants disagree with the placement, but beyond appellants' disagreement with the respondents' treatment decisions for their son, appellants allege no facts to support that respondents having arranged treatment for J.K.C. was inappropriate. Appellants allege that "only" one medical provider saw J.K.C. for substance abuse, but the record contains nothing to indicate that "only" one provider is insufficient or that this provider's advice was mistaken or unsound. To the contrary, the record amply confirms that J.K.C. needs—and is receiving—treatment. No expert opinion or other evidence is claimed to exist supporting appellants' allegations that J.K.C. would be harmed by the placement arranged by his parents. When the second petition was filed, J.K.C. was residing at an inpatient treatment facility. He was not in respondents' home and was no longer at The Bridge. And we agree with the district court that appellants' petition does not sufficiently allege any abandonment, neglect, or disregard.

Appellants also alleged that J.K.C. "will be harmed by living with [respondent-father] due to past physical and emotional abuse of J.K.C." Appellants alleged that this abuse took place in 2015. The district court considered the allegation of past abuse by respondent-father to be insufficiently detailed and conclusory to give appellants the status of interested third parties. Again, we agree. At the time of the second petition in June 2018, J.K.C. was not living at home and appellants did not even allege any current risk of abuse by respondent-father while J.K.C. is in his current placement.

Appellants also argued that this case "presents extraordinary circumstances as it is unclear where J.K.C. is currently living, what type of treatment he is receiving, or if he is currently institutionalized due only to the conflict" between J.K.C. and respondents. The district court determined that appellants, as J.K.C.'s grandparents, have no legal right to be informed of respondents' parental decisions for the care of their son. This determination is supported by both the record and the law. *See Troxel v. Granville*, 530 U.S. 57, 71, 120 S. Ct. 2054, 2063 (2000). No extraordinary circumstances appear here. It is respondents' right, as J.K.C.'s parents, to decide what information is released, to decide to whom information is released, and to make decisions about J.K.C.'s care. *Id.* While better extended-family communication than is present here might be ideal, there is simply nothing "extraordinary" about parents making placement decisions for a child without the consent of extended family.

No contested hearing was required here because appellants' pleadings do not allege facts sufficient to make them interested third parties under the third-party custody statute. We see no error in the district court's dismissal of the third-party-custody request.

The district court did not misapply the grandparent-visitation statute, and the record supports the district court's denial of grandparent visitation.

Appellants argue that the district court did not apply the plain language of the grandparent-visitation statute and instead engaged in a policy analysis of an unambiguous

statute.[2] Conversely, respondents argue that the district court made findings on the merits of appellants' request for grandparent visitation.

A district court has broad discretion to determine visitation issues. *Rohmiller v. Hart*, 799 N.W.2d 612, 615 (Minn. App. 2011), *aff'd*, 811 N.W.2d 585 (Minn. 2012). "When reviewing visitation determinations for an abuse of discretion, we must determine whether the court made findings unsupported by the evidence or improperly applied the law." *SooHoo v. Johnson*, 731 N.W.2d 815, 825 (Minn. 2007). The district court's findings will not be overturned unless they are clearly erroneous. *Id.* "A finding is clearly erroneous if we are left with the definite and firm conviction that the court made a mistake." *Id.*

The grandparent-visitation statute explains that the district court may grant visitation to a grandparent "if it finds that (1) visitation rights would be in the best interests of the child; and (2) such visitation would not interfere with the parent-child relationship." Minn. Stat. § 257C.08, subd. 2.

In dismissing appellants' second petition as it relates to grandparent visitation, the district court made findings based on the written record. The district court found that "even if [appellants] did have standing to bring a claim for grandparent visitation," the court would have to determine whether visitation would be in the best interests of J.K.C. and whether that visitation would interfere with the parent-child relationship.

[2] There is no argument on appeal concerning whether a step-grandparent has standing to seek grandparent visitation. We therefore address the grandparent-visitation issue assuming that J.K.C.'s step-grandmother is entitled to be treated just as if she were the child's grandmother.

Concerning interference with the parent-child relationship, the district court found that appellants took "actions which do interfere with the parent-child relationship." The record amply supports this finding. The district court explained that, by giving J.K.C. money and a cellphone while he was at The Bridge, appellants acted "contrary to the wishes of the child's parents" and that the actions were "carried out with questionable judgment considering the child was awaiting an opening in a substance abuse treatment facility." The district court also noted the "highly conflicted nature of the parties' relationship." The record supports that there exists a substantial amount of conflict between the parties to this appeal that would likely interfere with J.K.C.'s relationship with respondents if grandparent visitation were ordered. The record supports the district court's denial of appellants' grandparent-visitation request.

Affirmed.