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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1438**

Kenneth Hovland, et al.,
Respondents,

vs.

Ryan Richard Jazdzewski,
Appellant.

**Filed April 6, 2020
Reversed and remanded
Bratvold, Judge**

St. Louis County District Court
File No. 69DU-FA-19-462

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Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Bryan, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant-father challenges the district court's order granting respondent-maternal-grandparents' petition for third-party custody and awarding permanent physical and legal custody of his three minor children without an evidentiary hearing, which father contends violated his statutory and constitutional due-process rights. Minnesota law requires an

evidentiary hearing for interested third parties to obtain contested custody of a child. Because the district court granted permanent custody of the children to respondents over appellant's objection and without an evidentiary hearing, we reverse. And, because we resolve this appeal by relying on Minnesota law, we do not reach appellant's due-process argument.

FACTS

Appellant Ryan Richard Jazdzewski (father) and his wife, N.K., had three children together, born between 2011 and 2015 (the children). On June 2, 2019, father allegedly stabbed N.K. to death at their home while the children were present. Police arrested father the same day and took him into custody. On June 3, the state charged father with second-degree murder, beginning a criminal case that is still pending. *See State v. Ryan Richard Jazdzewski*, Court File No. 69DU-CR-19-1925.¹

The children were temporarily placed with their nonparty paternal grandparents. On June 5, 2019, the district court awarded respondents Kenneth and Deborah Hovland (maternal grandparents) temporary custody of the children under an emergency ex parte order for protection (OFP). *See In the Matter of Kenneth Alan Hovland on behalf of Minor Children vs. Ryan Richard Jazdzewski*, Court File No. 69DU-FA-19-460.²

¹ The district court in the criminal matter issued a domestic-abuse no-contact order (DANCO) that prohibited father from having contact with the children.

² After a hearing, the district court issued a two-year OFP on behalf of the children. Father's appeal from the OFP is pending, No. A19-1653.

On June 6, maternal grandparents filed a verified summons and petition (petition) for third-party custody of the children as well as an ex parte motion and affidavit. In the petition, maternal grandparents identified themselves as interested third parties and alleged that the children witnessed mother's murder and "likely witnessed other domestic abuse by father against the mother." The petition asked that grandmother and grandfather be awarded joint legal and joint physical custody of the children, and that the district court reserve a decision on father's parenting-time rights. Their affidavit in support of their motion for an ex parte order asserted that father was being held in jail, bail was set at \$750,000, and he "is not able to care for the children." The affidavit requested "that the court award [them] temporary joint legal and joint physical custody of the children" so they could "properly consent to [the children's] medical care and arrange for their education."

On the same date the petition was filed, the district court entered an ex parte order finding that it "is appropriate that the maternal grandparents be awarded temporary sole legal and sole physical custody of the children and that [father] have no contact with the children." The order also "set the matter for hearing" on June 17. On June 7, father was served with the summons and petition along with the ex parte motion and order.

On June 17, father and maternal grandparents attended the hearing; all parties had legal counsel. After summarizing the procedural history, maternal grandparents argued, "There has been no answer" to the petition, therefore, the "[p]etition and motion stand unopposed." Maternal grandparents asked the court "to grant a permanent Order awarding [her] clients legal and physical custody of these three children." Father stated that he "oppose[s] permanent placement" and "any kind of a default order because here he is."

Father also argued that he had not been convicted of any crime and that “this is [an] ex parte hearing” and “not a full custody hearing.” He asserted it would be legally inappropriate “to do any kind of a permanent placement order today.” Father added that he preferred custody going to his sister and brother-in-law.

Maternal grandparents stated that “[t]oday is a motion hearing on an Ex Parte order,” and they understood that the court “may not want to issue a permanent order today.” They added that “if we’re going to have an evidentiary hearing on custody, we will not waive any timelines.” Father asked to “set this for an evidentiary hearing.”

The district court then stated:

[Y]ou might say I can’t do this, but I’m going to do it. I’m going to grant sole permanent legal and physical custody to the [maternal grandparents]. They are the only Petitioners before the Court. [Father] is present. He is clearly not in a position to have custody.

As indicated by [maternal grandparents], there was no response. There was no Answer. The Court can look at this as being unopposed.

The district court also stated that “these children need stability and they need to be assured that they know where they’re going to be. They do not need to be in the middle of a custody fight.”

The day after the hearing, and 11 days after being served with the petition, father filed an answer to maternal grandparents’ petition. He denied allegations about his criminal case and denied that the children would be in danger while in his care. He stated that he did not have enough information to admit or deny allegations of domestic abuse; he

admitted that he is in jail. He asked that temporary legal and physical custody go to his sister and brother-in-law.

On July 16, 2019, the district court filed a written order granting the maternal grandparents “permanent joint legal and joint physical custody of the children” subject to father’s parenting time which was “reserved until further court order.” The district court found it had “only” maternal grandparents’ petition and “no other pending petition for custody.” The district court also stated that father had filed an answer after the hearing and requested placement of the children with his sister and brother-in-law, but no one had filed a competing petition for custody. In addressing maternal grandparents’ petition, the district court found that they had standing as interested third parties and that placement with father “is not feasible nor safe.” The district court also found that maternal grandparents were “in the best position to care for the children given the children’s particular needs.” And the district court found that awarding custody to maternal grandparents is in the best interests of the children, analyzing many statutory factors based on the affidavit submitted by maternal grandparents. This appeal follows.

D E C I S I O N

Father asserts that the trial court denied “his statutory rights under Minnesota Statutes [chapters] 257C and 518B by not setting an evidentiary hearing.” He contends that “[chapter] 257C contemplates evidentiary hearings for third party custody proceedings” and that the district court made erroneous findings of fact and conclusions of law in its July order because “there was no evidence before the trial court.”

We first consider a preliminary issue raised by maternal grandparents, who argue that father's brief is inadequate for this court's review. We then address father's arguments.

I. Father's brief is adequate for this court's review.

Maternal grandparents first assert that chapter 518B is irrelevant to this third-party custody proceeding. We agree. Chapter 518B, which contains the Domestic Abuse Act, is not at issue in this appeal. Maternal grandparents filed their petition under chapter 257C, which provides the applicable statutory framework for an interested third party seeking custody of a child. *See generally* Minn. Stat. § 257C.03 (2018).

Maternal grandparents also contend that father inadequately briefed his argument because he “fail[ed] to provide any reference to case law that may provide for an evidentiary hearing” or any other legal support for his position. But father cites relevant precedent discussing when a district court should hold an evidentiary hearing in response to a petition for third-party custody. *See Lewis-Miller v. Ross*, 710 N.W.2d 565, 569-70 (Minn. 2006). We conclude that father's brief is adequate because it is supported by argument and authority. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971) (declining to consider issue that is a “mere assertion” and “not supported by any argument or authorities”).

II. The district court erred by awarding permanent custody to maternal grandparents without conducting an evidentiary hearing.

Appellate courts generally review custody determinations for abuse of discretion. *Lewis-Miller*, 710 N.W.2d at 568. But father's argument focuses on whether an evidentiary hearing is required before a district court awards permanent custody over a parent's

objection to an interested third party who proceeds under chapter 257C. This issue asks us to address statutory requirements. “[T]he interpretation and construction of statutes are questions of law that this court reviews de novo.” *Id.*

We begin by observing that father does not challenge the district court’s decision to award ex parte temporary custody to maternal grandparents. Under section 257C.03, an interested third party may seek temporary custody as ex parte relief under subdivision five, and the district court “must be guided by the factors set forth in section 518.131,” which concerns temporary custody orders, among other things. After a district court awards ex parte temporary custody, the court must notify the parties of a hearing “at the earliest practicable date.” Minn. Stat. § 518.131, subd. 4 (2018). The Minnesota General Rules of Practice more specifically provide that “[i]f the relief obtained affects custody or parenting time, the court shall set the matter for hearing within 14 days of the date the emergency relief is granted.” Minn. Gen. R. Prac. 303.04(f). Next, “the court should hold a hearing upon notice to all parties before continuing or extending the relief.” *Id.*, 2012 advisory comm. cmt.

The district court granted ex parte temporary custody of the children to maternal grandparents on June 6 and scheduled the matter “for further hearing on June 17.” At the June 17 hearing, maternal grandparents orally requested permanent legal and physical custody of the children.³ During the hearing, father acknowledged that he had been served

³ It appears that this oral request was the first notice father had that maternal grandparents would ask for permanent custody at the June 17 hearing. The affidavit maternal grandparents filed in support of their emergency petition requested *temporary* custody of the children. While father does not argue that he lacked notice of maternal

with maternal grandparents' petition and had not yet filed an answer, but father objected to a permanent award. While the district court had authority to continue or extend its ex parte order awarding temporary custody to maternal grandparents under sections 257C.03, subd. 5 and 518.131, we are aware of no authority authorizing the district court to consider an oral request for permanent custody at a hearing previously set to review an ex parte award of temporary custody.

Even if we assume that the district court had authority to consider a permanent custody request by an interested third party who had petitioned under chapter 257C and received temporary custody on an ex parte basis, we must then consider father's argument that the district court erred in awarding permanent custody over his objection and without an evidentiary hearing.

A "third-party child custody proceeding may be brought by an individual other than a parent by filing a petition seeking custody." Minn. Stat. § 257C.03, subd. 1(a). The Minnesota Supreme Court has held that the "statutory scheme contemplates a two-stage process." *Lewis-Miller*, 710 N.W.2d at 569. In the first stage, a third-party petitioner must "state and allege" 15 listed conditions supported by "competent evidence" in a verified

grandparents' permanent custody request, we observe that under the statute, "Written notice of a hearing on a petition to establish de facto or third-party custody of a child must be given to" the parent of the child unless the parent's rights have been terminated or the parent cannot prove parentage. Minn. Stat. § 257C.03, subd. 3(a), (b). Neither of the exceptions to parental notice appear to apply here.

petition and affidavits.⁴ *Id.* at 658; Minn. Stat. § 257C.03, subd. 2(a), (b).⁵ In the second stage, “if the petition and affidavits alleged facts which, if proven, would satisfy the statutory criteria, the court would then schedule an evidentiary hearing.” *Lewis-Miller*, 710 N.W.2d at 569. District courts may grant a petition for third-party custody “without a hearing” in one circumstance: “if both parents consent by stipulation or agreement 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. 4(a); *see also Lewis-Miller*, 710 N.W.2d at 569 n.3.

A district court’s order awarding permanent custody to an interested third party without an evidentiary hearing on a disputed custody petition, thus, has no basis in chapter 257C or Minnesota caselaw. While maternal grandparents had submitted a petition and a supporting affidavit, this pleading and accompanying document only establish that

⁴ To establish status or standing as an interested third party, an individual must (1) “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 (2) “show by clear and convincing evidence” one of three child-endangerment factors. *Lewis-Miller*, 710 N.W.2d at 568 (citation omitted); Minn. Stat. § 257C.03, subd. 7(a)(1)-(2). The statute identifies 12 best-interest factors. Minn. Stat. § 257C.04, subd. 1(a)(1)-(12) (2018). There are three child-endangerment factors, including child abandonment or neglect, physical or emotional danger to the child, or “other extraordinary circumstances.” Minn. Stat. § 257C.03, subd. 7(a)(1)(i)-(iii). The district court also must consider additional factors, including “the amount of involvement the interested third party had with the child during the parent’s absence” and “the facts and circumstances of the parent’s absence.” *Id.*, subd. 7(b)(1), (4).

⁵ The supreme court has noted that, “[a]s a practical matter,” a district court may dismiss a third-party custody petition after the first stage without an evidentiary hearing if the support for the petition “would not be sufficient to satisfy” the statute. *Lewis-Miller*, 710 N.W.2d at 569.

maternal grandparents, at most, have alleged sufficient facts to proceed to the second stage, an evidentiary hearing. *See Lewis-Miller*, 710 N.W.2d at 569.

Still, maternal grandparents urge three reasons to affirm the district court's decision, first arguing that extraordinary circumstances supported a permanent custody order without further hearings. The district court determined that it "is compelled" to grant permanent custody "based on the exceptional circumstances of this case." But "extraordinary circumstances" are not an exception to the evidentiary-hearing requirement. *See generally Lewis-Miller*, 710 N.W.2d at 569; Minn. Stat. § 257C.03.

The district court's order granting permanent custody states that a custody award was "necessary" to provide the children with "additional services" and to facilitate "important decisions" for "their care and overall welfare." And the district court noted that the county attorney's office had said that "a child protection action will not be opened if custody of the children remains" with maternal grandparents. While these observations support extending the temporary custody award, neither observation directly supports skipping the second-stage evidentiary hearing. At oral argument, maternal grandparents' attorney conceded that nothing in the record explains why the district court granted permanent custody rather than continue a temporary custody award.

Second, maternal grandparents argue that there was no "competing petition" for the district court to consider, therefore, any error the district court made in granting permanent custody to maternal grandparents "was harmless error." We disagree. Neither *Lewis-Miller* nor chapter 257C suggest that a competing petition is required before an evidentiary

hearing must be held. *Lewis-Miller* explains that, because section 257C.03 requires the establishment of some elements “by clear and convincing evidence and other elements by a preponderance of the evidence,” it “clearly shows that the statute contemplates evidentiary hearings for third-party custody proceedings.” 710 N.W.2d at 569.

Third, maternal grandparents appear to argue that the district court could treat their petition as unopposed because father “did not say a single word after the court announced its[] decision” at the hearing. But father objected several times during the June 17 hearing. He did not need to do anything more to preserve his right to contest the permanent custody award. It is true that father appeared at the June 17 hearing without having answered the petition. But father had 20 days to serve an answer and he did so within 11 days. *See* Minn. R. Civ. P. 12.01 (providing 20 days to serve an answer to a summons);⁶ *see also* Minn. R. Gen. Prac. 301.01(a), (d) (providing that the rules of civil procedure apply to family-court actions in matters not addressed by the rules of general practice). The district court’s July 15 order awarding permanent custody acknowledged that father had filed his answer and objected to the permanent award.

We conclude that the district court abused its discretion in awarding permanent custody to maternal grandparents over father’s objection, and without an evidentiary hearing, thus, we reverse. Because we resolve father’s appeal by relying on Minnesota statute and caselaw, we decline to reach father’s constitutional due-process argument. The

⁶ We note that rule 12.01 was amended, effective January 1, 2020, to provide 21 days to serve an answer to a summons. Minn. R. Civ. P. 12.01; *see Order Promulgating Amendments to Rules of Civil Procedure*, No. ADM04-8001 (Minn. June 20, 2019).

propriety of the order granting temporary custody to the maternal grandparents has not been challenged and remains in full force and effect pending further proceedings in district court consistent with this opinion.

Reversed and remanded.