STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1378

In Re the Custody of:
S.K.T.S: Sharon D. Oglesby, petitioner,
Appellant,

vs.

Kristopher Lee Stubrud,
Respondent.

Filed August 9, 2021
Reversed and remanded
Bratvold, Judge

Washington County District Court
File No. 82-FA-20-3225

David K. Meier, Sjoberg & Tebelius, P.A., Woodbury, Minnesota (for appellant)

John M. Jerabek, Tuft, Lach, Jerabek & O'Connell, PLLC, Maplewood, Minnesota; and

Kathy K. Hart, Applehof, Pfeifer & Hart, Oakdale, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant-aunt filed a petition and, later, an amended petition for third-party custody of her eleven-year-old nephew. Without holding any hearing, the district court granted respondent-father's motion to dismiss both petitions. Aunt convinced the district

court to reconsider its dismissal, and, after a motion hearing, the district court again denied aunt's petition. Aunt appeals, arguing that the district court erred by (1) failing to hold any hearing on her original petition; (2) failing to expressly consider her amended petition; and (3) granting, without an evidentiary hearing, father's motion to dismiss.

Because the district court granted aunt's motion to reconsider and conducted a motion hearing at which it received the parties' arguments before, again, dismissing aunt's petition, we reject aunt's assertion that the district court erred by dismissing her petition without a motion hearing. But because aunt's amended petition presented a prima facie case for third-party custody under Minn. Stat. § 257C.03, subd. 7(a) (2020), we also conclude that the district court erred by failing to consider aunt's amended petition and by dismissing her petition without an evidentiary hearing. Thus, we reverse and remand for an evidentiary hearing. We express no opinion on the merits of aunt's petition.

FACTS

Mother and respondent Kristopher L. Stubrud (father) had one child, S.K.T.S., who was born in December 2008. Mother and father divorced in 2011 and shared joint legal custody of S.K.T.S. Mother received sole physical custody of S.K.T.S., and father had parenting time on alternating weekends.

In November 2016, the district court issued an order for protection (OFP) against father to protect S.K.T.S. and mother. The OFP provided parenting time to father, but stated that father had to exercise his parenting time by first contacting a parenting consultant, providing medical records confirming his abstinence from illegal drugs, and taking prescribed medications. In 2018, the district court extended the OFP. The order stated that

father had not complied with the previous OFP because he did not contact the parenting consultant, did not sign any medical releases, and did not provide verification that he was taking prescribed medications. The OFP also stated that father tried to contact mother through a social-media website and third persons.

Mother died unexpectedly in her Washington County home on June 7, 2020; S.K.T.S was home at the time. The next day, appellant Sharon D. Oglesby (aunt) brought S.K.T.S. to her home in Little Rock, Arkansas. In July 2020, the district court dismissed the OFP against father.

Aunt started legal proceedings for guardianship of S.K.T.S. in Arkansas, which were ultimately dismissed. On August 13, Aunt petitioned the Minnesota district court for third-party custody of S.K.T.S., and also filed an affidavit along with a request for an expedited hearing. Aunt returned to Minnesota with S.K.T.S. on August 17 and, in her affidavit, attested that she planned to enroll her nephew in a Minnesota school.

On August 20, 2020, father moved to dismiss aunt's petition under Minn. R. Civ. P. 12.02(e), among other grounds. The same day, aunt filed an amended petition. Also on the same day, the district court ordered aunt to immediately return S.K.T.S. to father. Aunt complied and returned S.K.T.S. to father's care on August 21. Father resides in Michigan.

On September 2, 2020, the district court, without conducting any hearing, granted father's motion to dismiss. The order did not refer to aunt's amended petition. Aunt filed a letter asking the district court to reconsider its decision, which the district court granted by scheduling a motion hearing on October 23, where it heard the parties' arguments. Before the hearing, the parties submitted additional affidavits. After the hearing, the district court

filed an order on October 29, 2020, denying aunt's request for an evidentiary hearing and granting father's motion to dismiss aunt's petition. Aunt appeals.

DECISION

I. The district court erred by dismissing aunt's third-party custody petition without an evidentiary hearing.

Chapter 257C (2020) governs requests for custody made by persons who are not a parent of the child. Aunt petitioned for third-party custody of S.K.T.S. as an "interested third party" under Minn. Stat. § 257C.03, subd. 7. A district court "must" dismiss a petition for third-party custody if it finds that, among, other things, the petitioner fails to establish "at least one of the factors" required for custody by an interested third party. Minn. Stat. § 257C.03, subd. 8(a)(2). Appellate courts review a district court's determinations regarding third-party custody for abuse of discretion. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006) (*Lewis-Miller II*).

Aunt contends that the district court erred by dismissing her petition for third-party custody without an evidentiary hearing. Father responds that the district court properly dismissed aunt's petition because she failed to establish a prima facie case for custody and failed to meet the requirements of Minn. Stat. § 257C.03. Aunt makes three arguments, which we consolidate into two arguments and address in turn.

A. No motion hearing before the first order for dismissal

Aunt argues that the district court "granted the *ex parte* motion and dismissed [her] Amended Petition, without allowing time for a response and without conducting a hearing." Father does not respond to this argument.

While the district court's September 2 order dismissed aunt's petition without any hearing, the district court later granted aunt's motion to reconsider that dismissal and conducted an October 23 motion hearing before issuing its October 29 order, again dismissing aunt's petition. Therefore, any error by the district court in issuing the September 2 order without any hearing is harmless, and we need not further address this issue. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

B. No evidentiary hearing even though aunt's petition presented a prima facie case for third-party custody

As a threshold matter, we address aunt's argument that the district court should have considered her amended petition. The district court does not mention aunt's amended petition in either of its orders. Aunt points to Minn. R. Civ. P. 15.01, which states, "A party may amend a pleading once *as a matter of course* at any time before a responsive pleading is served." (Emphasis added.) Aunt filed her amended petition after father filed his rule 12.02(e) motion to dismiss. A motion to dismiss under rule 12.02(e) is "not a 'responsive pleading' for purposes of rule 15.01." *Sharkey v. City of Shoreview*, 853 N.W.2d 832, 835 (Minn. App. 2014). Thus, father had not yet served a responsive pleading before aunt amended her petition, and the district court should have considered aunt's amended petition, along with the accompanying affidavits. This opinion will hereafter refer to aunt's original and amended petitions as "aunt's petition."

The district court's second order dismissing aunt's petition provides one reason for doing so: "As the sole living biological parent, [father] has sole legal custody and sole physical custody" of S.K.T.S. This was error for two reasons. First, the district court failed

to determine whether aunt's petition, along with her affidavits, stated a prima facie case for third-party custody, as required by chapter 257C and related caselaw, before it dismissed aunt's petition without an evidentiary hearing. Second, the district court appears to have rejected aunt's petition solely because she is not S.K.T.S.'s biological parent. We discuss each reason in turn.

1. The district court failed to determine whether aunt's petition and accompanying affidavits alleged a prima facie case for third-party custody.

A 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 Minn. Stat. § 257C.03, subd. 7(a)." *Lewis-Miller II*, 710 N.W.2d at 569. If, however, the petition and affidavits alleged facts which, if true, would satisfy the statutory criteria, an evidentiary hearing is required. *Id.* In short, a party petitioning for third-party custody must make a "prima facie showing" that she qualifies as an interested third party. *Lewis-Miller v. Ross*, 699 N.W.2d 9, 13 (Minn. App. 2005) (*Lewis-Miller I*), *aff'd*, *Lewis-Miller II,* 710 N.W.2d at 570.

The subdivision 7(a) criteria are mainly two-fold.[1] First, an interested third party must prove by a preponderance of the evidence that it is in the child's best interests to be in the custody of the interested third party. Minn. Stat. § 257C.03, subd. 7(a)(2). Second, an interested third party must establish one of the three "child-endangerment factors":

[1] Subdivision 7(a) requires that the interested third party has not been convicted of a crime listed in Minn. Stat. § 518.179 (2020) by clear and convincing evidence. *See* Minn. Stat. § 257C.03, subd. 7(a)(3). There is no allegation that aunt does not satisfy this third criteria.

> (i) [T]he 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.

Id., subd. 7(a)(1); *see also Lewis-Miller I,* 710 N.W.2d at 568; Minn. Stat. § 257C.01, subd. 3(a); Minn. Stat. § 257C.03, subd. 8(a)(2). It is because a petitioner must *prove* the existence of these conditions to prevail on a petition for third-party custody that a district court has discretion to dismiss a petition that fails to make a prima facie case for the existence of these conditions.

Because it requires an extended discussion, we start by considering whether aunt's petition and accompanying affidavits presented a prima facie case that the child would be endangered in father's custody. Aunt's petition alleged that (i) father abandoned S.K.T.S., (ii) father poses physical and emotional danger to S.K.T.S., and (iii) extraordinary circumstances exist. For abandonment, aunt attested that, since the 2016 OFP, father has not had any contact with S.K.T.S. or made any efforts to avail himself of parenting time, as permitted under the OFP. Aunt also attested that mother tried to facilitate father's relationship with S.K.T.S. by offering to pay his share of the parenting consultant's retainer

fee and costs. And aunt's affidavit averred that father never paid his required child support and, at the time of mother's death, was in arrears to mother in the amount of $26,059.48.[2]

Taking aunt's petition and affidavits as true, as we must at this stage of the proceedings, we conclude that she has made a prima facie case for abandonment by alleging that father had no contact with S.K.T.S. from 2016-2020. *See, e.g.*, *In re Welfare of Child of R.W.*, 678 N.W.2d 49, 55 (Minn. 2004) (stating, in a termination of parental rights appeal, that "[a]bandonment may be established . . . if the parent has actually deserted the child and has an intention to forsake the duties of parenthood") (quotation omitted); *In re Welfare of L.A.F.*, 554 N.W.2d 393, 398 (Minn. 1996) (stating, in a termination-of-parental-rights appeal, that abandonment was established where father failed to avail himself of rights to child, help with child-rearing expenses, or contact the child because absence was intentional rather "than due to misfortune and misconduct alone") (quotation omitted).

Aunt established one of three child-endangerment factors, therefore, we need not address the other two factors. *See* Minn. Stat. § 257C.01, subd. 3(a). But because it may assist the district court on remand, we also discuss whether aunt's petition stated a

[2] Because we need only determine whether aunt presented a prima facie case, we need not consider father's evidence disputing aunt's claims. We note, however, that father's affidavit stated that he moved to Michigan "because [his] efforts to reunite and spend time with [S.K.T.S.] were completely thwarted." He averred that aunt "and the rest of [S.K.T.S.'s] maternal family have united to keep [him] out of [S.K.T.S.'s] life." Aunt, in turn, disputed father's claims, noting that her amended petition requests parenting time for father because she believes it is important that S.K.T.S. have a relationship with his father. Aunt's amended petition also stated that, since S.K.T.S. has been living with father, aunt and her family have been unable to contact S.K.T.S. These factual disputes highlight the need for an evidentiary hearing in this case.

prima facie case for child endangerment based on her claim that father poses physical or emotional harm to S.K.T.S. if he remains in father's custody. *See J.E.B. v Danks*, 785 N.W.2d 741, 751 (Minn. 2010) (addressing certain matters "to provide guidance on remand"); *In re Estate of Vittorio,* 546 N.W.2d 751, 756 (Minn. App. 1996) (addressing a question "in the interest of judicial economy" "[b]ecause this issue will arise on remand").

Aunt's affidavit attested that on September 13, 2016, an OFP was issued to protect mother and S.K.T.S. from contact with father based on threats that he was "[g]onna take as many people out who put [father] in the position . . . a great cleansing . . . gonna kill the bad guys or die trying . . . ." A police investigation revealed that father asked his friend, who reported the threats to police, for a gun so he could kill his ex-wife, the judge, and the lawyer working on their custody dispute about S.K.T.S. Aunt's affidavit also attested that, during the time that S.K.T.S. lived with her, he reported daydreams about father "searching for him with the intent to kill him."

Aunt's affidavit stated that S.K.T.S. "was the victim of psychological and emotional trauma at the hands of his father." Aunt supported her affidavit with medical records, attached as exhibits to her affidavit, which state that S.K.T.S. "had been diagnosed with Generalized Anxiety Disorder and Posttraumatic Stress Disorder and that he was seeing a therapist" for issues related to death threats made by father against S.K.T.S. and mother. We therefore note that aunt has made a prima facie showing that father poses a physical or emotional danger to S.K.T.S., providing a second child-endangerment factor. *See* Minn. Stat. § 257C.03, subd. 7(a)(1)(ii).

Next, we consider whether aunt's petition made the required prima facie showing that "it is in the best interests of the child to be in the custody of the interested third party" under subdivision 7(a)(2). Aunt's affidavit stated, "I have a Master's De[g]ree as a clinical nurse and am working on my Doctorate. My Bachelor's degree is as a Registered Nurse." Also, aunt averred: "When I first became a Registered Nurse, I worked for 11 years for the Veteran's Hospital. During that time, I dealt with patients suffering from Post-Traumatic Stress Disorder, Depression and Anxiety on an almost daily basis. I believe this makes me uniquely qualified to care for SKTS." Based on the family history outlined in the OFPs, S.K.T.S.'s special needs, and aunt's training and experience, we conclude that aunt has made a prima facie showing that placement with her is in S.K.T.S.'s best interest.

Father argues that aunt failed to state a prima facie case for third-party custody because she did not allege a substantial relationship with S.K.T.S. and that "[f]ailure to allege a substantial relationship in the petition, itself, warrants dismissal of the action." Father points out that this court has held that an interested third party must show "a substantial relationship between the petitioner and the child that exists when the petitioner petitions for custody." *In re Kayachith*, 683 N.W.2d 325, 327 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). It is unclear whether caselaw actually requires a substantial relationship between the child and the interested third party.[3] But we do not consider whether a substantial relationship is actually required because aunt does not challenge it.

[3] In *Kayachith*, this court's decision rested on the district court's determination that the petitioners were interested third parties *solely because of* extraordinary circumstances. *Id.* There, "we conclude[d] that because [petitioners] have not alleged that they had a substantial relationship with the child when they petitioned for custody . . . their

Even so, father's argument is unavailing because aunt's affidavit sufficiently alleged a substantial relationship. In *Lewis-Miller I*, the third-party "petition for custody was accompanied by an affidavit including five paragraphs detailing her allegations concerning her relationship with the child[]. These allegations, as verified by her and supported by competent evidence, are sufficient as a matter of law to meet the evidentiary standard applicable to petitions." 699 N.W.2d at 14. Similarly, aunt's affidavit has five paragraphs explaining her relationship with her nephew. For example, aunt averred that she has had a "close loving relationship with SKTS since his birth" and, at mother's request, agreed to be his guardian "should something happen to his parents." Aunt and S.K.T.S. visited in person once or twice a year and communicated weekly by telephone or text. Aunt also attested that mother named her as S.K.T.S.'s guardian in mother's will.

In sum, we conclude that the district court did not follow binding caselaw because it failed to take aunt's amended petition and affidavits as true. *See Lewis-Miller II*, 710 N.W.2d at 569. Aunt's petition and affidavits sufficiently averred abandonment, the threat of physical and emotional harm to S.K.T.S., and that custody with aunt is in S.K.T.S.'s best interests. If proven, the allegations would satisfy the criteria in Minn. Stat. § 257C.03, subd. 7(a), meaning that aunt is entitled to an evidentiary hearing. Thus, the district court also erred by denying aunt an evidentiary hearing.

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circumstances are not 'extraordinary' for purposes of Chapter 257C." *Id.* In other words, when a third-party custody petition alleges child endangerment based on parental abandonment or physical and emotional danger to the child, it is not clear whether a "substantial relationship" is required.

2. The district court erred by rejecting aunt's third-party petition solely because she is not S.K.T.S.'s parent.

Because it may be helpful on remand, we consider the district court's reason for rejecting aunt's petition. *See J.E.B.*, 785 N.W.2d at 751; *Vittorio,* 546 N.W.2d at 756. Without any other explanation, the district court's order stated, "As the sole living biological parent, [father] has sole legal custody and sole physical custody of the subject minor child."

We recognize that some caselaw supports the district court's view that father's custody is presumed. In custody disputes between parents and third parties, Minnesota courts have traditionally presumed that the child's natural parent is entitled to custody of the child. *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002). *But see In re Custody of A.L.R.*, 830 N.W.2d 163, 168 (Minn. App. 2013) ("Although *Lewis–Miller* [*II*] addressed different circumstances, the common-law parental presumption that was discussed extensively in *N.A.K.* was conspicuously absent from the supreme court's post-chapter 257C *Lewis–Miller* decision."). Any parental preference, however, "must be viewed in context of the parent's parenting in the past." *N.A.K.*, 649 N.W.2d at 175. Indeed, "[t]he weight to be given to the promise of future right treatment arising out of the blood relationship of parent and child varies according to the surviving parent's past record of fidelity in meeting his parental obligations." *Id.* (quotation omitted).

Through chapter 257C, the Minnesota legislature has allowed a person who is not a parent of a particular child to seek custody of that child if the person qualifies as an "interested third party" under Minn. Stat. § 257C.03, subd. 7. In resolving the merits of a

custody dispute between a person who qualifies as an "interested third party" and a parent of the child, the district court must "consider and evaluate all relevant factors in determining the best interests of the child." Minn. Stat. § 257C.04, subd. 1. The legislature has identified 12 best-interest factors as relevant to a third-party custody petition, including the petitioning party's relationship to the child. *Id.*

But the legislature has also provided that a court "may *not* use one factor to the exclusion of all others" and "must *not* give preference to a party over the . . . interested third party solely because the party is a parent of the child." Minn. Stat. § 257C.04, subd. 1(c) (emphasis added). In other words, to the extent that the district court dismissed aunt's petition *solely* because she is not S.K.T.S.'s parent, this was error.

We note that whether aunt is actually an "interested third party" and whether the assertions in her petition "are actually true is to be resolved at the subsequent hearing." *Lewis-Miller I*, 699 N.W.2d at 14; *see also Lewis-Miller II*, 710 N.W.2d at 569 (stating petitioner must satisfy evidentiary burdens for each subdivision 7(a) requirement at evidentiary hearing). We offer no opinion on the merits of aunt's petition for third-party custody.

Thus, the district court abused its discretion by failing to grant aunt an evidentiary hearing. As a result, we reverse and remand for the district court to hold an evidentiary hearing on aunt's third-party custody petition.

Reversed and remanded.