STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1117

In re the Custody of: S. D. C. and Z. R. C.,
Kris Marie Hell,
Respondent,

vs.

Cali Joanne Marie Cress,
Appellant,

Zachary P Hopper,
Respondent.

Filed August 8, 2022
Affirmed
Bryan, Judge

Koochiching County District Court
File No. 36-FA-20-144

Emilee M. Meyer, Legal Aid Service of Northeastern Minnesota, Virginia, Minnesota (for respondent Kris Marie Hell)

Benjamin Kaasa, Benjamin Kaasa Law Office, PLLC, Duluth, Minnesota (for appellant)

Zachary P. Hopper, Hampton, Virginia (pro se respondent)

Considered and decided by Bryan, Presiding Judge; Cochran, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this third-party custody dispute, appellant challenges the district court's determination that respondent satisfies the statutory definition of de facto custodian of appellant's two young children. Appellant argues that the district court made the following two errors: (1) it misapplied the law when it determined that appellant was not "present" with the children; and (2) it made clearly erroneous factual findings regarding appellant's compliance with the duties of the parent-child relationship. Because the district court did not misapply the law and because appellant has not established reversible error regarding the district court's factual findings, we affirm.

FACTS

Appellant Cali Cress (mother) gave birth to twins, S.D.C. and Z.R.C., in May 2018, while she was living in the State of Virginia. The children were born prematurely and required hospitalization for several weeks after birth. Within a few weeks after the children were born, mother underwent surgery and was unable to care for the children. The local social services agency in Virginia contacted respondent Kris Hell (aunt) who agreed to be a relative placement option for the children instead of foster care.[1] Aunt flew to Virginia, took the children into her care, and brought the children to her home in International Falls, Minnesota. The parties understood that aunt would care for the children indefinitely.

After mother was able to travel, aunt arranged for the social services agency to buy mother an airplane ticket, but mother missed the flight. Mother was unable to arrange for another airplane ticket and she did not see the children in September or October 2018.

[1] The children's father, Zachary Hopper, is also labeled a respondent in this case, but he is not a participant in this appeal. We use the term "respondent" to refer to Hell.

Eventually, mother traveled to Minnesota by bus at the end of October 2018. After arriving, mother moved in with her great aunt in Gilbert, Minnesota, which was almost two hours away from aunt's home in International Falls. Aunt drove to Gilbert with the children once in November and once in December 2018 so mother could visit with them. Mother moved to International Falls in January 2019, but aunt could not offer a place for mother to stay at aunt's home because other relatives were living with aunt. For the first eight weeks after moving to International Falls, mother contacted aunt only twice.

Mother struggled to obtain stable housing and employment. From January to May 2019, mother intermittently stayed with friends and at a shelter. In February 2019, mother overdosed on pills in an apparent suicide attempt and was hospitalized. Mother obtained an apartment in May 2019, where she stayed until she was removed for damaging property in October 2019. Mother has also struggled to maintain sobriety, and she was diagnosed with "severe alcohol abuse." Mother acknowledged that she struggled with depression, general anxiety, and post-traumatic stress disorder. Mother was also charged with misdemeanor disorderly conduct in May 2020. In total, mother visited the children approximately ten times in 2019 and did not see the children in January, February, March, August, or October of that year. When mother did visit with the children, mother would spend the day at aunt's home. There were always other people in the home and mother was not alone with the children.

On March 2, 2020, aunt filed a petition for third-party custody, seeking custody as the children's de facto custodian. The petition alleged that aunt was the primary caretaker of the children, the children had resided with aunt since August 2018, mother had not

resided with the children since August 2018, and mother had had minimal contact with the children since August 2018. The petition asked the district court to award aunt sole legal and sole physical custody of the children.

The case proceeded to an evidentiary hearing and the district court filed its order on March 15, 2021. The district court determined that aunt had shown by clear and convincing evidence that she satisfied the provisions of Minnesota Statutes section 257C.01, subdivision 2 (2020), including the residency requirement set forth in 2(a), and that aunt had established by a preponderance of the evidence that it was in the best interests of the children for her to have sole physical custody and joint legal custody of the children. In reaching this conclusion, the district court reasoned that aunt was the children's primary caretaker and performed all the normal parental duties since August 2018. In addition, mother had only sporadic contact with the children in 2019 and 2020. Mother moved for amended findings or a new trial. The district court denied the motion for a new trial but issued amended findings regarding how mother's struggles prevented her from having greater contact with the children. The district court addressed mother's contention that the reason mother had limited contact with the children was because of aunt's efforts to prevent the children from seeing mother. The district court found mother's assertion not to be credible "given the lengths [aunt] has attempted to involve [mother] in the children's lives overall" and "the multiple problems [mother] has encountered that tend to show her continued inability to parent her children." The district court concluded that the amended findings supported its previous decisions. Mother appeals.

DECISION

Mother challenges two aspects of the district court's custody order. First, mother argues that the district court misapplied the law when it determined that aunt satisfied the residency provisions of section 257C.01, subdivision 2(a). We affirm the district court's determination that aunt satisfied this subdivision because the parties do not dispute that the children lived with aunt from August 2018 until March 2020 (when aunt filed the petition) and that during this time, mother had no contact with the children for seven, non-consecutive months. Second, mother asserts that the district court clearly erred in making the factual findings underlying its determination that, pursuant to section 257C.01, subdivision 2(c) (2020), mother did not comply with the duties imposed by the parent-child relationship. We are not persuaded because mother does not establish that these findings affected the outcome of the proceedings and because the findings are supported by evidence in the record.

I. Application of Section 257C.01, subdivision 2(a)

Minnesota Statutes chapter 257C governs de facto custodian proceedings. An individual other than a child's parent may petition for child custody as a de facto custodian. Minn. Stat. § 257C.03, subd. 1(a) (2020). To prevail, the individual must "show by clear and convincing evidence that the individual satisfies the provisions of section 257C.01, subdivision 2," and 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 de facto custodian."[2] Minn. Stat. § 257C.03,

[2] Mother does not challenge the district court's best-interests determination.

subd. 6(a) (2020). Minnesota Statutes section 257C.01, subdivision 2(a), in turn, defines the term "de facto custodian" as:

> [A]n individual who has been the primary caretaker for a child who has, within the 24 months immediately preceding the filing of the petition, *resided with the individual without a parent present* and with a lack of demonstrated consistent participation by a parent for a period of:
>
> (1) six months or more, which need not be consecutive, if the child is under three years of age; or
>
> (2) one year or more, which need not be consecutive, if the child is three years of age or older.

(Emphasis added.)

In this case, the district court concluded that aunt satisfied this subdivision, reasoning that mother's "estimated monthly visits of several hours does not constitute being 'present' in the children's lives." Mother argues that the district court misapplied the statute because during the visits that she had with the children, mother was "present," as that word is defined by *Black's Law Dictionary*. *See Black's Law Dictionary*, 1432 (11th ed. 2019) (defining "present" as "[i]n attendance; not elsewhere"). Mother's argument raises a question of law that we review de novo. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006).[3]

For children under three years of age, the legislature specified that section 257C.01, subdivision 2(a), is satisfied if the parent is not present for six, nonconsecutive months during the 24 months immediately preceding the filing date of the petition. Minn. Stat. § 257C.01, subd. 2(a)(1). Although mother's argument centers on the nature and duration

[3] Both parties define the word "present" in the same way, relying on the same definition.

of the visits she did have, we need not determine whether these visits meet the definition of the word "present." The parties do not dispute that mother did not visit the children at any point during the following seven, nonconsecutive months: September 2018, October 2018, January 2019, February 2019, March 2019, August 2019, and October 2019. All seven months occurred during the 24 months preceding March 2020, when aunt filed the petition. By her own testimony, therefore, mother was not "in attendance" or otherwise with the children during those seven months. For this reason, we affirm the district court.

II. Factual Findings Regarding Section 257C.01, subdivision 2(c)

Mother next challenges three aspects of the district court's factual findings regarding its determination that mother neglected the duties imposed by the parent-child relationship. We affirm the district court's decision because mother does not establish that these findings affected the outcome of the proceedings and because the findings are supported by evidence in the record.

As noted above, section 257C.01, subdivision 2(a), includes two, distinct prongs: whether the petitioner "resided with the individual without a parent present" and whether this occurred "with a lack of demonstrated consistent participation by a parent." The statute further defines the term "lack of demonstrated consistent participation" by a parent as:

> [R]efusal 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) (2020). In determining a parent's lack of demonstrated consistent participation, the statute requires consideration of six factors:

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

Minn. Stat. § 257C.03, subd. 6(b) (2020).

We will not set aside factual findings unless those findings are clearly erroneous. *In re Custody of A.L.R.*, 830 N.W.2d 163, 166 (Minn. App. 2013). In examining whether the findings are clearly erroneous, we view the evidence in the light most favorable to the district court's findings and defer to the district court's credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). A finding is clearly erroneous if we are "left with the definite and firm conviction that a mistake has been made." *Id.* (quoting *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999)). Appellate courts do not reconcile conflicting evidence or weigh the evidence as if considering the matter de novo. *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021). When evidence in the record supports the findings at issue on appeal, it is immaterial that the record might also support findings to the contrary. *Id.* at 223.

Mother challenges the following three findings underlying the district court's determination that mother did not comply with the duties of the parent-child relationship: (1) mother was not the source of the food provided during the visits at aunt's house; (2) mother was supervised during the visits at aunt's house; and (3) mother was responsible for her infrequent and inconsistent participation.[4] We decline to reverse on these grounds for two reasons. First, mother does not establish or even explain how these findings affected the outcome of the proceedings. "[O]n appeal error is never presumed. It must be made [to] appear affirmatively before there can be reversal . . . [and] the burden of showing error rests upon the one who relies upon it." *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1974).

Second, evidence in the record supports the challenged findings. The district court made the following findings about provision of food and supervision: "[aunt] continued to be responsible for decisions about the children's schedule, meals, and daily care during these visits"; "[mother] only ever had supervised parenting time with [the children] typically at [aunt's] home"; "[a]t no time did [mother] independently provide meals, clothing, or healthcare for [the children]"; "at no time . . . did [mother] provide the children

[4] Portions of mother's brief appear to also challenge the district court's admission of and reliance on evidence of mother's conduct that postdates the filing date of the petition. Mother directs us to section 257C.01, subdivision 2(b) (2020), which prohibits district courts from considering "any period of time after a legal proceeding has been commenced and filed . . . in determining whether the child has resided with the individual for the required minimum period." Mother does not explain how this provision, which is limited on its face to "determining whether the child has resided with the [petitioner]" for the relevant period of time precludes the district court from considering or admitting evidence of conduct occurring after the filing date of the petition for other purposes. We discern no error by the district court given the clear language of the statute.

with the necessary food, clothing, shelter, health care, education, or other care and control necessary for the children's physical, mental or emotional health and development"; "[aunt] provided all food, clothing, shelter, health care and education for the children since August 2018"; and "[mother's] visits were typically limited to several hours usually including a meal prepared by [aunt]."

The testimony presented, when viewed in the light most favorable to the challenged findings, *Vangsness*, 607 N.W.2d at 472, shows that although portions of mother's testimony could support different findings, the record included evidence that mother never watched the children alone and that there were always people around during her visits with the children. In addition, aunt testified that mother was standoffish when feeding and changing the children and she often supervised mother during those visits. Finally, the evidence also supports the findings regarding aunt's care of the children and how she provided the food, clothing, shelter, education, and health care necessary for the children's development. The district court did not clearly err when making these findings.

We reach the same conclusion regarding mother's stated reason for not having more frequent and meaningful visits with the children.[5] Contrary to mother's argument, the district court did consider mother's stated reason, but determined that it lacked credibility

[5] To the extent that mother also challenges findings that aunt was right to have concerns about mother's ability to safely parent the children or provide safe housing, the record also supports these findings. For instance, from January to May 2019, mother intermittently stayed with friends and at a shelter and she was hospitalized for a few weeks after a suicide attempt. In addition, mother was diagnosed with "severe alcohol abuse," struggled with depression, general anxiety, and post-traumatic stress disorder, and was charged with misdemeanor disorderly conduct in May 2020. Finally, although mother did obtain an apartment in May 2019, she was removed from that apartment in October 2019.

"given the lengths [aunt] has attempted to involve [mother] in the children's lives overall" and "the multiple problems [mother] has encountered that tend to show her continued inability to parent her children." We defer to the district court's credibility determinations. *See Vangsness*, 607 N.W.2d at 472. In sum, the district court's findings are supported by the record and are not clearly erroneous.

Affirmed.