STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1329

Thomas Anthony Greshowak, et al.,
Appellants,

vs.

Adam Paul Greshowak, et al.,
Respondents

Filed August 14, 2023
Affirmed
Connolly, Judge

Dakota County District Court
File No. 19HA-FA-22-209

John DeWalt, Melissa Chawla, Dewalt, Chawla + Saksena, LLC, Minneapolis, Minnesota (for appellants)

Kathryn M. Lammers, Courtney Latcham, Heimerl & Lammers, LLC, Minnetonka, Minnesota (for respondents)

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

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

On appeal from the dismissal of their petition for grandparent visitation, appellants argue that (1) the district court erred in dismissing their petition for failure to state a claim for relief when they asserted a common-law right to grandparent visitation; and (2) the

grandparent-visitation statute is unconstitutional because it violates the equal-protection clause. We affirm.

FACTS

Appellants Thomas and Jamie Greshowak are the parents of respondent Adam Greshowak (father). Father is married to respondent Laura Greshowak (mother), and the couple (together, respondents) have two minor children. Appellants last saw respondents' children on May 20, 2021, because a dispute on that day between appellants and respondents resulted in respondents "withholding" their children from appellants.

In March 2022, appellants filed a petition requesting that the district court "make a determination for a common law right" for appellants to have visitation with their grandchildren. The petition also stated that, "[i]f the Court finds [that appellants] do not have standing under common law to seek grandparent visitation," appellants request a determination that Minn. Stat. § 257C.08 (2022)—Minnesota's grandparent-visitation statute—is unconstitutional.

Respondents moved to dismiss appellants' petition under Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted, arguing that appellants lacked standing to assert a claim for visitation under section 257C.08. The district court granted respondents' motion, finding that respondents are both still living and married to each other, "there is no other family court proceeding pending in which [appellants] could intervene," and the "children have never *resided* with [appellants], although they have spent numerous overnights at their home." As such, the district court concluded that appellants lack standing to assert a claim for grandparent visitation under section 257C.08

because appellants are unable to establish any of the specific grounds to assert such a claim under the statute. The district court also determined that "[t]here are no common law grounds upon which [appellants] could claim a right to visitation." And the district court rejected appellants' argument that section 257C.08 is unconstitutional.

Appellants filed this appeal challenging the dismissal of their petition for grandparent visitation. The attorney general subsequently filed correspondence stating that appellants did not timely file and serve notice of their constitutional challenge on the attorney general pursuant to Minn. R. Civ. App. P. 144. The correspondence stated that, "[b]ecause of the lack of notice, and the fact that the decision below does not address the merits of the constitutional issue, the Attorney General is not seeking to intervene at this time." The next day, appellants filed a motion requesting a 14-day extension to allow the attorney general the opportunity to intervene in this appeal. This court denied the motion and deferred to the panel "the issue of how this court should address appellants' constitutional challenge in light of the untimely notice on the attorney general."

DECISION

I.

"The sole question on appeal" from a rule 12.02(e) dismissal "is whether the complaint sets forth a legally sufficient claim for relief." *Engstrom v. Whitebirch*, 931 N.W.2d 786, 790 (Minn. 2019) (quotation omitted). "We review de novo whether a complaint sets forth a legally sufficient claim for relief. We accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014) (citation omitted).

The parties frame the issue as one involving standing. "Standing is the requirement that a party have a sufficient stake in a justiciable controversy." *Sec. Bank & Tr. Co. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 916 N.W.2d 491, 496 (Minn. 2018) (quotation omitted). "A party has standing when (1) the party has suffered an injury-in-fact, or (2) the party is the beneficiary of a legislative enactment granting standing." *Webb Golden Valley, LLC v. State*, 865 N.W.2d 689, 693 (Minn. 2015). "Standing focuses on whether the plaintiff is the proper party to bring a particular lawsuit." *Citizens for Rule of Law v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169, 174 (Minn. App. 2009) (quotation omitted), *rev. denied* (Minn. Oct. 20, 2009).

Minnesota's grandparent-visitation statute confers standing on grandparents to petition for visitation with their grandchildren under certain circumstances. *See* Minn. Stat. § 257C.08. Specifically, the relevant portions of the statute provide:

> Subd. 1. **If parent is deceased.** If a parent of an unmarried minor child is deceased, the parents and grandparents of the deceased parent may be granted reasonable visitation rights to the unmarried minor child during minority by the district court.
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> . . . .
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> Subd. 2. **Family court proceedings.** (a) In all proceedings for dissolution, custody, legal separation, annulment, or parentage, after the commencement of the proceeding, or at any time after completion of the proceedings, and continuing during the minority of the child, the court may, upon the request of the parent or grandparent of a party, grant reasonable visitation rights to the unmarried minor child . . . .
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> . . . .
>
> Subd. 3. **If child has resided with grandparents.** If an unmarried minor has resided with grandparents or great-grandparents for a period of 12 months or more, and is

> subsequently removed from the home by the minor's parents, the grandparents or great-grandparents may petition the district court for an order granting them reasonable visitation rights to the child during minority.

Id., subds. 1-3. To protect the constitutional right of fit custodial parents to the care, custody, and control of their children, the petitioning grandparent bears the burden of proving by clear and convincing evidence that the requested visitation is in the best interests of the child and that it will not interfere with the parent and child relationship. *SooHoo v. Johnson*, 731 N.W.2d 815, 823-24 (Minn. 2007) (considering visitation with a third party the child has resided with for more than two years pursuant to Minn. Stat. § 257C.08, subd. 4 (2006)); *In re C.D.G.D.*, 800 N.W.2d 652, 655-56 (Minn. App. 2011) (applying the standard set forth in *SooHoo* to grandparent visitation), *rev. denied* (Minn. Aug. 24, 2011).

Respondents argue that the district court properly dismissed appellants' petition because appellants failed to satisfy any of the criteria established in Minn. Stat. § 257C.08, subds. 1-3. Appellants acknowledge that they "do not meet the requirements to pursue visitation with their grandchildren under" section 257C.08 because the "children's parents are not deceased and have not been the subject of a legal proceedings as enumerated by statute," and the "children have not resided with Appellants for a period of 12 months or more." Thus, appellants concede that "they do not meet the statutory threshold to have standing." But appellants contend that they have a right to "seek visitation with their grandchildren" independent of section 257C.08 "through common law."

We disagree. Appellants assert a common law, rather than a statutory, right to visitation with their grandchildren over the objections of the children's parents, and seem to be arguing that their (alleged) common law right to visitation is based on something other than their standing (or ever having stood) in loco parentis[1] to their grandchildren. The supreme court, however, has stated:

> Grandparents, like other non-parents, had rights to visitation under Minnesota common law only if they were standing, or had stood, in loco parentis to a child. The legislative purpose in enacting Minn. Stat. § 257C.08 was to provide such a right for grandparents and great-grandparents under the circumstances set forth in the statute.

Rohmiller v. Hart, 811 N.W.2d 585, 591-92 (Minn. 2012) (citation and footnote omitted). Here, appellants candidly concede that they do not now, and never have, stood in loco parentis to these children. Thus, even if we assume that some vestige of a common law right of grandparent visitation continued to exist after enactment of Minn. Stat. § 257C.08, these appellants do not fit within the scope of that right, and we need decide neither whether

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[1] The supreme court has acknowledged that:

> "The term 'in loco parentis,' according to its generally accepted common-law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming obligations incident to the parental relation without going through the formalities necessary to legal adoption and embodies the two ideas of assuming the parental status and discharging the parental duties."

SooHoo, 731 N.W.2d at 822 (quoting *London Guar. & Accident Co. v. Smith*, 64 N.W.2d 781, 784 (Minn. 1954)).

any such common law right continues to exist, nor the extent of any common law right that might continue to exist.

Appellants further argue that the district court improperly dismissed their petition without a hearing on the merits. But because appellants lack any right to seek grandparent visitation, the district court cannot have abused its discretion in declining to hold a hearing on the nonexistent "merits" of appellants' claims.

Appellants' petition fails to allege any facts satisfying the criteria set forth in section 257C.08. Accordingly, the district court did not err by dismissing appellants' petition without an evidentiary hearing under rule 12.02(e).

II.

Appellants challenge the constitutionality of section 257C.08 on equal-protection grounds. The Equal-Protection Clause of the Minnesota Constitution guarantees that "all similarly situated individuals shall be treated alike." *Scott v. Minneapolis Police Relief Ass'n*, 615 N.W.2d 66, 74 (Minn. 2000). "A party may assert an equal-protection challenge based either on a statute's express terms, which is a facial challenge, or based on the statute's application to a particular situation." *In re Application of Griepentrog*, 888 N.W.2d 478, 491 (Minn. App. 2016). A facial equal-protection challenge alleges that the statute creates at least two classes of individuals, which are treated differently under the statute, and that this difference in treatment cannot be justified. *In re McCannel*, 301 N.W.2d 910, 916 (Minn. 1980). An "as applied" challenge on equal-protection grounds alleges that the statute has been applied in an arbitrary or discriminatory manner. *Id.*

Appellants "assert a facial challenge to Minn. Stat. § 257C.08, subds. 1 and 2," arguing that "it creates two classes that are treated differently under the statute, and the difference in treatment between the two classes cannot be justified." But Minn. R. Civ. App. P. 144 requires the party who asserts the unconstitutionality of a legislative act on appeal to file and serve notice of their assertion on the attorney general. Appellate courts have generally required strict compliance with the rule 144 notice requirements. *State v. Jorgenson*, 934 N.W.2d 362, 367 n.2 (Minn. App. 2019), *aff'd*, 946 N.W.2d 596 (Minn. 2020). And appellate courts have declined to address constitutional questions when the appellant failed to comply with such requirements. *See Charboneau v. Am. Fam. Ins. Co.*, 481 N.W.2d 19, 23 (Minn. 1992); *see also Losen v. Allina Health Sys.*, 767 N.W.2d 703, 711 (Minn. App. 2009) (declining to consider constitutional challenge to a statute when proper notice was not given to the attorney general under rule 144), *rev. denied* (Minn. Sept. 29, 2009). This court has further concluded that without timely notice to the attorney general, an appellant cannot make a facial challenge to a statute's constitutionality, and the reviewing court is limited to addressing the constitutionality of the statute as applied. *See Welsh v. Johnson*, 508 N.W.2d 212, 215 n.1 (Minn. App. 1993) (providing that the appellant's lack of notice to the attorney general of a facial constitutional challenge limited him to "arguing the constitutionality of the statute on an 'as applied' basis"); *see also Markert v. Behm*, 394 N.W.2d 239, 243 (Minn. App. 1986).

Here, appellants acknowledge that they failed to provide the proper notice to the attorney general under rule 144. As such, appellants' facial challenge to section 257C.08 is not properly before us. *See Welsh*, 508 N.W.2d at 215 n.1.

Affirmed.