STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0775

In re the Matter of I. A. E.

Mark and Susan Estep, petitioners,
Respondents,

vs.

Chelsea Estep,
Appellant.

Filed December 24, 2012
Affirmed in part, reversed in part, and remanded
Crippen, Judge[*]

Dakota County District Court
File No. 19AV-FA-10-2554

Merlyn Meinerts, Meinerts Law Office, P.A., Burnsville, Minnesota (for respondents)

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Considered and decided by Ross, Presiding Judge; Hooten, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CRIPPEN, Judge

Appellant mother challenges the district court's placement of her child's permanent legal and physical custody with the child's paternal grandparents, who the district court determined were both de facto custodians and interested third parties under Minn. Stat. § 257C.01 (2010). The district court's judgment also made provisions to increase contacts between appellant and the child with the evident goal of restoring appellant's relationship with the child.

Because the district court abused its discretion by establishing permanent custody, thus imposing on appellant the future burden, as a condition of restoring her custody, to show endangerment of the child in the care of respondents, we reverse the designation of permanent custody and remand for the district court's placement of temporary legal and physical custody in respondents, subject to periodic review. We affirm insofar as the district court found extraordinary circumstances of a grave and weighty nature that justified presently leaving the child with his grandparents.

FACTS

Appellant Chelsea Estep and Nathan Estep were parents of a son born in October 2006. Nathan Estep is now deceased, and respondents are Nathan's parents, Mark and Susan Estep. The child has resided with respondents since April 2009 when, at the urging of respondents, the child's father abandoned appellant in Wichita, Kansas. Despite being in telephone and email contact with appellant, and at the urging of respondents, the father obtained a default divorce after service by publication in Kansas.

Nathan Estep died due to mixed-drug toxicity in December 2010. In August 2010, respondents filed the petition in these proceedings, seeking to obtain custody of the child from the child's father and appellant. Respondents have had temporary custody since this was determined by the court shortly after the proceedings began. Despite their contacts with appellant, respondents did not inform her of either the temporary-custody order or of the fact that the father had passed away.

Trial evidence showed the attachment of the child with respondents, especially with his grandmother; that abrupt separation of the child from these caregivers involved significant risks for the child; and that the child "would have very little idea of who his mother is and—and what role she has or has not played in his life." But a psychologist retained by respondents also testified that it was very important for the child to develop a relationship with appellant and recommended a course of "reunification therapy" with gradual reintroduction of the child to appellant and her family. Although the district court placed sole and permanent custody with respondents, it also ordered reunification therapy and directed respondents to bear all costs associated with the therapy, including appellant's transportation and lodging costs.

The district court concluded that respondent-grandparents were "de facto custodians" within the meaning of Minn. Stat. § 257C.01, subd. 2, and "interested third parties" within the meaning of Minn. Stat. § 257C.01, subd. 3. The district court also analyzed the best-interests factors of Minn. Stat. § 257C.04 (2010), focusing on the child's integration into respondent's household and community and his lack of relationship with appellant, her household, and her community. Although the district

court found that the child is well-adjusted in a life centered in the care of his grandparents, the district court also found that respondents have taken actions that were plainly designed to minimize appellant mother's relationship with the child.

D E C I S I O N

This court reviews a district court's custody determinations made under Minn. Stat. chapter 257C for an abuse of discretion. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006). A trial court abuses its discretion when it makes a decision that goes against logic and the facts on the record, *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984), or when it misapplies the law to the facts of a case. *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. App. 1998). We will sustain the district court's findings of fact unless they are clearly erroneous, *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002), but the court's interpretation of chapter 257C is a question of law which is reviewed de novo. *Lewis-Miller*, 710 N.W.2d at 568.

1. De Facto Custodians

Chapter 257C of Minnesota Statutes permits child custody claims by either a "de facto custodian" or an "interested third party," as those designations are defined in section 257C.01, subdivisions 2–3. A de facto custodian is a "primary caretaker" for a child who has resided with the custodian for prescribed periods of time "with a lack of demonstrated consistent participation by a parent." Minn. Stat. § 257C.01, subd. 2. Appellant disputes the district court's determination that she has failed to demonstrate participation of a parent, pointing to the factors prescribed by Minn. Stat. § 257C.03,

subd. 6(b) (2010), which "determin[e] a parent's lack of demonstrated consistent participation for purposes of section 257C.01, subdivision 2":

> (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).[1] Appellant argues that she never intended for respondents to have custody and that the circumstances of their care occurred because of their control of the child's circumstances while she struggled to care for herself in Kansas and Missouri. The district court found that respondents had withheld information or deceived appellant regarding the death of the child's father and the commencement and conclusion of his earlier divorce action; appellant characterizes this conduct as fraudulent and in bad faith.

[1] Minn. Stat. § 257C.01, subd. 2(c), declares that the lack of participation means:

> refusal 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.

The district court found that the child's father intentionally placed the child with respondents. Respecting appellant's circumstances, the district court pointed to her long separation from the child and concluded that "[w]hile there are clear financial constraints, [appellant] has made no serious effort to see [her son] since April 2009." The district court's findings stated that in his first three years, before his father brought him to the home of his parents, the child's parents provided unstable circumstances and the child was neglected, and that since the grandparent care began in 2009, appellant has had "limited personal contact" with the child. The district court found that this limited contact included frequent telephone calls but less than five hours of personal contact.

Appellant disputes the district court's exercise of discretion in applying the factors of section 257C.03, subdivision 6(b), arguing that the court failed to consider the circumstances of her absence. But the record supports the district court's finding that appellant failed to make a serious effort to see the child since April 2009, and appellant does not contend that this finding is clearly erroneous. The district court's remaining, undisputed findings further demonstrate that the court considered the factors of section 257C.03, subdivision 6(b), and appropriately concluded that respondents were the child's de facto custodians.

2. Interested Third Parties

An interested third party is an individual "who can prove that at least one of the factors" that are found in Minn. Stat. § 257C.03, subd. 7(a)(1) (2010). Minn. Stat. § 257C.01, subd. 3. Under section 257C.03, subdivision 7(a)(1), establishing that an

individual is an interested third party requires a showing "by clear and convincing evidence" that one of three 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). Subdivision 7 adds a statement of eight relevant factors that the district court must consider in connection with any finding of interested-third-party status. Relevant to the issues on appeal, these factors include "(1) the amount of involvement the interested third party had with the child during the parent's absence or during the child's lifetime; (2) the amount of involvement the parent had with the child during the parent's absence; . . . (4) the facts and circumstances of the parent's absence." *Id.*, subd. 7(b) (2010).

Appellant disputes application of the abandonment or danger factors of Minn. Stat. § 257C.03, subd. 7(a)(1). Consistently, neither factor was named by the district court in its determination that respondents were interested third parties. Rather, the district court singularly relied on the conclusion that "extraordinary circumstances" permit designating its interested-third-party determination. *See* Minn. Stat. § 257C.03, subd. 7(a)(1)(iii). Appellant disputes that clear and convincing evidence establishes circumstances rising to the level of extraordinary.

Addressing the circumstances of appellant's child, the district court enumerated the extraordinary circumstances that it concluded were sufficient to meet the statutory standard. The "life" of this child, the district court found, "has been one made up of unusual and extraordinary circumstances," a finding reflecting detailed findings on the unstable circumstances of the child and his parents before 2009 and the adjustment he had made in the settled circumstances of respondents. Currently, the district court found, the child's "entire life revolves around the structure and care of [respondents]," who have "parented [the child] for the majority of his life," are properly characterized as the child's "primary caretakers," and have "a strong, intimate relationship" with the child. The district court added a finding on the heroin use of the parents during the three-month period in Kansas immediately before the father brought the child to the home of respondents. The district court also observed the reality that appellant lives 620 miles from the settled circumstances of her son, residing in a rural community with her fiancé and two additional children, and that appellant had spent "less than five hours" of personal contact with the child since 2009; relevant evidence shows that suddenly removing the child from respondents' care would result in severe emotional trauma to the child and would lead immediately to severe and persistent emotional and psychological problems.

Appellant first contends, despite the findings on extraordinary circumstances, that respondents' burden is enlarged by constitutional principles as well as Minnesota

common law dating to the end of the 19th century.[2] *See* 2002 Minn. Laws ch. 304, § 3, at 433 (enacting Minn. Stat. § 257C.03). Under the Fourteenth Amendment of the United States Constitution, as a matter of substantive due process of law, a parent is afforded "heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 571 U.S. 702, 720, 117 S. Ct. 2258, 2267 (1997). Minnesota courts uphold these fundamental rights but nevertheless recognize that "there may be instances when the state may constitutionally intrude upon a fit parent's right to the care, custody, and control of the parent's child" and issue an order contrary to the parent's wishes. *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007). A statute that would so intrude must require proof by clear and convincing evidence that the circumstances justify the interference with the fundamental rights of the parent. *Id.* at 824. Appellant has not suggested any way in which Minn. Stat. § 257C.03, subd. 7(a)(1)(iii), fails to comply with these constitutional standards.

Coinciding with the state's common law developments, a constitutional level of extraordinary circumstances must be "grave and weighty." *Id.* at 823 (quoting *In re Welfare of Children of Coats*, 633 N.W.2d 505, 514 (Minn. 2001)).

Since the end of the 19th century, the supreme court has recognized that a young child's best interests are "paramount to the claims of either parent." *State ex rel. Flint v.*

[2] Because appellant has not addressed the effects of this constitutional and common law history on the de-facto-custodian provision of third-party statutory law, we have no occasion to address that similar line of reasoning.

Flint, 63 Minn. 187, 189, 65 N.W. 272, 273 (1895) (observing that, despite father's right to custody as against the mother under a statute then in effect, "the primary object of all courts, at least in America, is to secure the welfare of the child, and not the special claims of one or the other parent"); *see Wallin v. Wallin*, 290 Minn. 261, 264–65, 187 N.W.2d 627, 629–30 (1971) (recognizing that the best-interests-of-the-child doctrine is superior to a presumptive parental interest; reiterating as well the need to protect the child upon proof that a parent has abandoned the child or is otherwise unfit).

Concurrently with this long history of protecting the interests of children, only the showing of a high level of proof of conflicting interests of the child permits interference with the presumptive rights of the natural parent. Appropriate to the circumstances of the immediate case, the supreme court has determined that upon the death of the parent who has held custody of a minor child under a divorce decree, the right to custody automatically inures to the surviving natural parent unless parental abandonment or unfitness is found in an appropriate proceeding or that, irrespective of parental fitness, "exceptional circumstances" indicate that the best interests of the child clearly require that the surviving parent be denied custody. *Hohmann v. Walch*, 255 Minn. 165, 168–69, 95 N.W.2d 643, 646–47 (1959). These standards closely resemble the stated interested-third-party standards of Minn. Stat. § 257C.03, subd. 7.

Specifically, the "extraordinary circumstances" concept of Minn. Stat. § 257C.03, subd. 7(a)(1)(iii), is rooted in the common law concept of "exceptional" circumstances.[3] Combining the "exceptional circumstances" standard with a mandate for showing "grave and weighty reasons," the supreme court in 2002 declared that the parental presumption "is overcome by extraordinary circumstances of a grave and weighty nature." *N.A.K.*, 649 N.W.2d at 175.

Appellant has not identified any functional dissimilarity between Minn. Stat. § 257C.03, subd. 7(a)(1)(iii), and this common law history. But her reliance on constitutional and common law developments demonstrates that Minnesota courts must look upon extraordinary circumstances as those that are of a grave and weighty nature.

Addressing the gravity of the circumstances surrounding the care of her child by respondents, appellant asserts that the history of the child and his parents is "tragic" but not extraordinary. This argument suggests reasonable differences in the understanding of

[3] Among the relevant comments in prior supreme court cases, the *Wallin* court (1971) employed the word "extraordinary" as synonymous with "exceptional." 290 Minn. at 264, 187 N.W.2d at 629. Legislative history on the Minnesota enactment of the "extraordinary circumstances" language suggests that it is intended to conform to existing caselaw. *See* S. Floor Deb. on S.F. No. 2673 (Mar. 19, 2002) (statement of Sen. Cohen). Finally, a number of states have enacted statutes that parallel Minnesota's de-facto-custodian law but do not include the interested-third-party provisions found in chapter 257C. *See, e.g.*, Idaho Code Ann. § 32-1703(1) (2012); Ind. Code Ann. § 31-9-2-35.5 (2007); Ky. Rev. Stat. Ann. § 403.270(1)(a) (LexisNexis 2010), 1998 Ky. Acts 937-40 (evident model for Minnesota's similar de-facto-custodian provision); S.C. Code Ann. § 63-15-60(A) (2010); *and see* Elizabeth Barker Brandt, *De Facto Custodians: A Response to the Needs of Informal Kin Caregivers?*, 38 Fam. L.Q. 291, 300-314 (2004) (discussing de-facto-custodian statutes of various states); *see also* Ky. Rev. Stat. Ann. § 403.270 (LexisNexis 2012).

the evidence, but it does not indicate an abuse of the district court's discretion in determining that respondents are interested third persons.

Finally, appellant contends that the gravity of the circumstances in this case falls short of the situations in earlier Minnesota appellate cases. Among those with published appellate dispositions, the decisions only affirm third-party placements in other cases and do not set parameters on the standards. *See generally In re Child of Evenson*, 729 N.W.2d 632, 635-37 (Minn. App. 2007), *review denied* (Minn. June 19, 2007); *Johnson-Smolak v. Fink*, 703 N.W.2d 588, 592 (Minn. App. 2005).

In sum, the record does not suggest any abuse of the district court's discretion in determining that respondents are interested third parties under Minn. Stat. §§ 257C.01, subd. 3, .03, subd. 7 (2010).

Examining overall appellant's challenge to the district court's decision, we observe that few if any of the district court's findings of fact are questioned. Significantly, appellant does not dispute the district court's determination that placement of the child's custody with respondents serves the child's best interests.

3. Case Disposition

The district court has broad discretion in making its custody determinations. *Lewis-Miller*, 710 N.W.2d at 568. The district court is thus afforded broad discretion in balancing the equities of a custody dispute, and its exercise of that discretion will not be reversed unless it is abused. *See Ross v. Ross*, 477 N.W.2d 753, 755 (Minn. App. 1991) ("We review the trial court's exercise of its equitable jurisdiction in determining ultimate issues under an abuse of discretion standard.").

Still, the weight of the parental presumption is such that it constrains not only the legislature's power to amend it, but also the district court's power to ignore it when crafting its custody order. *See In re C.D.G.D.*, 800 N.W.2d 652, 661 (Minn. App. 2011) (recognizing that district courts must give sufficient weight to the presumption), *review denied* (Minn. Aug. 24, 2011). Stated differently, the presumption serves to "both to determine constitutionality and to frame the extent of the district court's discretion" in crafting a remedy. *Id.*

The district court appropriately conditioned its placement of the child's custody with three limiting provisions that defer to appellant's parental interests. They coincide with evidence that appellant neither abandoned the child nor has been shown to be unfit as a parent, and they respond to evidence that restoration of the child-parent relationship serves the child's interests. They also respect evidence and findings that respondents interfered with appellant's relationship with her child. As stated in the district court's order:

> "2. [Respondents] and [appellant] are to meet with an expert selected by the parties for reunification therapy. All costs, including transportation and lodging for [appellant], are to be paid by [respondents]. The parties will cooperate with the therapist and follow all recommendations.
>
> "3. [Appellant] is granted supervised parenting time at the home of [Respondents] during her visits for reunification therapy.
>
> "4. [Appellant] shall have the right to reasonable and liberal telephone contact with [the child] at a schedule to be agreed upon by the parties."

The conflicting dispositional provisions, favoring the relationship of respondents with the child but also anticipating a rebuilding of appellant's parent-child relationship,

constitute an abuse of discretion for two central reasons. First, these reasons include the evidence and findings that explain the foregoing conditions related to rehabilitation of appellant's relationship with the child. The law compels appropriate attention to the interests of appellant as a natural parent. The circumstances of the case turn on the separation of the child from his mother but not the fault of appellant in either abandoning him or suffering some inability to care for him. The evidence includes expert testimony showing the benefit to the child in restoring contact with his mother. And the separation of the parent and child is colored in this case by inappropriate behavior of respondents, who variously misled appellant or failed to notify her on matters of importance in her relationship with the child. Second, it is critical to recognize that the district court's conditions, directly aimed at rehabilitating the mother-child relationship, sharply conflict with the permanent placement with respondents that prohibits restoration of appellant's custody without proof under Minnesota law that the requirements for modifying custody under Minn. Stat. § 518.18 (2010) are satisfied.[4]

Under these circumstances, it is premature to place permanent legal and physical custody of the child in respondents. Instead, the district court, upon remand of the proceeding, should presently provide for the temporary placement of legal and physical

[4] Under Minn. Stat. § 257C.06 (2010), any future modification of the permanent custody order would be governed by Minn. Stat. § 518.18. Under the latter provision, the district court would need to leave custody with respondents unless the parties agreed to the modification or appellant could establish that "the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child" and certain other statutory thresholds were met. Minn. Stat. § 518.18(d).

custody of the child in respondents, subject to regular review of the child's relationships with his mother and his grandparents. This opinion is not intended to limit the scope of district court remedies premised on changed circumstances that are evident upon review of the case. The initial review should occur when the district court determines it to be reasonably practicable, near the first anniversary of its order that this court now reviews.

Based on the preceding analysis, we affirm the district court's determination that respondents were de facto custodians and interested third parties under chapter 257C. We reverse the award of permanent custody of the child to respondents and remand the proceedings for further action of the district court consistent with this opinion.

Affirmed in part, reversed in part, and remanded.