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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0416**

In the Matter of the Welfare of the Child of:
H.S. and E.M., Parents.

**Filed August 26, 2008
Reversed and remanded
Worke, Judge**

Winona County District Court
File No. 85-JV-07-116

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Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and
Worke, Judge.

UNPUBLISHED OPINION

WORKE, Judge

On appeal from the permanent transfer of a child's legal custody to the child's maternal grandmother, appellant-father argues that (1) the district court failed to consider the rebuttable presumption favoring a biological parent over a third party in a custody dispute; and (2) the record does not support the findings that transferring legal custody to grandmother is in the child's best interests. Because the district court failed to consider the rebuttable presumption that father is entitled to custody, we reverse and remand.

FACTS

It is undisputed that A.K., who was born in October 1997, is the biological child of appellant-father E.M. A.K. lived with mother, H.S., and had little contact with father. Mother did not provide A.K. with a stable environment, moving frequently and living in homeless shelters. Mother was also married to an individual whom A.K. feared.

In January 2007, mother left A.K. in the care of a friend. Mother did not provide for any financial support and the cell-phone number that mother left did not work. The friend contacted grandmother and asked her to take care of A.K. Grandmother was already caring for mother's other two children and agreed to care for A.K. In early March 2007, however, grandmother contacted father and asked him to care for A.K. because grandmother feared that mother and her husband would return and try to take A.K. On March 7, 2007, A.K. began living with father.

On March 16, 2007, a petition for children in need of protection or services (CHIPS petition) was filed on behalf of all three of mother's children alleging that she

abandoned them. A guardian ad litem (GAL) was appointed to the case. In May 2007, a GAL report indicated that A.K. was happy living with father and doing well in her new school. A.K. had frequent phone contact with grandmother and her half siblings. The GAL recommended that A.K. continue living with father. The GAL filed similar reports and recommendations in June and August. Mother conceded that the children were in need of protection and services because she abandoned them, the district court issued an order accordingly, and, in August 2007, mother agreed to voluntarily place the children with grandmother. The county then filed a petition for the permanent transfer of custody of the children to grandmother. Father, however, wanted custody of A.K. to remain with him.

At the hearing on the county's petition to transfer custody, grandmother testified that she had a stable home and employment. Grandmother also testified that mother currently lived in the same area as grandmother and was developing relationships with her other two children. Grandmother testified that she wanted custody of A.K. transferred to her and that she was physically and mentally able to care for A.K. According to grandmother, mother would play a role in A.K.'s life.

A child protection worker testified that she visited A.K. at father's home and that while A.K. gets along well with father, grandmother has been a stable force in all of the children's lives. The worker recommended transferring custody to grandmother. According to the child protection worker, if custody is transferred to father there may be some concerns regarding father facilitating contact between A.K. and the rest of her family, although in the previous months there had not been any such issues. The GAL

testified that there were concerns regarding father's living situation because of the number of people living in the home. The GAL also testified that there was a time when there were communication problems between father and mother. The GAL believed that it was in A.K.'s best interests to live with grandmother because of A.K.'s bond with mother and her half siblings. The GAL testified that although father did a great job providing for A.K.'s basic needs, health needs, and education, he did not really provide for A.K.'s emotional needs.

Father testified that A.K. was doing well living with him, she really enjoyed school, and he was involved with her school activities. Father testified that A.K. was in good physical health and that he takes her to her medical, dental, and eye appointments. According to father, he is a "hands-on" parent. Father is not currently working and is always home for A.K. Father is living off of his pension and can provide for A.K. financially. Father testified that visits have been arranged for A.K. with the rest of her family and that she has permission to use the telephone whenever she wants. Father testified that he is willing to continue to foster A.K.'s relationship with the rest of her family.

A.K. wrote a letter to the district court. Father testified that he was in a different room when A.K. wrote the letter, she gave the letter to him in a sealed envelope, and that he did not open the letter. In the letter, A.K. expressed her desire to remain living with father. The court determined that A.K. may be of sufficient age to express her preference, but found that the letter was written under the supervision of father and, therefore, could not be considered a candid reflection of A.K.'s actual preference.

The court found that father had been A.K.'s primary caretaker since March 2007, and that A.K. appears to be well-adjusted to father's home, her new school, and the community. The court found that father's home may or may not be stable because he is not employed, he moved since A.K. lived with him, and he lives with several family members. The court found that father does meet A.K.'s needs. The court found that both father and grandmother are in good health and capable of giving love, affection, and guidance. The court concluded that it was in the best interests of A.K. to have custody transferred to grandmother, and father appeals.

DECISION

Father argues that, in transferring custody of A.K. to grandmother, the district court failed to consider the presumption favoring a biological parent over a third party in custody matters. Whether the district court correctly applied the law is a legal question, which we review de novo. *In re A.R.M.*, 611 N.W.2d 43, 47 (Minn. App. 2000).

Initially, we note that this matter originated as a CHIPS petition. We also note that the record lacks any indication that mother and father were ever married, as well as any indication that there was ever an acknowledgement or adjudication of A.K.'s paternity. Nor does the record include a finding of A.K.'s paternity. The parties, however, do not dispute that father is A.K.'s biological parent, and at oral argument before this court, father's attorney conceded that father is A.K.'s biological parent. The relevant statutes and caselaw show that, in a custody dispute with a nonparent, a parent is entitled to a custodial preference. *See, e.g.*, Minn. Stat. §§ 260.012(a), 260C.212, subd. 2(a)(1) (Supp. 2007), 260C.001, subd. 3 (2006); *In re Welfare of Solomon*, 291 N.W.2d

364, 369, 70-71 (Minn. 1980); *In re Welfare of Clausen*, 289 N.W.2d 153, 156 (Minn. 1980); *In re Child of Evenson*, 729 N.W.2d 632, 635-36 (Minn. App. 2007), *review denied* (Minn. June. 19, 2007); *cf. In re Custody of N.A.K.*, 649 N.W.2d 166, 175 (Minn. 2002) (stating that “following the death of a custodial parent, a surviving, noncustodial parent is entitled to custody unless the presumption that the parent be awarded custody is overcome by extraordinary circumstances of a grave and weighty nature, indicating that the best interests of the child require that the surviving parent be denied custody”). Other authorities on this point are legion.

Appellate courts are to apply the law even when an issue has been overlooked by counsel and the district court. *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990); *see Greenbush State Bank v. Stephens*, 463 N.W.2d 303, 306 n.1 (Minn. App. 1990) (applying *Hannuksela* in a civil case), *review denied* (Minn. Feb. 4, 1991); *cf. Minn. R. Civ. App. P. 103.04* (stating that an appellate court may address any issue “as the interest of justice may require”). Therefore, despite the record’s lack of an explicit indication that father is A.K.’s biological father, we will remand this matter to the district court for it to make an appropriate adjudication of paternity, and to readdress the petition to transfer A.K.’s custody in light of that adjudication.

On remand, the district court must reopen the record to adjudicate and make a finding on paternity and then, if the custodial presumption applies, apply it in father’s favor when readdressing A.K.’s custody. As the authorities above explain, the presumption applies in CHIPS cases as well as transfer-of-custody cases, and grandmother must meet a high threshold to rebut the presumption. Finally, implicit in

our direction that the district court readdress A.K.'s custody in light of the parental preference is the requirement that the district court re-analyze A.K.'s best interest.¹

Reversed and remanded.

¹ We note that the existing record does not support the district court's best-interest findings.