STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2165

In re the Custody of: K.A.R. and G.R.R.,
Terri Jeane Sherman, petitioner,
Respondent,

vs.

Tonya Jeane Hill,
Appellant.

Filed December 8, 2009
Reversed
Huspeni, Judge[*]

Wright County District Court
File No. 86-FA-07-6366

Jeffrey P. Hicken, Hicken, Scott, Howard & Anderson, P.A., 300 Anoka Office Center, 2150 Third Avenue, Anoka, MN 55303-2296; and

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Considered and decided by Klaphake, Presiding Judge; Kalitowski, Judge; and Huspeni, 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

HUSPENI, Judge

Appellant natural mother challenges the district court's grant of custody to respondent maternal grandmother, arguing that (a) the district court failed to properly apply a presumption favoring custody with the natural parent and (b) the record does not support the determination that grandmother is an "interested third party" under Minn. Stat. § 257C.03, subd. 7 (2008). We reverse.

FACTS

K.R. (age 6) and G.R. (age 4) are the children of Erik Richter and appellant Tonya Hill. Respondent Terri Sherman is the natural mother of Hill, the maternal grandmother of K.R. and G.R. and has been the wife of Lawrence Sherman for 22 years.

Hill and Erik Richter were married in 2001, and K.R. was born in November of that year. Erik Richter was a frequent user of methamphetamine. Hill used methamphetamine on many occasions until her pregnancy, and then again in 2002. Erik Richter and Hill also were frequent users of marijuana. They used drugs while K.R. was in the home, but in a separate room. Hill and Erik Richter separated in December 2002.

During the following five years Hill and the children moved several times to different locations around the state. Hill currently resides in Minneapolis, and has maintained employment since November 2007. She has never been homeless, but has encountered difficulty making timely rent payments. Terri Sherman testified that Hill's residence was unsanitary, but other witnesses described it as suitable for children.

Erik Richter was killed in 2006. Since his death, witnesses observed suicidal tendencies and heightened anger in Hill. Since 1994, Hill has been convicted of seven misdemeanors, including disorderly conduct, driving under the influence, providing a fictitious name to the police, making harassing phone calls (to Terri Sherman), and possessing drug paraphernalia. Hill recently tested negative for methamphetamine, but continues to use marijuana and drink alcohol.

Prior to commencement of the current proceeding, the children lived with Hill and occasionally stayed with the Shermans. The Shermans' relationship with Hill (and their confidence in her parenting) became severely strained, however, in 2006, at which time Terri Sherman contacted Wright County authorities, alleging parental neglect on behalf of Hill. This contact resulted in an investigation by Wright County. That investigation resulted in a finding of no safety risks to the children. In August 2007, Terri Sherman petitioned for third-party custody of the children under Minn. Stat. § 257C.03, subd. 7. One day later, before a response from Hill was received, an ex parte order was issued granting temporary custody to Terri Sherman.[1] The officer who served the order on Hill found "no signs of neglect on either child." A guardian ad litem (GAL) was subsequently appointed, and a six-day evidentiary hearing was eventually conducted in May and August of 2008.

[1] The record is unclear regarding the basis upon which the ex parte order for custody was issued. In the absence of emergency conditions or a demonstration of imminent danger to children, we trust that an occurrence where—such as here—a nonparent who is not the primary caretaker succeeds in obtaining an ex parte order for custody based on unanswered allegations of parental neglect will be a rare occurrence indeed.

After completing a custody evaluation, the GAL recommended that Hill be granted permanent physical and legal custody of the children, and expressed little concern for Hill's parenting abilities. The GAL also concluded that the children were more affectionate with Hill than with the Shermans. No expert witnesses or other evidence established any dangers to the children posed by Hill's lifestyle.

Considerable testimony was presented at the evidentiary hearing indicating that the children expressed affection toward Hill, that she has a positive relationship with them, and that she has attended to their medical needs. The children have received immunizations and checkups, although not always promptly. Hill properly attended to G.R.'s eye disorder with multiple appointments and treatments. The county safety assessment referenced above found no dangers to the children at Hill's home. While Terri Sherman testified that Hill did not maintain enough food for the children at home and gave them sweets when she visited them, the record substantiates that the children are generally healthy and suffer from no learning disabilities. Consistent with the results of the Wright County investigation, prior to the present litigation, Hill has never been subject to any state or county proceedings to remove the custody of K.R. and G.R. from her or to terminate her parental rights.

Following the evidentiary hearing, the district court granted permanent legal and physical custody of the children to Terri Sherman; Hill was granted supervised visitation. The district court made extensive and detailed findings following several days of contentious and protracted testimony. In granting custody to Terri Sherman, the district court declared her to be an "interested third party" through a finding that

> (i) [Hill] has endangered and otherwise exhibited disregard for the children's well-being to the extent that the children will be harmed by living with [Hill] (the Court finds no abandonment or neglect)
> (ii) Placement of the children with [Terri Sherman] takes priority over preserving the day-to-day parent/child relationships between [Hill] and her two children because of the presence of physical or emotional danger; or
> (iii) Other extraordinary circumstances, stated below.

The district court found no abandonment or neglect, but determined that Hill had "failed to provide a stable, secure and drug-free residence"; "was constantly in default" on rent payments; "exposed" the children to drug and alcohol use; discussed the custody dispute with the children in "poor judgment"; "lacks any significant insight into the dangers of her chemical use"; has "no respect for authority or the laws of this state as to chemical use"; has "difficulty in managing her finances, to such a great extent that she has frequently put at risk the stability of her children as to housing"; keeps her apartment in "an extremely unhealthy condition for young children"; and "will likely re-offend, placing her children at great risk of being placed in foster care."

The district court further determined that custody with Terri Sherman was in the best interests of the children as required by Minn. Stat. § 257C.03, subd. 7(2) (2008), giving considerable attention to the Shermans' role as secondary caretakers to the children, the children's relationship with Mr. Sherman, the children's shared community with the Shermans, and Hill's lack of a "stable, satisfactory environment" for the family.

This appeal followed.

D E C I S I O N

Custody determinations are not set aside unless the district court "abused its discretion by making findings unsupported by the evidence or improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). Findings of fact receive significant deference, while legal conclusions are reviewed de novo. *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002).

We note at the outset the awkward scenario we face where two independent yet coincident standards—one judicially imposed and another legislative—have been argued as applicable to this dispute. When contests over child custody have been between natural parents and nonparent third parties, Minnesota courts have traditionally applied caselaw explicitly articulating a presumption in favor of custody with the natural parent.[2] *N.A.K.*, 649 N.W.2d at 176 (citation omitted). As explored below, this caselaw presumption has a rich history of application within our case law. *See, e.g.*, *id.*; *Wallin v. Wallin*, 290 Minn. 261, 264-65, 187 N.W.2d 627, 629-30 (1971); *Durkin v. Hinich*, 442 N.W.2d 148, 153 (Minn. 1984). Adopted in 2002, section 257C.03 (discussed in section II) creates a legislatively defined standard that *also* applies to custody disputes between natural parents and third parties under a similarly high burden. Section 257C.03 sets forth a tiered scheme for such petitions, whereby a third party desiring custody and alleging himself or herself to be an "interested third party," must, among other things,

[2] This judicially imposed presumption is said to be rooted in the liberty interests inherent to parental rights, *NAK*, 649 N.W.2d 166, 178 (Gilbert, J., concurring in part and dissenting in part), along with the policy maxim that children are best served in the custody of natural parents. *In re Welfare of A.R.W.*, 268 N.W.2d 414, 417 (Minn. 1978).

establish by clear and convincing evidence one of three scenarios involving some form of jeopardy to the children, and then prove by a preponderance of the evidence that custody with the third party is in the child's best interest. Minn. Stat. § 257C.03, subd. 7. Though the statute's enactment raises doubts regarding the continued viability of the parental presumption,[3] both parties have agreed that the presumption remains operative.[4] Thus, we decide this case under the presumption as well as section 257C.03. We address each of Hill's challenges in turn.

I.

The judicial presumption in favor of the natural parent has been described as follows:

> The natural parent is entitled, as a matter of law, to custody of a minor child unless "there has been established on the parent's part neglect, abandonment, incapacity, moral delinquency, instability of character or inability to furnish the

[3] Given the similar burdens established in section 257C.03, subd. (7), and the parental presumption identified in caselaw, it could be argued that the legislature intended to either incorporate or supplant the caselaw presumption with the statutory framework. Previously, this court has not had the opportunity to adequately address this issue in a published opinion, though it has recognized the continued existence of the presumption in cases analyzed under section 518.18. *In re Child of Evenson*, 728 N.W.2d 632, 637 n.1 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). We also acknowledge that the issue may be impacted by the supreme court's opinion in *Lewis-Miller v. Ross*, which applied section 257C exclusively to a dispute between a natural parent and a third party. 710 N.W.2d 565 (Minn. 2006). As mentioned above, however, the argument that the presumption no longer applies—either by way of legislative intent or interpretation of *Lewis-Ross*—hasn't been asserted by either party, and we therefore do not address it here. *See State, Dep't Labor Industry v. Witz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to reach issues without adequate briefing.

[4] Respondent argues that the parental presumption was impliedly addressed in the district court's analysis. At oral argument, when pressed by the panel on what was "left of the common law presumption," respondent's counsel answered, "Well, I think it still exists, that parents have a presumption of fitness as against a nonparent."

> child with needed care . . . or unless it has been established that such custody otherwise would not be in the best interest of the child." Although the presumption favors [the natural parent], it may be overturned if there are "grave and weighty reasons to separate a child from his or her natural parents."
> . . . .
> . . . [T]he essential question to be answered by the court is whether extraordinary circumstances of a grave and weighty nature exist to support the grant of permanent custody to a third party and not to a [natural] parent . . . .

N.A.K., 649 N.W.2d at 74-75 (quoting *Durkin*, 442 N.W.2d at 152-53). "Grave and weighty" reasons capable of overcoming the presumption have included parental unfitness, abandonment, or "special needs of the child that dictate conferring custody on individuals most able to care for the child." *Id.* at 176. Earlier case law has not required that district courts to expressly use the words "grave and weighty reasons." *N.A.K.*, 649 N.W.2d at 166. Precedent has required, however, that district courts "take into account" a paramount right in favor of the parent and apply the "principled framework" behind the presumption. *Id.*

Applying this requirement, the supreme court in *N.A.K.* reversed and remanded a ruling that "d[id] not clearly reflect a proper incorporation of the parental presumption into the court's analysis." *Id.* at 176. Some years before *N.A.K.*, this court reversed the district court in *P.L.C.* for failure to "accord appellant the presumption of parental fitness." 384 N.W.2d at 226.[5] In that case, the district court removed custody from the

[5] The decision to reverse outright or to reverse and remand is based on whether the record could potentially support a finding that the presumption is overcome. *See N.A.K.*, 649 N.W.2d at 179 (Gilbert, J. concurring in part and dissenting in part) (finding evidence could not support depriving natural parent of custody); *P.L.C.*, 384 N.W.2d at 227. In *P.L.C.*, this court chose not to remand because a careful review of the record revealed

father because of alcohol abuse, his living situation, church attendance, evidence of spousal abuse, and a need for continuity in care. *Id*. at 226. On review, this court determined that the factors relied upon by the district court did not *directly* relate to the father's ability to care for his children. *Id*. at 226-27. Without more, the district court's findings "represent[ed] only 'ad hoc judgments on the beliefs [and] lifestyles . . . of the proposed custodian.'" *Id*. at 227 (quoting *Pikula*, 374 N.W.2d at 713).

In the present case, even if we were to strain to discern an implied application of the presumption favoring a natural parent, the record does not reflect any neglect, harm, abandonment, special needs, or incapacity that would justify depriving Hill of custody of her children. In fact, the district court acknowledged that Hill has been a more or less concerned and affectionate parent. Despite Terri Sherman's "concern[s]" about G.R.'s eye problems, the district court concluded (and there is ample evidence in the record to support the conclusion) that Hill "dealt appropriately" with the condition. Terri Sherman testified that Hill's home was unkept, but no resulting risk of harm to the children was established. Allegations regarding low food supply and too many sweets given to the children provided no unusual detriment to the children, and clearly did not constitute a grave and weighty circumstance. Terri Sherman argues that drug use, even away from the children, has effects that eventually impact the children's lives. The alleged effects on the children, however, are too speculative and indirect in the record before us.

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that no grave and weighty reasons existed to overcome the presumption favoring the natural parent. 384 N.W.2d at 227.

The tenor of the findings and conclusions of the district court in the present case mirror remarkably those of the district court in *P.L.C.* There is an abundance of criticism of Hill's lifestyle and conduct, but a singular lack of a nexus between those factors and a detrimental effect upon K.R. and G.R. We are not unaware that Hill's lifestyle, dishonesty, and criminality could plausibly constitute "moral delinquency" or "instability of character" that would justify removing custody. *Durkin*, 442 N.W.2d at 152-53. A parent's character flaws, however, must directly relate to a concrete danger in order to transcend the presumption of parental fitness. *P.L.C.* 384 N.W.2d at 226-27.

While expert testimony linking such behavior to harm or danger is not essential, such testimony has served as the basis for removing custody from a natural parent. *Durkin*, 442 N.W.2d at 153. In this case no expert testimony was presented. To the extent that the GAL's testimony may be considered that of an expert, that testimony unequivocally favored Hill. The absence of expert testimony or other evidence linking lifestyle factors to adverse consequences for K.R. and G.R. is striking and stands in stark contrast to the situation in *N.A.K.*—a situation in which the decision of the district court, notwithstanding extensive expert testimony presented at trial, was still found wanting. 649 N.W.2d at 169-70, 177.

Unfortunately, in today's society, and probably in yesterday's as well, scores of parents use drugs or alcohol, commit misdemeanors, frequently move, or suffer from anger or depression. Such behavior may, indeed, be lamentable and presage tragic consequences, but absent a demonstrated nexus connecting such behaviors to a

detrimental effect upon their children, there is no justification for removing those children from the care of their natural parents. *P.L.C.*, 384 N.W2d at 224.

We conclude that, assuming that the district court impliedly addressed the presumption favoring the natural mother in this case, that presumption was not overcome.

II.

Hill argues as a separate basis for reversal that the district court erred in determining that Sherman established herself as an "interested third party" under section 257C.03. Because both the presumption and the statute create a high burden for third parties seeking custody against parents, and because both standards require like dangers, risks, or extraordinary circumstances to justify removing custody from the natural parent, much of our earlier discussion regarding the parental presumption informs our review of the statutory designation. Recognizing the overlap, we accept the invitation to separately address the provisions of Minn. Stat. § 257C.03.

Terri Sherman had to prove by clear and convincing evidence one of the following:

> (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

Id. subd. 7(a)(1). The district court concluded that she met her burden on all three grounds. As explanation, the court referenced its extensive findings regarding Hill's drug

use, recalcitrance, dishonesty, frequent moving, poor housekeeping, lack of food, deficient finances, anger issues, and depression.

Subdivision (i) of section 257C.03, subd. 7(a)(1), requires parental disregard "to the extent that the child will be harmed by living with the parent." Subdivision (ii) requires that custody with the natural parent cause "physical or emotional danger to the child . . . ." Subdivision (iii) requires "extraordinary circumstances." As mentioned above, we find these three factors very similar to the "grave reasons" that would satisfy the parental presumption; thus, any rationale for finding the required potential for harm or danger under the statute falters under a similar analysis to that described in section I: the record can only show that the children are not exposed to real dangers, are generally healthy, have had their medical needs attended to, and are affectionate with their mother. There is no evidence showing maltreatment or neglect, or a nexus between Hill's drug use and substandard parenting, or any special needs on behalf of the children that would warrant an unusual scenario appropriate for custody removal. As a result, the record does not adequately support the district court's finding under any of these statutory provisions.

III.

Because we have determined that Teri Sherman did not overcome the presumption accorded to a natural parent or prove by clear and convincing evidence the presence of any of the factors under section 257C.03, subd. 7(a)(1), we need not address whether the district court properly applied the best-interest factors under section 257.03, subd. 7(a)(2). Nevertheless, in the interest of full analysis of all issues raised, we shall consider this last issue.

The burden of proof placed upon Terri Sherman to establish the best interests of K.R. and G.R. was preponderance of the evidence. When weighing a child's best interests, the district court's ruling deserves deference: the "law leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000). Here, the district court included a finding for each requisite factor. When the district court disagreed with the GAL, it explained the basis for its conclusions. The district court found that the GAL's observations "too infrequent and anecdotal to have credibility as to the permanent relationships that the children have." We defer to this credibility determination. *In the Matter of M.D.O.*, 462 N.W.2d 370, 374-75 (Minn. 1990).

Contrary to Hill's contention, the natural-parent presumption does not apply to the best-interest analysis of section 257C.04. Instead, this subsection directs the district court to "not give preference [to a party] solely because the party is a parent of the child." Minn. Stat. § 257C.04, subd. 1(c). Therefore, the district court's decision to equally weigh the interests of custody between Hill and Terri Sherman at this stage of the 257C.03, subd. 7, procedure was correct.

It is clear that the district court commendably attempted to resolve this contentious dispute between a mother and her natural daughter by conducting a lengthy evidentiary hearing, and by the issuance of a 55-page order that included a multitude of findings—findings that deserve significant deference. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Despite the industry and care with which the district court undertook its obligation to generate findings to support its grant of custody to Terri Sherman, there is

considerable merit in the arguments that Hill presents to this court. We reverse the grant of custody to Terri Sherman because neither the judicial natural-parent presumption nor the statutory prerequisites under 267C.03, subd. 7, were satisfied. Because we determine that custody of K.R. and G.R. shall remain with Hill, we need not address the issue of whether the district court abused its discretion in limiting Hill's contact with K.R. and G.R. to supervised visitation.

Reversed.