STATE OF MINNESOTA
IN COURT OF APPEALS
A09-258

In re the Matter of:

Hennepin County,
Plaintiff,

Angela Marie Nelson,
Plaintiff,

vs.

Sean Kyle Brown,
Respondent,

Kathryn Helgeson, et al., intervenors,
Appellants.

Filed December 15, 2009
Reversed and remanded
Wright, Judge

Hennepin County District Court
File No. 27-PA-FA-000041411

Leon A. Trawick, Trawick & Smith, 331 Second Avenue South, Suite 515, Minneapolis, MN 55401 (for respondent)

Gregory R. Solum, 3300 Edinborough Way, Suite 550, Edina, MN 55435; and

Jerome H. Lewis, Commerce at the Crossing, 250 Second Avenue South, Suite 225, Minneapolis, MN 55401 (for appellants)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

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

WRIGHT, Judge

Appellants challenge the district court's determination that they lack standing to seek child custody as interested third parties, arguing that the district court erred by requiring more than a prima facie case for standing at the prehearing stage. Respondent maintains that, because appellants' conduct has unnecessarily prolonged this litigation, he is entitled to conduct-based attorney fees on appeal. We reverse and remand.

FACTS

J.M.N. was born on January 10, 2000, to Angela Nelson (now known as Angela Wells). One month later, Nelson filed a complaint in Hennepin County District Court to determine the child's paternity. In May 2000, the district court adjudicated respondent Sean Brown J.M.N.'s father, ordered Nelson and Brown to share joint legal custody, and awarded Brown visitation rights. Although the reasons for Brown's lack of parenting time are in dispute, both parties agree that, prior to commencement of this lawsuit, Brown had not had parenting time with J.M.N. for approximately four years.

In July 2002, Nelson, who had sole physical custody of J.M.N., left J.M.N. in the care of appellant Kathryn Helgeson, J.M.N.'s maternal grandmother. In April 2003, Helgeson moved the district court for an ex parte order granting her sole legal and physical custody of J.M.N. The district court granted Helgeson's motion for temporary legal and physical custody. But the district court denied her subsequent motion for permanent legal and physical custody, finding that she was not a de facto custodian or an interested third party as defined by Minn. Stat. § 257C.01, subds. 2, 3 (2002). With the

exception of approximately seven months, J.M.N. has resided since her birth in the home of appellants Brian and Kathryn Helgeson. During some of that time, Nelson also has resided with them. But the Helgesons have remained J.M.N.'s primary caregivers.

In March 2008, Brown moved the district court for either parenting-time assistance or, alternatively, a change of physical and legal custody of J.M.N. Brown served the Helgesons. But Kathryn Helgeson declined involvement, relying on the 2003 district court order, which found that she was not an interested third party. In January 2009, however, the Helgesons moved the district court for intervention as a matter of right under Minn. R. Civ. P. 24.01 or permissive intervention under Minn. R. Civ. P. 24.02, to seek custody as interested third parties or, alternatively, grandparent visitation.

The district court denied the Helgesons' motion to intervene as a matter of right but granted their motion for permissive intervention. The district court held that, as intervenors, the Helgesons had standing to "proceed with their request for grandparent visitation based on what is in the best interests of the child." But the district court held that

> there is no clear and convincing evidence that the parents abandoned, neglected, or showed disregard for [J.M.N.'s] well-being. There is no convincing evidence that the child is in physical or emotional danger if one of the parents is awarded custody. And, there are no compelling extraordinary circumstances that warrant the parties being given standing as interested third parties.

This appeal followed.

D E C I S I O N

I.

The Helgesons first maintain that the district court erred by denying their motion for intervention as a matter of right. Whether to grant a motion to intervene as a matter of right presents a question of law, which we review de novo. *Erickson v. Bennett*, 409 N.W.2d 884, 886 (Minn. App. 1987). Intervention as a matter of right is governed by Rule 24.01 of the Minnesota Rules of Civil Procedure, which requires nonparty movants to establish

> (1) a timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and (4) a showing that the party is not adequately represented by the existing parties.

Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 207 (Minn. 1986). Failure to establish any one factor warrants denial of the motion. Here, the second factor is dispositive.

Rule 24.01 requires a potential intervenor to claim "an interest relating to the *property or transaction* which is the subject of the action." Minn. R. Civ. P. 24.01 (emphasis added). The Minnesota Supreme Court has interpreted this requirement to preclude intervention as a matter of right in a child-protection matter, which is instructive by analogy here. In *Valentine v. Lutz*, former foster parents sought to intervene as a matter of right in a Child in Need of Protective Services (CHIPS) proceeding. 512 N.W.2d 868, 869-70 (Minn. 1994). The *Valentine* court held that rule 24.01 is inapposite

in a CHIPS proceeding because the personal and family interests at issue are "inconsistent with the language of Rule 24.01." *Id.* at 870. The court reasoned:

> Rule 24.01 concerns "interests relating to . . . property or transaction[s] . . . ." This language more appropriately applies to interests involved in traditional civil actions, such as in contracts and torts, rather than the very personal and family interests involved in CHIPS proceedings. Therefore, we hold that the type of interaction between foster parents and child is not an interest that allows intervention under Rule 24.01.

Id. (citation omitted).

We subsequently have applied *Valentine* in family-law proceedings involving custody disputes. *See, e.g.*, *Van Meveren v. Van Meveren*, 603 N.W.2d 671, 673 (Minn. App. 1999) (holding that in custody dispute, adult daughter's personal or family interest in welfare of her minor brothers did not constitute an "interest" contemplated by Rule 24.01 to permit intervention as of right in parents' custody dispute), *review denied* (Minn. Feb. 23, 2000). Although the Helgesons attempt to distinguish the instant case from *Valentine* and its progeny by arguing that they meet the statutory definition of both "interested third party" and "de facto custodian," they fail to acknowledge that an interest in J.M.N.'s welfare is not "an interest relating to the property or transaction which is the subject of the action." *See* Minn. R. Civ. P. 24.01. As such, the district court did not err by denying the Helgesons' motion to intervene as a matter of right.

II.

The Helgesons next contend that the district court erred by requiring more than a prima facie case for standing at the prehearing stage and argue that they have standing to

permissively intervene as either interested third parties or as de facto custodians.[1] The Helgesons' argument mischaracterizes the district court's order by conflating the issue of permissive intervention and the issue of standing as interested third parties. Indeed, the district court properly granted the Helgesons' motion for permissive intervention in the proceeding. But the district court held that

> there is no clear and convincing evidence that the parents abandoned, neglected, or showed disregard for [J.M.N.'s] well-being, . . . [or] that the child is in physical or emotional danger if one of the parents is awarded custody. And, there are no compelling extraordinary circumstances that warrant the parties being given *standing* as interested parties.

(Emphasis added.) Because the district court granted the Helgesons' motion for permissive intervention, the sole issue before us is whether the district court erred by determining that the Helgesons did not have standing to petition for child custody as interested third parties.

Whether a party has standing to sue is a question of law, which we review de novo. *Longrie v. Luthen*, 662 N.W.2d 150, 153 (Minn. App. 2003), *review denied* (Minn. Aug. 19, 2003). Standing to petition for child custody as an interested third party is governed by Minn. Stat. § 257C.03 (2008). In *Lewis-Miller v. Ross*, the Minnesota Supreme Court held that establishing third-party custody as an interested third party under Minn. Stat. § 257C.03 involves a two-stage process. 710 N.W.2d 565, 569 (Minn.

[1] The Helgesons now argue that they have standing to seek custody as de facto custodians. Because they did not present their argument for standing as de facto custodians to the district court, the issue is not properly before us. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that "[a] reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it").

2006). First, the party commencing a third-party custody proceeding must submit a valid petition and supporting affidavits which, if taken as true, satisfy the criteria of Minn. Stat. § 257C.03, subd. 7(a). *Id.* If this requirement is satisfied, the party seeking custody is entitled to an evidentiary hearing. *Id.* At the evidentiary hearing, the party seeking custody 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 interested third party" and "show by clear and convincing evidence" one of the three child-endangerment factors. Minn. Stat. § 257C.03, subd. 7(a)(1), (2).

Here, the two-step process set forth in *Lewis-Miller* was not followed. When the district court dismissed the Helgesons' motion for third-party custody as interested third parties based on a lack of standing, the district court erroneously applied the clear-and-convincing-evidence standard without first determining whether the Helgesons submitted a valid petition and supporting affidavits which, if taken as true, satisfy the criteria of Minn. Stat. § 257C.03, subd. 7(a). We, therefore, reverse and remand. In doing so, we direct the district court on remand to determine whether the Helgesons submitted a valid petition and supporting affidavits which, if taken as true, satisfy the criteria of Minn. Stat. § 257C.03, subd. 7(a). If the Helgesons satisfy this first requirement, they have standing to proceed to an evidentiary hearing, at which they 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 interested third party" and "show by clear and convincing evidence" that

> (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).

III.

In proceedings before the special-term panel, Brown sought attorney fees. By order filed June 16, 2009, the special-term panel denied that motion "at this time[,]" noting that Brown had not submitted the supporting documentation required by Minn. R. Civ. App. P. 139.06, subd. 1. At the conclusion of his brief on appeal, and without having filed a renewed motion for attorney fees, Brown again asserts that he is entitled to conduct-based attorney fees on the same grounds. *See* Minn. Stat. § 518.14, subd. 1 (2008) (permitting award of conduct-based attorney fees when party's conduct "unreasonably contributes to the length or expense of the proceeding"); Minn. R. Civ. App. P. 127 (stating that an application for relief "shall be" by motion), 139.06, subd. 1 (stating that a party seeking attorney feess on appeal "shall submit such a request by motion under Rule 127"). The Helgesons do not argue that Brown's current fee request is not properly before this court. Therefore, we proceed directly to the merits of his request.

Conduct-based attorney fees may be awarded "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1(3). They are not warranted, however, when a party presents colorable legal arguments on difficult issues, *Kitchar v. Kitchar*, 553 N.W.2d 97, 104 (Minn. App. 1996), *review*

denied (Minn. Oct. 29, 1996), or when additional litigation costs result from a simple oversight, *Johnson v. Johnson*, 533 N.W.2d 859, 867 (Minn. App. 1995). Rather, conduct-based attorney fees are warranted when a party's argument is "so specious as to force the conclusion that so unfounded a position could be advanced only to harass," *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 691 (Minn. App. 1989), *review denied* (Minn. June 21, 1989), or when a party's argument is disingenuous and has the effect of lengthening litigation and increasing the expense of the proceedings, *Redmond v. Redmond*, 594 N.W.2d 272, 276 (Minn. App. 1999).

Although Brown properly served Kathryn Helgeson when he moved the district court for either parenting-time assistance or a change of physical and legal custody of J.M.N., the record establishes that Kathryn Helgeson personally declined involvement because of her mistaken belief that the 2003 district court order, which held that she was not an interested third party, remained controlling. From our review of the record, we cannot conclude that the Helgesons' subsequent motion to intervene in the proceedings is based on specious arguments advanced to harass Brown or that the Helgesons' arguments are disingenuous. Rather, the Helgesons' delay in seeking to participate in the proceedings results from their misunderstanding prior to obtaining legal representation to advise them on the applicability of the 2003 district court order. As such, Brown is not entitled to conduct-based attorney fees.

Reversed and remanded.