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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-630**

In re the Custody of L. A. P. W.:
Joan Gorman-Meyer, et al., petitioners,
Respondents,

vs.

Kelly Meyer,
Respondent,

Robert Westlund, IV,
Appellant.

**Filed December 29, 2010
Affirmed
Johnson, Chief Judge**

Ramsey County District Court
File No. 62-FA-08-1085

Peter M. Banovetz, Banovetz Law Firm, Vadnais Heights, Minnesota (for respondents
Joan Gorman-Meyer, et al.)

Kelly Meyer, Roseville, Minnesota (pro se respondent)

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Considered and decided by Minge, Presiding Judge; Johnson, Chief Judge; and
Crippen, Judge.*

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

UNPUBLISHED OPINION

JOHNSON, Chief Judge

The issue in this case is whether custody of a ten-year-old girl should be awarded to her father or to her maternal grandparents. The district court awarded temporary sole legal and physical custody to the maternal grandparents as de facto custodians under chapter 257C of the Minnesota Statutes. The father argues that the district court erred by failing to apply a presumption in his favor because of his status as a parent and by finding that the girl's best interests would be served by an award of custody to the maternal grandparents. We conclude that the district court did not err and, therefore, affirm.

FACTS

L.A.P.W. was born in September 2000 to Kelly Meyer and Robert Westlund, who were 16 years old at the time. The couple never married. Westlund acknowledged that he is L.A.P.W.'s father in 2005.

After her birth, L.A.P.W. lived with Kelly Meyer (hereinafter "Meyer") in the home of her parents, Joan Gorman-Meyer and John Meyer (hereinafter "the Meyer grandparents"), first in St. Paul and then in Roseville. The Meyer grandparents provided primary care for L.A.P.W. while Meyer finished high school and attended college. Westlund's mother sometimes cared for L.A.P.W. during that time period. As L.A.P.W. grew older, Meyer took a less active role in her life, and Westlund began to care for her more frequently. Westlund owns a home in Roseville where L.A.P.W. has her own bedroom. But L.A.P.W. now lives with the Meyer grandparents and spends most of her time with them. At the time of the district court proceedings, Meyer sometimes cared for

L.A.P.W. but often was absent from the Meyer grandparents' home. Gorman-Meyer testified that Meyer stopped living at the Meyer grandparents' home in the spring of 2006 and did not return for at least 12 months. Westlund testified that Meyer sells drugs and uses methamphetamine, and the district court found "strong evidence" to suggest that Meyer's absence is due to drug use. Westlund obtained a court-ordered right to parenting time in 2008.

According to the guardian ad litem, the relationship between the Meyer grandparents, Westlund, and Meyer is "contentious." Gorman-Meyer stated that Westlund is angry and has acted violently in the past, sometimes in front of L.A.P.W. Gorman-Meyer testified that she observed Westlund physically assault Meyer between 12 and 14 times. Gorman-Meyer testified to one occasion when Meyer showed her a belt that Westlund had cut into two pieces with a knife. Gorman-Meyer testified that Westlund damaged Meyer's car, wrote profane messages on her car, and threw a full soda can at her, which exploded in the Meyer grandparents' living room, and caused damage. Gorman-Meyer also testified that Westlund punched the Meyer grandparents' clothes dryer in L.A.P.W.'s presence and smashed Meyer's cell phones on three occasions by throwing them onto a driveway while L.A.P.W. watched out a window. Gorman-Meyer testified that, on two occasions, Westlund tore up photographs of L.A.P.W. that were in the Meyer grandparents' home. Gorman-Meyer testified that Westlund often pounded on the Meyer grandparents' front door while demanding that Meyer open the door, thereby breaking six door panels. Gorman-Meyer testified that Westlund went to her workplace twice and said, in L.A.P.W.'s presence when she was three years old, that he was going

to kill himself. Gorman-Meyer testified that when L.A.P.W. was four years old, Westlund entered the workplace, demanded to know where Meyer was, and became angry when Gorman-Meyer did not respond. Gorman-Meyer testified that Westlund then grabbed L.A.P.W., lifted the girl by her head, and quickly left the workplace. Gorman-Meyer obtained a restraining order against Westlund in September 2004 because of his anger and violent acts.

Gorman-Meyer testified that, in the spring of 2008, Westlund took L.A.P.W. from her elementary school during the school day on three occasions. Each time, Meyer located Westlund and took L.A.P.W. back to the Meyer grandparents' home. Gorman-Meyer testified that L.A.P.W. became afraid and upset after Westlund began taking her from school. Westlund admitted that he took L.A.P.W. from school but said that he did so only when there "was a doctor's appointment or some sort of family emergency."

Westlund denied physically assaulting Meyer, damaging her car or the Meyer grandparents' property, destroying photographs of L.A.P.W., or threatening to kill himself. Westlund admitted that he cut off Meyer's belt with a knife but said it was playful. Westlund also admitted that he wrote vulgar messages on Meyer's car but said he did it because of "heartbreak." Westlund admitted that he tossed a can of soda to Meyer but claimed that he did not intend for it to explode. Westlund admitted to denting the Meyer grandparents' clothes dryer but said that it was an accident that occurred during a "heated debate" with Meyer. Westlund admitted that he violated the restraining order by going to Gorman-Meyer's workplace but stated that he did not know the

restraining order was still in effect. Westlund stated that Gorman-Meyer has never liked him because he caused Meyer to become pregnant.

In April 2008, the Meyer grandparents petitioned for custody of L.A.P.W. At the same time, they moved for an *ex parte* order granting them temporary custody of L.A.P.W. They alleged that L.A.P.W. would be in “immediate physical and emotional danger” if Westlund had custody because of Westlund’s “violent and frequent angry outbursts” to the girl. In May 2008, the district court issued an *ex parte* order granting the Meyer grandparents temporary sole legal and physical custody of L.A.P.W. Westlund moved to vacate the order and, in addition, sought temporary sole legal and physical custody of L.A.P.W. or, in the alternative, reasonable parenting time. The district court kept the *ex parte* order in effect but granted Westlund parenting time. In May 2008, Meyer and the Meyer grandparents (but not Westlund) stipulated that the Meyer grandparents may have sole physical custody of L.A.P.W. and may share joint legal custody with Meyer.

In October 2009, the district court held a two-day evidentiary hearing on the Meyer grandparents’ petition. In February 2010, the district court granted the Meyer grandparents’ petition, finding that it is in L.A.P.W.’s best interests for temporary sole legal and physical custody to be awarded to them. In awarding custody to the Meyer grandparents, the court relied heavily on evidence of Westlund’s “anger and lack of impulse control.” The district court awarded Westlund unsupervised parenting time and gave Meyer supervised parenting time with L.A.P.W. Westlund appeals.

DECISION

Westlund asserts two arguments on appeal. First, he argues that the district court erred by failing to expressly apply a presumption in his favor because of his status as a parent. Second, he argues that the district court erred by finding that an award of custody to the Meyer grandparents was in the girl's best interests.

I. Parental Presumption

Westlund first argues that the district court erred when assessing the child's best interests by not expressly applying a presumption in his favor because of his status as a parent. Westlund's argument is essentially a statutory argument in that he challenges the district court's interpretation and application of chapter 257C of the Minnesota Statutes. Westlund briefly alludes to a parent's constitutional liberty interest to raise his or her child, but Westlund does not argue that the district court's order infringes on his constitutional rights. This court applies a *de novo* standard of review to a district court's interpretation of a statute. *Rooney v. Rooney*, 782 N.W.2d 572, 575 (Minn. App. 2010).

A.

In 2002, the legislature enacted chapter 257C of the Minnesota Statutes. 2002 Minn. Laws ch. 304, §§ 1-6, at 428-36. Under chapter 257C, a person who is not a parent of a child may, by petition or motion, seek custody of the child as either a "de facto custodian" or an "interested third party." Minn. Stat. § 257C.03, subd. 1(a) (2008); *see also* Minn. Stat. § 257C.01, subds. 2(a), 3(a) (2008) (defining de facto custodian and interested third party). In this case, the Meyer grandparents sought custody of L.A.P.W. as de facto custodians.

A person seeking custody as a de facto custodian must satisfy burdens of pleading and proof at three sequential stages. First, the petitioner must allege, among other things, that he or she is a de facto custodian. Minn. Stat. § 257C.03, subd. 2(a)(5) (2008).

If a petitioner satisfies the pleading requirements at the first stage, the petitioner proceeds to the second stage, at which he or she must prove, by clear and convincing evidence, the facts necessary to establish de facto custodian status. Minn. Stat. § 257C.03, subd. 6(a)(1) (2008). Specifically, a petitioner must allege that he or she is

an individual who has been the primary caretaker for a child who has, within the 24 months immediately preceding the filing of the petition, resided with the individual without a parent present and with a lack of demonstrated consistent participation for a period of:

- (1) six months or more, which need not be consecutive, if the child is under three years of age; or
- (2) one year or more, which need not be consecutive, if the child is three years of age or older.

Minn. Stat. § 257C.01, subd. 2(a). The phrase “lack of demonstrated consistent participation” is defined to mean

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.

Minn. Stat. § 257C.01, subd. 2(c). Whether a parent has not demonstrated consistent participation depends on the following factors:

- (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) (2008). If a petitioner fails to prove that he or she is a de facto custodian, the district court must dismiss the petition. Minn. Stat. § 257C.03, subd. 8(a)(1).

If a petitioner satisfies the burden of persuasion at the second stage, the petitioner proceeds to the third stage, at which he or she 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 de facto custodian.” Minn. Stat. § 257C.03, subd. 6(a)(2). The district court determines the child's best interests by considering the following factors:

- (1) the wishes of the party or parties as to custody;
- (2) the reasonable preferences of the child, if the court deems the child to be of sufficient age to express preference;
- (3) the child's primary caretaker;

- (4) the intimacy of the relationship between each party and the child;
- (5) the interaction and interrelationship of the child with a party or parties, siblings, and any other person who may significantly affect the child's best interests;
- (6) the child's adjustment to home, school, and community;
- (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
- (8) the permanence, as a family unit, of the existing or proposed custodial home;
- (9) the mental and physical health of all individuals involved; . . .
- (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
- (11) the child's cultural background, and;
- (12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, subdivision 2, that has occurred between the parents or the parties.

Minn. Stat. § 257C.04, subd. 1(a) (2008). If either party is seeking or considering joint legal or physical custody of the child, the court must additionally consider these four factors:

- (1) the ability of the parties to cooperate in the rearing of the child;

- (2) methods for resolving disputes regarding any major decision concerning the life of the child and the parties' willingness to use those methods;
- (3) whether it would be detrimental to the child if one party were to have sole authority over the child's upbringing; and
- (4) whether domestic abuse, as defined in section 518B.01, subdivision 2, has occurred between the parties.

Minn. Stat. § 257C.04, subd. 2(a) (2008).

In this case, it is undisputed that the Meyer grandparents satisfied their burden at the first stage by alleging facts that they are de facto custodians of L.A.P.W. It also is undisputed that the Meyer grandparents satisfied their burden at the second stage by proving the facts necessary for de facto custodian status. But the parties dispute whether the district court erred by not expressly applying a presumption in Westlund's favor because of his status as a parent of L.A.P.W.

B.

In support of his argument for the application of a parental presumption, Westlund relies on *In re N.A.K.*, 649 N.W.2d 166 (Minn. 2002), in which the supreme court stated:

[T]he right of a parent to custody of their child is paramount and either parent is presumed to be a fit and suitable person to be entrusted with care of child or children born to and belonging to them. The burden of disproving this presumption rests upon those who challenge it.

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 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 appellant, it may be overturned if there are “grave and weighty” reasons to separate a child from his or her natural parents.

Id. at 174-75 (quotations and citations omitted). The custody dispute in *N.A.K.* arose after a girl’s mother died. *Id.* at 168-69. An aunt and uncle of the girl petitioned for custody; the girl’s father opposed the petition. *Id.* at 167. The district court awarded custody to the aunt and uncle after evaluating the best-interests factors in Minn. Stat. §§ 257.025 and 518.17 (2000). *Id.* at 170. The district court reasoned that it was “not permitted to advance a core belief that biological parents should be entitled to custody of their children vis a vis non-biological parents.” *Id.* The supreme court reversed, holding that the district court erred by failing to incorporate the parental presumption into its best-interests analysis. *Id.* at 176.

The parental presumption described in *N.A.K.* is a long-standing feature of Minnesota law on child-custody disputes involving persons other than parents. *See, e.g., Durkin v. Hinich*, 442 N.W.2d 148, 152-53 (Minn. 1989); *Wallin v. Wallin*, 290 Minn. 261, 264-66, 187 N.W.2d 627, 629-30 (1971); *In re Klugman*, 256 Minn. 113, 118, 97 N.W.2d 425, 428-29 (1959). The supreme court has recognized the basic policy that a child’s best interests generally are served by preserving a natural parent’s right to custody. *See, e.g., In re Welfare of A.R.W. & Y.R.C.*, 268 N.W.2d 414, 417 (Minn. 1978). This body of caselaw concerning the parental presumption is intertwined with caselaw that recognizes a parent’s constitutionally protected liberty interest in the care, custody, and control of his or her children. *See Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct.

2054, 2060 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399-400, 43 S. Ct. 625, 626-27 (1925). The two sources of law, though doctrinally separate, are interdependent such that it sometimes is impossible to fully and accurately analyze the applicability of the state-law parental presumption without simultaneously analyzing the federal constitutional issues. *See, e.g., Soohoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007). In his brief to this court, Westlund alludes to his constitutional rights only briefly and does not cite any caselaw applying constitutional principles. The incomplete nature of Westlund’s argument hinders our ability to consider his arguments for reversal and precludes us from conducting a comprehensive analysis of the issues raised.

C.

Westlund’s first argument turns on the question whether a parental presumption applies to a custody determination made pursuant to section 257C.04, subdivision 1(a). Relevant to that issue is a provision of section 257C.04 that states, “The court must not give preference to a party over the de facto custodian or interested third party solely because the party is a parent of the child.” Minn. Stat. § 257C.04, subd. 1(c). This language indicates that the legislature likely intended to change then-existing law with respect to de facto custodians when it enacted chapter 257C. But it is unclear what type of change was intended. Uncertainty arises for at least two reasons. First, section 257C.04, subdivision 1(c), does not use the term “presumption,” which would have clearly signaled that the legislature was speaking to the same issue to which *N.A.K.* spoke. Second, the new statute does not state the extent to which a district court may

give preference to a parent over a de facto custodian in a custody dispute governed by chapter 257C. The statute states only that no preference is due to parents “*solely* because the party is a parent of the child.” *Id.* (emphasis added).

Chapter 257C does not contain any provision expressly stating whether the parental presumption described in *N.A.K.* applies to a custody dispute governed by that chapter. The supreme court never has addressed whether the parental presumption described in *N.A.K.* applies to custody disputes governed by chapter 257C. *Cf. Lewis-Miller v. Ross*, 710 N.W.2d 565, 568-70 (Minn. 2006) (applying section 257C.03, subdivision 7, to petition of interested third party without mentioning parental presumption). This court never has issued a published opinion answering the question whether the parental presumption described in *N.A.K.* survives the enactment of chapter 257C. As indicated above, a complete analysis of the issue would require careful and nuanced consideration of the constitutional limitations on a statutory scheme that permits the deprivation of a parent’s liberty interest in a parent-child relationship. We are constrained in our ability to conduct such an analysis by Westlund’s incomplete argument.

In light of the foregoing, we conclude that the district court did not err when conducting the best-interests analysis in this case. The district court did not violate the command of section 257C.04, subdivision 1(c), because the district court did not give a preference to Westlund over the Meyer grandparents solely because Westlund is a parent of L.A.P.W. The district court essentially applied the parental presumption described in *N.A.K.* by applying each stage of the analysis under chapter 257C, which is, on the

whole, functionally similar to the parental presumption described in *N.A.K.* Nothing in the caselaw requires a district court to use the words “grave and weighty reasons” or to express any other formulation of the parental presumption described in *N.A.K.* See *N.A.K.*, 649 N.W.2d at 177.

Even if we were to conclude that the district court erred by not expressly applying the parental presumption described in *N.A.K.* when performing its best-interests analysis, we would conclude that the error is harmless. See Minn. R. Civ. P. 61. The evidence in the record strongly suggests that grave and weighty reasons exist to overcome the presumption, and the district court’s findings of fact support that conclusion. The district court appropriately considered both Westlund’s conduct toward the child as well as the strength of the relationship between the Meyer grandparents and the child. Accordingly, we conclude that, even if the district court had expressly applied the parental presumption described in *N.A.K.*, the district court would have reached the same result.

Thus, we conclude that the district court did not commit reversible error by not expressly applying a parental presumption in this case.

II. Best Interests

Westlund also argues that, regardless whether the parental presumption applies, the district court erred by finding that L.A.P.W.’s best interests are served by awarding custody to the Meyer grandparents. A district court has “broad discretion” in conducting a best-interests analysis, and we apply a clear-error standard of review to its findings of fact. *In re Evenson*, 729 N.W.2d 632, 635 (Minn. App. 2007), *review denied* (Minn. June 19, 2007).

Westlund challenges the district court's findings in four respects. First, he contends that the district court should not have relied on conduct by him that occurred years earlier, when he was at a different stage of life and maturity. A district court is required to "consider and evaluate *all* relevant factors in determining the best interests of the child." Minn. Stat. § 257C.04, subd. 1(a) (emphasis added). This statute does not impose any temporal limitation on the evidence that may be considered. Accordingly, the district court did not err by considering Westlund's conduct since L.A.P.W.'s birth in 2000.

Second, Westlund contends that the district court erred by treating Gorman-Meyer as a biological parent, rather than a grandparent, when evaluating "the ability of the parties to cooperate in the rearing of the child." Minn. Stat. § 257C.04, subd. 2(a)(1). The district court's findings do not treat Gorman-Meyer as L.A.P.W.'s biological parent; the district court treated Gorman-Meyer as a de facto custodian. The district court found that Gorman-Meyer would be willing to cooperate with Westlund in raising L.A.P.W. but that Westlund's anger issues might prevent that cooperation. Thus, the district court did not err when analyzing the ability of Gorman-Meyer and Westlund to cooperate in raising L.A.P.W.

Third, Westlund contends that the district court erred by failing to recognize that the Meyer grandparents will "perpetuate" the girl's anxiety disorder. The district court thoroughly evaluated "the mental and physical health of all individuals involved" in the dispute. *Id.*, subd. 1(a)(9). Thus, the district court did not err in this respect.

Fourth and finally, Westlund contends that the district court erred by considering his unwillingness to attend parenting classes and therapy sessions as recommended by the district court. Westlund asserts that he does not need parenting classes and therapy and that one of the classes conflicts with his parenting schedule. The district court found that Westlund's unwillingness to attend therapy was related to his anger and violent behavior. This finding is supported by evidence in the record. Thus, the district court did not err by factoring it into the best-interests analysis.

In sum, the district court did not err by finding that L.A.P.W.'s best interests are served by awarding custody to the Meyer grandparents.

Affirmed.