STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0913

In Re the Custody of:

E.D.N.,
D.O.B. 05/22/08,
Child,

Shawn A. Pehrson, petitioner,
Respondent,

vs.

Heather Marie Heidi Northrup,
Respondent,

Anthony Levine, intervenor,
Appellant.

Filed April 22, 2013
Affirmed
Rodenberg, Judge

Faribault County District Court
File No. 22-FA-08-674

David F. Frundt, Ryan A. Gustafson, Frundt & Johnson, Ltd., Blue Earth, Minnesota (for respondent Shawn A. Pehrson)

Heather Marie Northrup, Mapleton, Minnesota (pro se respondent)

Lori Michael, Apple Valley, Minnesota (for appellant)

Considered and decided by Chief Judge Johnson, Presiding Judge; Rodenberg, Judge; and Toussaint, Judge.[*]

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

RODENBERG, Judge

In this third-party custody dispute, appellant challenges the district court's dismissal of his third-party custody petition without an evidentiary hearing. We affirm.

FACTS

This appeal arises from the district court's dismissal of appellant Anthony Levine's third-party custody petition and motion to intervene in the custody matter regarding E.D.N. (the child), born May 22, 2008.. Respondents Shawn Pehrson (father) and Heather Northrup (mother) are the child's biological parents. Respondents were never married. In the fall of 2008, father signed a voluntary recognition of parentage and moved to establish custodial rights. Mother and father reached an agreement for mother to maintain sole physical custody with mother and father sharing legal custody. A parenting-time arrangement was also established.

At the time of the child's birth, mother was in a romantic relationship with appellant. Mother and the child lived with appellant from the time of the child's birth until January 2011.

In 2011, father initiated an action seeking temporary or permanent physical custody of the child. On November 4, appellant filed a third-party custody petition

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

seeking to intervene as a de facto custodian or interested third party. Appellant sought sole or joint legal custody and joint physical custody of the child with mother. The child was three years old when appellant filed the petition.

Based on appellant's petition and supporting documents, the district court concluded that appellant had failed to make a prima facie showing that he met the statutory definitions of de facto custodian or interested third party. The district court denied without an evidentiary hearing appellant's motion to intervene in this proceeding. This appeal followed.

D E C I S I O N

Appellant challenges the district court's conclusion that he failed to make a prima facie showing that he qualifies as a de facto custodian or interested third party. Appellant contends that he made the necessary showing and that he is, therefore, entitled to an evidentiary hearing. The issue of standing is a question of law, which this court reviews de novo. *In re M.R.P.-C.*, 794 N.W.2d 373, 376 (Minn. App. 2011) (citing *Longrie v. Luthen*, 662 N.W.2d 150, 153 (Minn. App. 2003), *review denied* (Minn. Aug. 19, 2003)). Whether a party has standing to intervene in a custody dispute is governed by Minn. Stat. § 257C.03 (2012).[1] *M.R.P.-C.*, 794 N.W.2d at 376. The party seeking to intervene must allege in the petition that he meets the statutory definition of de facto custodian or interested third party. *See* Minn. Stat. § 257C.03, subd. 2(a)(5) (requiring that petition allege the "basis for jurisdiction"); *see also M.R.P.-C.*, 794 N.W.2d at 376 (stating that to

[1] For ease of reference, we cite the 2012 statutes throughout this opinion. There were no changes to the relevant sections from 2010 to 2012.

allege the basis for jurisdiction, the party must allege that he qualifies as a de facto custodian or interested third party). The allegations must be established by competent evidence. Minn. Stat. § 257C.03, subd. 2(b). To succeed at the pleading stage and be entitled to an evidentiary hearing, the petitioner must allege facts which, if proven, would show that he meets the definition of a de facto custodian or interested third party. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 570 (Minn. 2006). If the district court concludes that the petitioner is not a de facto custodian or interested third party, it must dismiss the petition. Minn. Stat. § 257C.03, subd. 8(a).

I

A "de facto custodian" is defined by statute as

> 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 by a parent for a period of . . . 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)(2) (2012).

Appellant argues that he is a de facto custodian because he has had a consistent custody and co-parenting arrangement with mother since the child's birth and at times has cared for the child "up to 100% when [mother] has needed assistance." Appellant also asserts that the child resided with him for over 31 months of the child's life and that appellant provided care for the child for at least 50% of the time in the year prior to filing the third-party custody petition.

Appellant's allegations, even if true, are insufficient to establish that he meets the statutory definition of de facto custodian. Appellant does not assert that he lived with the child without a parent present for 12 months or more within the 24 months prior to filing the petition. *See id.* (imposing that requirement when the child is three years of age or older). In the petition and supporting affidavits, appellant alleges that he lived with mother and the child from the time of the child's birth until January 2011. Appellant filed the petition in November 2011. Even if the child lived exclusively with appellant from January to November 2011, which appellant does not allege, that time period is less than the 12 months required by statute. And although the 12 months need not be consecutive, appellant does not assert that, at any time prior to January 2011, he lived with the child without a parent's presence. Therefore, taking appellant's own statements as true, he does not meet the definition of de facto custodian under Minn. Stat. § 257C.01, subd. 2(a).

II

An "interested third party" is an individual who is not a de facto custodian but who can prove one of three endangerment factors:

> (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.01, subd. 3, 257C.03, subd. 7(a)(1).

"Extraordinary circumstances" is not further defined in the statute. *See* Minn. Stat. § 257C.03, subd. 7. We have previously reasoned that, to show "extraordinary circumstances" under Minn. Stat. § 257C.03, subd. 7(a), a petitioner must demonstrate that, at a minimum, a substantial relationship exists between the petitioner and the child at the time the petition is filed. *In re Kayachith*, 683 N.W.2d 325, 327 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). Additionally, in a decision issued following the effective date of chapter 257C but applying pre-chapter 257C law, the Minnesota Supreme Court required extraordinary circumstances to be "of a grave and weighty nature." *In re Custody of N.A.K.*, 649 N.W.2d 166, 175 (Minn. 2002) (stating that the parental presumption may be overcome by "extraordinary circumstances of a grave and weighty nature"). We recently held in *In re Custody of A.L.R.*, ___ N.W.2d ___, ___, 2013 WL 1395623, at *7 (Minn. Apr. 8, 2013), that Minn. Stat. § 257C.03, subd. 7(a)(1)(iii), requires that "extraordinary circumstances" be of a "grave and weighty nature."

Appellant asserts that he and the child had a substantial relationship when he filed the petition and that the relationship between the child, appellant, and the child's half-sibling, who resides with appellant, constitutes extraordinary circumstances.

But *Kayachith* does not stand for the proposition that a substantial relationship alone constitutes extraordinary circumstances. And the mere possibility of disruption to a child because of a change in circumstances is not enough to constitute extraordinary circumstances. *See Wallin v. Wallin*, 290 Minn. 261, 267, 187 N.W.2d 627, 631 (1971) ("[S]ince a change of custody involving small children will be disruptive to some degree

in almost all cases, we are reluctant to establish precedent which could prevent a parent from prevailing in a custody dispute for that reason alone."). Furthermore, the district court correctly pointed out that

> [mother] resided with the Child all of the Child's life, has a significant relationship with the Child, and has maintained custody of the Child since his birth. [Mother] has been the Child's primary caretaker since January 2011, when [mother] and [appellant] ended their romantic relationship. The Child resided with [appellant] only because [mother] resided with [appellant]. [Father] continues to be entitled to parenting time with the Child, and has custody of [father's] and [mother's] other child. [Mother] and [father] are each capable of caring for the Child and have each been involved in the Child's life. It would be impossible for [appellant] to show that the Child would be endangered in [mother's] or [father's] custody.

Finally, appellant essentially suggests that placing the child in appellant's care is in the best interests of the child. But the legislature chose to require a petitioner to show both extraordinary circumstances *and* that the child's best interests would be served by granting custody to the petitioner. Minn. Stat. § 257C.03, subd. 7(a)(1)(iii) (extraordinary circumstances), (2) (best interests). Therefore, a best-interests argument is insufficient to establish extraordinary circumstances. *See A.L.R.*, 2013 WL 1395623, at *7.

In sum, appellant has not alleged facts which, if believed, would establish extraordinary circumstances. Thus, appellant has failed to make a prima facie showing that he meets the statutory definition of interested third party, and the district court did not err in dismissing his petition without holding an evidentiary hearing.

Affirmed.