STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1569

Dennis Schneider, Sr., et al., petitioners,
Appellants,

vs.

State of Minnesota, Hennepin County Human Services
and Public Health Department,
Respondent,

Dennis Schneider, Jr.,
Respondent,

Barbara Schneider,
Respondent.

Filed August 5, 2008
Affirmed
Minge, Judge

Hennepin County District Court
File No. 27-FA-07-1874

Paul P. Sarratori, Sarratori Law Office, P.A., 2601 Coon Rapids Boulevard, Coon Rapids, MN 55433 (for appellants)

Michael O. Freeman, Hennepin County Attorney, Nancy K. Jones, Assistant County Attorney, Health Services Building, 525 Portland Avenue, Suite 1210, Minneapolis, MN 55415 (for respondent Hennepin County)

Dennis Schneider, Jr., and Barbara Schneider, 12851 – 274th Street N.W., Zimmerman, MN 55398 (pro se respondents)

Considered and decided by Minge, Presiding Judge; Wright, Judge; and Muehlberg, Judge*

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

MINGE, Judge

Appellants challenge the dismissal (without an evidentiary hearing) of their petition for visitation with their grandchildren pursuant to Minn. Stat. § 257C.08, subd. 4 (2006). Because appellants failed to allege or present prima facie evidence that their visitation would not interfere with the custodial relationship between the children and their adoptive parents, we affirm.

FACTS

Appellants Dennis and Diane Schneider (grandparents) are the grandparents of three children of their daughter, Denise Schneider. The children were born in 1995, 1998, and 2004. Denise and the three children lived with grandparents, and grandparents were actively involved in the lives of the children until January 2005, when the grandchildren were removed by Hennepin County and placed in foster care with their uncle Dennis Schneider, Jr., and his wife Barbara (respondents). Dennis Schneider, Jr., is grandparents' son and Denise's brother.

Denise Schneider's parental rights were terminated in December 2005. Denise originally designated respondents to be the adoptive parents for her children, and in July 2006 the county entered into an adoption-placement agreement with respondents.

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

Respondents have adopted two of the children; their adoption of the third child is pending.

Respondents have denied grandparents visitation with the children.[1] On March 28, 2007, grandparents filed a petition for visitation with the adopted children. Hennepin County moved to dismiss grandparents' petition, arguing that they did not have standing to seek visitation. Following the county's motion, the district court held an initial case management conference with counsel present. As a result of that conference, the district court set a hearing for June 7, 2007 to consider grandparents' motion for visitation and the county's motion to dismiss.

After the June 7 hearing, the district court ruled that grandparents had standing to petition for visitation pursuant to the third-party visitation provision in Minn. Stat. § 257C.08, subd. 4 (2006), and denied the county's motion to dismiss for lack of standing. In the same order, however, the district court dismissed grandparents' petition, ruling that they failed to establish a prima facie case addressing the third statutory factor in section 257C.08, subdivision 4.

Grandparents requested leave to move for reconsideration pursuant to Minn. R. Gen. Pract. 115.11, arguing that (1) the June 7 hearing was limited to the question of standing; and (2) Minn. Stat. § 257C.08, subd. 7, provides that grandparents are entitled to a hearing on whether visitation would interfere with the relationship between the custodial parents and the children. In a July 2007 order, the district court denied

[1] Respondents also deny grandparents visitation with their biological children. Visitation with these grandchildren is not at issue in this proceeding.

grandparents' request for reconsideration, ruling that (1) Minn. Stat. § 257C.08, subd. 7, was declared unconstitutional in *Soohoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007); (2) the petition failed to allege facts sufficient to constitute a prima facie case on all three relevant statutory factors; and (3) because respondents, as parents, have a fundamental right to make decisions concerning the care, custody, and control of their children, grandparents had the burden of alleging or otherwise submitting information indicating the existence of a prima facie case to warrant holding an evidentiary hearing. This appeal follows.

D E C I S I O N

The fundamental question on appeal is whether the district court abused its discretion by dismissing grandparents' petition for visitation without an evidentiary hearing. Neither party challenges the district court's determination that grandparents have standing to petition for visitation under the third-party visitation provision in Minn. Stat. § 257C.08, subd. 4. Grandparents contend, however, that the district court improperly required them to allege or otherwise submit information sufficient to constitute prima facie evidence on all three statutory factors as a condition of granting an evidentiary hearing.

We review a district court's broad discretion in determining visitation for an abuse of that discretion. *Soohoo v. Johnson*, 731 N.W.2d 815, 825 (Minn. 2007). When reviewing visitation determinations, we examine "whether the [district] court made findings unsupported by the evidence or improperly applied the law." *Id.* "[W]e will not reverse the court's findings unless they are clearly erroneous." *Id.*

The third-party visitation statute provides that

> [i]f an unmarried minor has resided in a household with a person . . . for two years or more and no longer resides with the person, the person may petition the district court for an order granting . . . reasonable visitation rights to the child during minority.

Minn. Stat. § 257C.08, subd. 4. The district court must grant the petition if it finds that "(1) visitation rights would be in the best interests of the child; (2) the petitioner and child had established emotional ties creating a parent and child relationship; and (3) visitation rights would not interfere with the relationship between the custodial parent and the child." *Id*., subd. 4(1)–(3). In order to afford due deference to custodial parents, parties seeking visitation bear the ultimate burden of showing the existence of these three factors by clear and convincing evidence. *Soohoo*, 731 N.W.2d at 823.

This court has previously addressed the right-to-a-hearing question. *Kulla v. McNulty*, 472 N.W.2d 175, 180 (Minn. App. 1991), *review denied* (Minn. Aug. 29, 1991). In *Kulla*, this court ruled that the district court did not abuse its discretion by requiring that, as a condition of obtaining a hearing, the petitioner had to make a prima facie showing of each of the statutory factors outlined in Minn. Stat. § 257.022, subd. 2b (Supp. 1989).[2] *Id*. at 180-81. This court reasoned that

> [i]f a court were unable to find the existence of one of the factors, it could not grant a visitation petition under the statute. Therefore, if a petitioner were unable to produce prima facie evidence on one of the factors, there is no reason for the court to hold an evidentiary hearing since it would be

[2] Minn. Stat. § 257.022 was renumbered as Minn. Stat. § 257C.08 in 2002. 2002 Minn. Laws ch. 304 § 13, at 444.

> unable to find the existence of all three statutory factors from the outset and unable to grant the petition under the statute.

Id. at 181. We concluded that "[p]ublic policy in favor of fostering the development and harmony of a family unit weighs in favor of non-parental third parties being required to meet the stringent burden of Minn. Stat. § [257C.08, subd. 4]" and, accordingly, the district court "properly required [the petitioner] to produce prima facie evidence to satisfy *all* three factors . . . as a prerequisite to granting an evidentiary hearing." *Id*. at 182 (emphasis in original).

Here, although the documents filed by the grandparents presented a basis for their claims under factor one ("best interests") and factor two ("emotional ties"), grandparents did not address factor three—that visitation would not interfere with the custodial relationship between respondents and their adopted children. Grandparents did not even claim that they could produce such evidence until submitting a request for reconsideration.

Grandparents contend that their petition for visitation had not yet progressed to a stage requiring them to address the custodial interference factor under section 257C.08, subdivision 4. Grandparents claim that the June 7, 2007 hearing was scheduled solely to address Hennepin County's motion to dismiss for lack of standing and, once the district court found standing under section 257C.08, subdivision 4, they should have had an opportunity to present additional evidence at an evidentiary hearing.

This claim is hard to evaluate without transcripts from the May 2007 initial case management conference or from the June hearing on the county's motion to dismiss for

lack of standing. Grandparents, as appellants, bear the burden of providing transcripts "deemed necessary for inclusion in the record." Minn. R. Civ. App. P. 110.02, subd. 1(a). Without a transcript, we consider the matter on the basis of the documents in the record. In this regard, we observe that in setting the June 7 hearing, the district court's order following the initial case management conference states that the "parties shall appear for a hearing on [grandparents'] Motion to Establish Visitation pursuant to Minn. Stat. § 257C on June 7 . . . ." This statement clearly indicates that the substance of grandparents' petition would be considered.

Furthermore, before the June 7 hearing, grandparents filed a "Memorandum of Points and Authorities in Support of Petitioner's Motion" that claimed they had standing under Minn. Stat. § 257C.08, subd. 4. Grandparents' memorandum included substantive arguments addressing the "best interests" and "emotional ties" factors in section 257C.08, subdivision 4, but made no claims related to the third factor, "custodial interference." Without any transcripts, we are unable to determine whether there is merit to grandparents' claim that, based on statements at the June 7 hearing or the earlier case-management conference, the June 7 hearing was limited to the standing issue.

We recognize that incident to the standing issue there was uncertainty about which subdivision of the statute is a proper basis for grandparents' visitation motion. However, this uncertainty does not explain the omission of information related to the custodial-interference factor. All of the provisions in the third-party visitation statute require that the petitioning party show by clear and convincing evidence that visitation would not interfere with the parents' custodial relationship. *See* Minn. Stat. § 257C.08, subds. 3, 4,

6; *Soohoo*, 731 N.W.2d at 823. Grandparents did not present any evidence that they now allege could have shown the district court that an evidentiary hearing was warranted.

Because grandparents did not allege or otherwise submit any information regarding the third statutory factor under Minn. Stat. § 257C.08, subd. 4, we conclude that the district court did not abuse its discretion by dismissing their petition before conducting an evidentiary hearing. *Kulla*, 472 N.W.2d at 184 ("Appellant has failed to produce a prima facie case on the third statutory factor. The [court] did not abuse [its] discretion by denying appellants' request for an evidentiary hearing."). We note, however, that the district court never reached the merits of grandparents' visitation request before dismissing their petition, and this may be significant should they choose to again request visitation. Grandparents also argue that it is in the best interests of the children to have visitation. Because of our resolution of the primary issue regarding whether grandparents were entitled to an evidentiary hearing, we do not address this contention.

Affirmed.

Dated: