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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1950**

Renee Wiskow, et al., petitioners,
Respondents,

vs.

Zachary O'Reilly,
Appellant.

**Filed September 5, 2017
Reversed and remanded; motions denied
Larkin, Judge**

Goodhue County District Court
File No. 25-FA-09-3801

Jill I. Frieders, O'Brien & Wolf, LLP, Rochester, Minnesota (for respondents)

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Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Klaphake,
Judge.*

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

UNPUBLISHED OPINION

LARKIN, Judge

Appellant-father challenges the district court's order granting respondent-grandparents visitation with his children. Because the district court failed to make adequate findings regarding the children's best interests, grandparents' interference with the parent-child relationship, and father's wishes regarding visitation, and because the district court applied the wrong standard of proof, we reverse and remand. We also deny the parties' pending motions to strike as moot.

FACTS

Appellant-father Zachary O'Reilly is the father of B.S.O., born 5/5/99, K.A.O., born 5/30/00, K.E.O., born 5/30/00, B.Z.O., born 4/23/02, and M.J.O., born 4/24/03. In September 2008, the children's mother died. In December 2009, respondents Renee Wiskow and Jeffrey Wiskow, the children's maternal grandparents, petitioned the district court for visitation with the children.

In April 2011, pursuant to a stipulation of the parties, the district court ordered grandparent visitation. The court-ordered schedule provided that the children would visit grandparents two weekends per month. One of the visits included an overnight, and the other consisted of an afternoon visit. The order provided that "[w]hen a visit is cancelled due to illness or for other reasons, 'make-up' visits shall be arranged to occur within seven days' time of the cancelled visit." The order included "ground rules," including that "[father's] role as sole parent and his parenting of children will be respected. The children

will not be given mixed messages regarding [father's] rules or his role as parent. [And grandparents] will be responsible for enforcing these rules at their home.”

In January 2012, grandparents moved to modify the visitation schedule for 2012. Grandparents requested that the children be allowed to call them on the children's birthdays, holidays, and special events, and that grandparents be able to call the children on such days. Grandparents also requested that they have the same visitation hours for certain holidays that they had under the 2011 schedule. Pursuant to a stipulation of the parties, the district court ordered holiday visitation and that “[t]he children shall be allowed to make telephone calls to [grandparents] on birthdays, holidays, to share exciting events and to let them know about important activities.”

In February 2016, grandparents moved to modify and enforce the visitation order. Specifically, grandparents asked the district court to enforce the phone-contact and “make-up” provisions of the visitation order and to either direct the parties to attend mediation to develop “a mutually agreeable new schedule which recognizes that the [children] have grown and have different needs” or to “work with their attorneys to develop a mutually agreeable new schedule.” In a supporting affidavit, grandmother alleged that grandparents' time with the children had decreased as the children became involved in after-school activities and sports, and that grandparents had not received “make-up” visits. Grandmother also alleged that the children are only allowed to use father's cell phone to call grandparents and that father asks “them why they want to talk to [grandparents].”

In a countermotion, father moved to suspend visitation. In his supporting affidavit, father alleged that grandmother “routinely undermines [him] as a parent.” For example,

father alleged that grandmother provided B.S.O. with a phone “when he was grounded from his phone at [father’s] house.” Father also alleged that on the weekend of April 29, during one of grandparents’ visits, grandmother helped B.S.O. research his “rights” on the Internet and told him “that because he was 16, he could make up his own mind on where to live, who to listen to, and what he was going to do.”

Father further alleged that on May 1, before the end of a scheduled visit, B.S.O. expressed frustration with father’s rules and stated that “he had rights to select where he was going to live” and that “he was going to live with [grandmother].” B.S.O. did not return home after the visit, but he attended school the next day. B.S.O. refused to return home after meeting with the family’s pastor on May 2, and he stayed with the pastor that night. Father picked up B.S.O. from school on May 3.

Lastly, father alleged that grandmother interferes with the children’s relationship with their stepmother and siblings, and that she makes them feel guilty if they tell her they cannot visit by saying that their mother would want them to visit.

The district court held a hearing on the parties’ motions but did not take testimony. The ensuing order set forth the parties’ allegations and a finding that “[i]t is clear that [grandparents], and [grandmother] in particular, have been undermining [father’s] authority. It was inappropriate for her to suggest that [B.S.O.] could live with her without [father’s] permission.” The district court “nonetheless [found] that it is in the children’s best interests that [grandparents’] parenting time be reinstated pursuant to the previous schedule.” However, the district court eliminated grandparents’ right to “make-up” time

when the children's schedules interfere with visitation. The district court also imposed the following conditions:

3. [Father] shall not willfully schedule activities or sporting events to conflict with [grandparents'] grand-parenting time.
4. [Father] shall allow the children to speak with [grandparents] using their own telephones; he shall not require them to use his.
5. None of the parties shall make disparaging remarks about the other parties to the children or where the children are likely to overhear such remarks; neither shall they allow other adults to do so.
6. [Grandparents] shall not discuss these proceedings with the children. They shall not suggest to the children that they are able to make their own decisions regarding where they live. They shall in no way attempt to undermine [father's] authority over the children. They shall enforce [father's] rules for the children, and any consequences he has imposed as discipline.

Father moved for a new hearing, amended findings, and to stay the visitation order pending appeal. The district court granted father's motion for amended findings in part, amending its order to include its conclusion that "visitation for [grandparents] is not likely to cause interference with [father's] relationship with the children." The district court otherwise denied father's motions. Father appeals.

D E C I S I O N

I.

Father contends that the district court abused its discretion by maintaining the 2011 court-ordered visitation schedule.

"A parent's right to make decisions concerning the care, custody, and control of his or her children is a protected fundamental right" under the Due Process Clause of the

Fourteenth Amendment. *SooHoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007) (citing *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000) (plurality opinion)). However, a grandparent may petition the district court for visitation rights under Minn. Stat. § 257C.08, subd. 1 (2016), over the objection of the child’s parent. The statute provides that

[i]f a parent of an unmarried minor child is deceased, the parents . . . of the deceased parent may be granted reasonable visitation rights to the unmarried minor child during minority by the district court upon finding that visitation rights would be in the best interests of the child and would not interfere with the parent child relationship.

Minn. Stat. § 257C.08, subd. 1.

In determining whether to grant such visitation, the district court “shall consider the amount of personal contact between the parents . . . of the deceased parent and the child prior to the application.” *Id.* A grandparent seeking visitation rights “must prove by clear and convincing evidence that visitation would not interfere with the parent-child relationship.” *In re C.D.G.D.*, 800 N.W.2d 652, 656 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). Lastly, because of the importance of a parent’s fundamental right to make decisions regarding his children, the district court must give “special weight” to a fit custodial parent’s wishes regarding visitation. *Id.* at 661; *cf. SooHoo*, 731 N.W.2d at 821 (noting that a third-party visitation statute “must give some special weight to the fit custodial parent’s decision regarding visitation” to survive a constitutional challenge).

A grandparent-visitation order is reviewed for an abuse of discretion. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). An appellate court considers whether the

district court “made findings unsupported by the evidence or improperly applied the law.” *SooHoo*, 731 N.W.2d at 825.

Best Interests of the Children

Father argues that “[t]he district court abused its discretion by concluding it is in the best interest of the minor children to award grandparent visitation as set forth in the previous [visitation] order.”

The paramount concern in grandparent-visitation cases is the best interests of the child. *Olson*, 534 N.W.2d at 549. “[W]hat is at issue in grandparent visitation cases is the right of the child to know [his] grandparents, and not the interests of the grandparents.” *Id.* (quotation omitted). In the underlying order, the district court restated the parties’ allegations, found that grandmother had undermined father’s authority, and concluded that it was “nonetheless . . . in the children’s best interests that [grandparents’ visitation] time be reinstated pursuant to the previous schedule.” The district court did not explain why it was in the children’s best interests to continue court-ordered visitation pursuant to the previous schedule, or to continue it at all. Nor did the district court make findings that make its reasoning apparent.

The previous grandparent-visitation schedule was over five years old at the time of the underlying order. The children are now ages 18, 17, 17, 15, and 13. The parties agree that the children are involved in many activities. Grandparents concede that the children are busy with sports and activities and that this change in circumstances has interfered with the current visitation schedule. In fact, grandparents asked for a new schedule that would accommodate the children’s activities.

Moreover, there appears to be acrimony stemming from the current visitation order. Father argues that the children have asked to end visits with grandparents early and that if the children call grandmother and tell her they cannot visit, she makes them feel guilty by saying their mother would want them to visit. Father also argues that grandmother interferes with the children's relationship with their father, stepmother, and stepsiblings. Grandmother argues that communicating with father has become difficult, father has discouraged the children from contacting grandparents, and that father has given grandparents little notice when the children's activities prevent them from visiting during designated visitation times.

On this record, it is not obvious that continuing the current visitation schedule is in the children's best interests. If the children's age-appropriate social and athletic activities make the current schedule unworkable, it may be in the children's best interests to modify the schedule, instead of ordering visits that are unlikely to occur. Similarly, if father's allegations are true, it may be in the children's best interests to vacate the order for visitation altogether. These important decisions are entrusted to the district court. But the current findings are inadequate to enable appellate review of the district court's best-interests determination.

The district court has broad discretion regarding visitation and the best interests of children. *Id.* at 550. And this court will defer to an exercise of that discretion so long as the district court makes sufficient findings to enable this court to understand its reasoning. One of the purposes of findings in family court actions is to enable the parties and a reviewing court to understand the reasons underlying a district court's decisions. *Rosenfeld*

v. Rosenfeld, 311 Minn. 76, 82, 249 N.W.2d 168, 171 (1976). Although the district court’s best-interest findings regarding grandparent visitation need not be as detailed as findings regarding a custody determination, *Olson*, 534 N.W.2d at 550 & n.5, adequate findings are necessary for the parties and the reviewing court to understand the district court’s decision.

This court cannot make its own factual findings. *See Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777, 779 (Minn. 1989) (“[A]n appellate court’s limited scope of review circumscribes additional fact finding by it.”). And without adequate findings, this court’s ability to review an exercise of discretion is limited. *See Rosenfeld*, 311 Minn. at 82, 249 N.W.2d at 171 (stating that findings are necessary to facilitate appellate review); *see also State ex rel. Swanson v. 3M Co.*, 845 N.W.2d 808, 816 (Minn. 2014) (“[An appellate court’s] ability to engage in effective appellate review of the exercise of . . . discretion depends on the existence of factual findings and legal analysis that sufficiently demonstrate that the district court considered all relevant factors.”). Because the district court’s best-interest findings are inadequate, this court cannot determine whether the district court abused its discretion when determining the children’s best interests.

Interference with the Parent-Child Relationship

Father argues that the district court erred “by awarding . . . grandparent visitation without clear and convincing evidence from [grandparents] that the visitation would not interfere with [father’s] parent-child relationship.”

In determining whether grandparent visitation would interfere with the parent-child relationship, the district court relied on Minn. Stat. § 257C.08, subd. 7 (2016), which states that the preponderance-of-the-evidence standard applies when making such a

determination. In *SooHoo*, the supreme court held that Minn. Stat. § 257C.08, subd. 7, is unconstitutional, in part because the provision’s “preponderance of the evidence standard is not sufficient to protect parents against the risk of an erroneous deprivation of their parental rights.” 731 N.W.2d at 824. The supreme court held that where a third-party seeks visitation rights, the clear-and-convincing evidence standard of proof is necessary to “protect against the risk of erroneously depriving a parent of his or her interest in the care, custody, and control of his or her children.” *Id.*

This court applied the holding of *SooHoo* to a grandparent-visitation claim in *C.D.G.D.*, stating that “the grandparent must prove by clear and convincing evidence that visitation would not interfere with the parent-child relationship.” *C.D.G.D.*, 800 N.W.2d at 656. Thus, the district court here erred by applying the preponderance-of-the-evidence standard under Minn. Stat. § 257C.08, subd. 7.

Moreover, the district court failed to make sufficient factual findings to support its determination that “visitation for [grandparents] is not likely to cause interference with [father’s] relationship with the children.” The district court concluded that “[g]iven the stricter limits put in place by the Court’s [underlying] order, . . . it is not likely that allowing [grandparents] to retain their visitation will interfere with [father’s] parenting” and that “with the new restrictions in place, [grandparents] will not interfere in [father’s] parental relationship.” Father argues that the “stricter limits” in the underlying order are similar to the “ground rules” in the 2011 visitation order and therefore cannot justify the district court’s conclusion. Father’s argument is persuasive.

The underlying order prohibits grandparents from discussing the visitation proceedings with the children, suggesting to the children that they are able to make their own decisions regarding where they live, and attempting to undermine father's authority over the children. The order also directs grandparents to "enforce [father's] rules for the children, and any consequences he has imposed as discipline." The "ground rules" in the 2011 order provide that (1) "[father's] role as sole parent and his parenting of children will be respected," (2) the "children will not be given mixed messages regarding [father's] rules or his role as parent," and (3) "[grandparents] will be responsible for enforcing these rules at their home."

Despite the existence of the 2011 ground rules, the district court found that it was "clear" that grandparents had undermined father's authority over the children. The underlying order does not reveal why the imposition of the current restrictions, which are similar to the ground rules that were in place when grandparents undermined father's authority, clearly and convincingly establishes that grandparents will not interfere with father's relationship with his children in the future. There may have been a basis for the district court to conclude that grandparents will comply with the restrictions, but this basis is not apparent from the district court's findings.

In addition, it is difficult for this court to review the district court's prediction that grandparents will not interfere with father's parent-child relationship without knowing the extent of the previous interference. Father alleged several examples of interference, but the district court only made findings regarding one incident involving B.S.O. If the district court did not believe the other allegations, such a credibility determination would tend to

support the district court's conclusion that grandparents will not interfere in the future. If, on the other hand, the district court believed the other allegations, there is all the more need for detailed findings explaining why the record clearly and convincingly shows that there will not be interference in the future.

In sum, as to the possibility of interference with the parent-child relationship, the district court applied the wrong standard of proof, and the district court's findings are inadequate to facilitate appellate review.

Custodial Parent's Wishes

Father argues that "[t]he district court abused its discretion by ordering grandparent visitation under Minn. Stat. § 257C.08 subd. 1, without giving presumptive deference to [his] wishes as to visitation and disregarding the overwhelming evidence provided by [father], the custodial parent of the children."

"A district court abuses its discretion by ordering grandparent visitation under Minnesota Statutes section 257C.08, subdivision 1, without giving presumptive deference to the parent's determination as to visitation." *Id.* at 653. Yet the district court's findings do not indicate that it gave father's wishes regarding grandparent visitation any more weight than grandparents' wishes. The district court's failure to make adequate findings regarding father's wishes as a custodial parent constitutes error. *See id.* at 662 (finding an abuse of discretion that "require[d] reversal" because there was no basis to conclude that the district court had given "special weight" to a custodial parent's wishes regarding grandparent visitation).

In sum, the district court's findings regarding the children's best interests, grandparents' interference with father's parent-child relationship, and father's wishes regarding grandparent visitation are inadequate. In addition, the district court erred by using the preponderance-of-the-evidence standard under Minn. Stat. § 257C.08, subd. 7, and not the clear-and-convincing evidence standard, when determining whether visitation will interfere with the parent-child relationship. We therefore reverse the award of grandparent visitation and remand for the district court to make sufficient findings that support whatever decision it makes on remand and that will enable appellate review, if necessary. To hasten an end to a situation that is likely stressful for the children, we suggest that findings regarding the following topics are relevant: the children's wishes regarding visitation, whether anyone has inappropriately pressured the children regarding visitation, the veracity of father's allegations regarding grandparents' past interference with the parent-child relationship, and father's wishes regarding visitation. When making findings of fact on remand regarding interference with the parent-child relationship, the district court shall apply the correct clear-and-convincing evidence standard.

Because we reverse and remand for additional findings and application of the correct evidentiary standard, we do not address father's argument that the district court "erred by awarding an excessive amount of grandparent visitation." A decision regarding the amount of court-ordered grandparent visitation, if any, is fact specific, and must be made on remand consistent with this opinion.

II.

Each of the parties has moved to strike references to certain documents in the other party's briefing. Grandparents move to strike "all references to [father's] affidavits dated August 29, 2016 . . . and September 19, 2016" on the ground that they were not available to the district court when the court issued its initial 2016 visitation order. Because this court did not consider or rely on the affidavits in deciding to reverse and remand, we deny grandparents' motion to strike as moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying as moot motion to strike where court did not rely on challenged materials).

Father moves this court to strike "all references to [the] Report of Guardian Ad Litem dated June 30, 2010," reasoning that "the Guardian Ad Litem's report was not considered by the [district] court when reaching its decision for grandparent visitation in . . . 2016" and that neither party offered the report in their pleadings or referred to the report in their arguments. Given our decision to reverse and remand, we deny father's motion to strike as moot.

Conclusion

It is obvious to this court that grandparents love their grandchildren and want to maintain a relationship with them, which could benefit the children in many ways. But we question whether ongoing litigation regarding court-ordered visitation is in the children's best interests. Given the children's ages, their busy schedules, and the acrimony between the parties, we also question whether grandparent visitation pursuant to court order is productive. We therefore strongly encourage the parties to put the children's needs and

interests first on remand and to settle their disagreement regarding visitation outside of the judicial process if at all possible.

Reversed and remanded; motions denied.