

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0754**

Jamison John Stewart,
Respondent,

vs.

John Doe,
Respondent,

vs.

Hoda Ahmed Sulub,
Appellant,
Malko Ibrahim, et al.,
Third-Party Intervenors.

**Filed March 1, 2021
Affirmed in part, reversed in part, and remanded
Reyes, Judge**

Ramsey County District Court
File No. 62-FA-19-1812

Jamison Stewart, St. Paul, Minnesota (pro se respondent)

Calandra Revering, Rosalind Sullivan, Robbinsdale, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and
Halbrooks, Judge.*

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

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant argues on appeal that the district court (1) abused its discretion by dismissing her third-party custody petition for lack of standing; (2) erred by failing to hold an evidentiary hearing on her petition; (3) abused its discretion by failing to dismiss respondent's competing third-party custody petition; and (4) erred by granting respondent's petition without holding an evidentiary hearing. We affirm on the first three issues, and reverse and remand on the fourth issue.

FACTS

This case arises from two competing third-party custody petitions. The child at issue is A.J., the 11-year-old daughter of Kalgailal Jabril (mother) and John Doe (father). Mother and father met and dated in Canada but never married. While pregnant with A.J., mother moved to Minnesota, where A.J. was born in August 2008. Father is not on A.J.'s birth certificate. While in Minnesota, mother lived with appellant Hoda Ahmed Sulub, who is mother's first cousin, for approximately four months. In late 2008, mother and A.J. moved to Grand Forks, North Dakota. There, mother met respondent Jamison John Stewart, and the two lived together beginning in December 2008. Mother and Stewart together moved first to Bismarck, North Dakota, in 2009 and then to St. Paul, Minnesota, in 2011. The two married in December 2012. Stewart helped take care of A.J. throughout this time.

Mother and Stewart separated in 2014, when mother moved to South Dakota for approximately six months, leaving A.J. with Stewart. When mother returned to Minnesota,

she and Stewart remained separated. Nevertheless, A.J. continued to spend some weekends and overnights with Stewart. Mother and Stewart divorced in May 2019, yet remained friends, and Stewart continued to co-parent A.J. Between 2014 and 2019, mother had three additional children with two other men.

Around September 1, 2019, mother and her youngest child died in a car accident. After mother's funeral, A.J. stayed with some of mother's relatives for several days. Stewart thought mother's relatives would return A.J. after the youngest child's funeral, but they did not attend the funeral. Stewart could not get in contact with A.J., so he filed an emergency ex parte motion requesting custody of A.J. The district court awarded him temporary sole legal custody and temporary sole physical custody of A.J.

Stewart also filed a third-party custody petition seeking permanent custody of A.J. Sulub, along with mother's sister, Samira Jabril, and mother's half-sister, Malko Ibrahim (collectively, intervenors) together filed a competing third-party custody petition. Stewart moved to dismiss intervenors' petition. After obtaining new counsel, intervenors filed an amended third-party custody petition (amended petition) and moved to dismiss Stewart's petition under Minn. Stat. § 257C.03, subd. 8 (2018). Stewart moved to dismiss intervenors' amended petition, also under Minn. Stat. § 257C.03, subd. 8.

The district court held a nonevidentiary motion hearing on February 5, 2020. In the resulting order, it found that intervenors failed to allege facts showing that they had a substantial relationship with A.J. and dismissed their amended petition with prejudice. The district court denied intervenors' motion to dismiss Stewart's petition. Finally, it granted Stewart's petition, giving him permanent sole legal custody and sole physical custody of

A.J. In doing so, the district court found that Stewart established a substantial relationship with A.J. and that granting Stewart custody is in the best interests of the child. This appeal follows.¹

DECISION

I. Legal Background

Minnesota law provides two pathways for a nonparent to obtain custody of a child: a de facto custodian proceeding or an interested third-party child-custody proceeding. Minn. Stat. § 257C.03, subd. 1(a) (2018). For both pathways, a nonparent must first file a petition for custody that responds to 15 requirements. Minn. Stat. § 257C.03, subd. 2 (2018). Because the statute is written in the conjunctive, the failure to adequately address any one of the requirements can be fatal to the petition. *Id.*; see *State v. Nelson*, 842 N.W.2d 433, 440 (Minn. 2014) (stating “and” is usually conjunctive). Of particular interest here is the requirement that the petitioner allege a basis for jurisdiction under Minn. Stat. § 257C.01, subd. 3 (2018) (addressing interested third-party custody), which requires the petitioner to “prove that at least one of the *factors* in section 257C.03, subdivision 7, paragraph (a), is met.” *Id.*, subd. 2(a)(5) (emphasis added).² Minn. Stat. § 257C.03, subd. 7(a), in turn requires the petitioner to establish: (1) one of three child-endangerment factors by clear and convincing evidence; (2) that placement with the petitioner is in the best

¹ Stewart did not file a brief or otherwise oppose this appeal. This court ordered the appeal to proceed under Minn. R. Civ. App. P. 142.03 (providing that if a respondent fails to file a brief, the case shall be determined on the merits). Additionally, Sulub is the only intervenor to appeal the district court’s decision.

² Nonparents seeking custody as de facto custodians must allege jurisdiction under Minn. Stat. § 257C.01, subd. 2 (2018).

interests of the child by a preponderance of the evidence; and (3) that petitioner has not been convicted of a crime listed in Minn. Stat. § 518.179 (2018)³ by clear and convincing evidence (collectively, subdivision 7(a) requirements). Minn. Stat. § 257C.03, subd. 7(a) (2018); *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006) (*Lewis-Miller II*).⁴ The three child-endangerment factors are 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 [exist].

Minn. Stat. § 257C.03, subd. 7(a)(1). Section 257C.01, subdivision 3, states that an interested third-party petitioner must prove “at least one of the *factors*” in subdivision 7(a) must be met. (Emphasis added.) We therefore interpret it to require that at least one child-endangerment *factor* must be met, in addition to the other subdivision 7(a) requirements, in order to meet the jurisdictional requirement of section 257C.03, subdivision 2(a)(5). *Id.* § 257C.01, subd. 3; *see also Lewis-Miller II*, 710 N.W.2d at 568-69 (listing then-existing

³ A petitioner who is convicted of a crime listed in section 518.179 may nevertheless gain custody of a child by meeting certain requirements. *Id.*, subd. 1. Neither party in this case is a convicted person under section 518.179.

⁴ At the time of the *Lewis-Miller II* decision, the third subdivision 7(a) requirement did not exist. *See* 2002 Minn. Laws ch. 304, § 3, at 433.

grounds for dismissing third-party custody petitions) (citing Minn. Stat. § 257C.03, subd. 8(a) (2004)).

Because both parties in this case based their petitions on the third child-endangerment factor, “other extraordinary circumstances,” we must first interpret that term. We review the interpretation of statutory language de novo. *In re Dakota County*, 866 N.W.2d 905, 909 (Minn. 2015). We first determine whether the statute’s language is ambiguous. *Id.* A statute is ambiguous if it is subject to multiple reasonable interpretations. *Id.* If it is unambiguous, we apply its plain meaning. *Id.*

The parties do not argue that the term “other extraordinary circumstances” is ambiguous, and though the term is broad, we discern no ambiguity. Neither chapter 257C nor caselaw define extraordinary circumstances. When a statute does not define a term, we look to the common dictionary definition. *Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601, 605 (Minn. 2016). “Extraordinary” is defined as “going beyond what is usual, regular, or customary” or “exceptional to a very marked extent.” *Merriam-Webster Dictionary* 444 (11th ed. 2014). We have described extraordinary circumstances as those “of a grave and weighty nature.” *In re Custody of A.L.R.*, 830 N.W.2d 163, 170 (Minn. App. 2013).

Caselaw also requires a petitioner seeking third-party custody based on extraordinary circumstances to show that the petitioner has a “substantial relationship” with the child. *In re Kayachith*, 683 N.W.2d 325, 327 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). Caselaw does not define “substantial relationship” but the *Merriam-Webster Dictionary* defines it as “important” or “essential.” *Merriam-Webster Dictionary*

at 1245. The *Kayachith* court contrasted a “substantial relationship” with a “nonexistent or only nominal” or “limited” one and stated that the “substantial relationship” must stem from interactions *before* the biological parent’s death and the third party’s petition. 683 N.W.2d at 328. In sum, as part of the jurisdictional allegation under Minn. Stat. § 257C.03, subd. 2(a)(5), a petitioner basing a third-party custody petition on other extraordinary circumstances must also allege a substantial relationship with the child in order to prevail on the petition. Failure to do so warrants dismissal. Minn. Stat. § 257C.03, subd. 8(a)(2); *Kayachith*, 683 N.W.2d at 328 (dismissing third-party petition for failure to allege a substantial relationship).

Establishing custody as a third party proceeds in two stages. *Lewis-Miller II*, 710 N.W.2d at 569-70. At the first stage, the petitioner must submit a valid petition and supporting affidavits alleging facts that meet the statutory requirements which, if true, would make a prima facie case for third-party custody. *Id.* Second, if the district court finds that the petitioner has made a prima facie case for custody modification, then the petitioner is entitled to an evidentiary hearing on the petition. *Id.* Whether the assertions in the petition “are actually true is to be resolved at the subsequent hearing.” *Lewis-Miller v. Ross*, 699 N.W.2d 9, 14 (Minn. App. 2005), *aff’d*, 710 N.W.2d 565 (Minn. 2006) (*Lewis-Miller I*); *see also Lewis-Miller II*, 710 N.W.2d at 569 (stating that petitioner must satisfy evidentiary burdens for each subdivision 7(a) requirement at evidentiary hearing).

II. Standard of Review

Caselaw is not clear as to our standard of review for interested third-party custody proceedings. Because the two-stage process for these proceedings is similar to the

procedure in custody-modification proceedings, we look to that caselaw for our standard of review. See *Lewis-Miller II*, 710 N.W.2d at 569 (applying a two-stage procedure for third-party custody proceedings similar to custody-modification procedure) (citing *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981) (requiring district court to deny motion for custody-modification and evidentiary hearing unless affidavits allege sufficient facts that, if true, would justify modification))).

In *Boland v. Murtha*, we set out the analytical framework, involving three distinct steps, for our review of district court determinations on custody-modification petitions. 800 N.W.2d 179, 182-85 (Minn. App. 2011). We first “review de novo whether the district court properly treated the allegations in the moving party’s affidavits as true, disregarded the contrary allegations in the nonmoving party’s affidavits, and considered only the explanatory allegations in the nonmoving party’s affidavits.” *Id.* at 185. Explanatory allegations are those that “explain or contextualize” but do not contradict the petitioner’s allegations. *Id.* at 183. The parties’ affidavits include not only affidavits of “the parties themselves, but to all affidavits submitted . . . in support of or in opposition to a motion.” *Id.* at 183, n.2. “Second, we review for an abuse of discretion the district court’s determination as to the existence of a prima facie case for the modification” *Id.* at 185. Third, “we review de novo whether the district court properly determined the need for an evidentiary hearing.” *Id.*

III. The district court did not abuse its discretion by dismissing Sulub's third-party custody petition because Sulub failed to allege a prima facie case for custody.

Sulub argues that the district court erred by dismissing her petition because the facts in her petition allege a substantial relationship with A.J. We disagree.

Here, our de novo review of the record reveals that, with one exception,⁵ the district court properly assumed Sulub's allegations were true. For example, the district court acknowledged Sulub's allegations that she has maintained a relationship with A.J. and that she participated in A.J.'s life events.

We next consider whether the district court abused its discretion by determining that Sulub failed to allege a substantial relationship with A.J. Sulub's affidavits and other submissions primarily detail her relationship with mother, her interpretation of mother's desires, her allegations about Stewart's unfitness, and her concerns about Stewart's unfamiliarity with A.J.'s alleged cultural background. However, the critical issue is Sulub's relationship with A.J. On that issue, Sulub submitted that mother and A.J. lived with her for the first four months of A.J.'s life and that she participated in A.J.'s major life events throughout A.J.'s life. But sporadic involvement does not create a substantial relationship. *Kayachith*, 683 N.W.2d at 328 (stating that limited interaction is insufficient to create substantial relationship). Sulub generally alleges having a relationship with A.J.,

⁵ The district court found that photos of intervenors with A.J. were taken after mother's funeral. Sulub stated that these photos were not taken after mother's funeral, but did not indicate when they were taken. Though the district court erred by failing to assume as true Sulub's statement, the error is harmless because the photos do not overcome the insufficiency of Sulub's allegations to make a prima facie case for third-party custody. See Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

which she says she maintains through phone calls, social media, special events, and family gatherings, but she did not allege when, how often, or how extensively those contacts occur. Sulub submitted several photos of A.J. with mother's relatives. However, the photos do not all include Sulub, and it is unclear when the photos were taken. Sulub also asserts that A.J. wore traditional Somali clothes and participated in cultural traditions with mother's relatives. But A.J.'s alleged participation in cultural traditions does not create a substantial relationship with Sulub. On this record, Sulub has not shown that the district court abused its discretion by concluding that her relationship with A.J. is limited rather than substantial.

Sulub emphasizes that Stewart brought A.J. to mother's relatives soon after mother died and that these relatives cared for A.J. for several days. But these interactions occurred after mother's death, so the district court properly did not consider them in determining whether a substantial relationship exists. *Kayachith*, 683 N.W.2d at 328. In sum, because Sulub's allegations do not meet the substantial-relationship requirement, the district court did not err by dismissing her petition for lack of standing.

IV. The district court did not err by denying Sulub's request for an evidentiary hearing.

Sulub argues that the district court should have held an evidentiary hearing on her petition. We disagree. Sulub is entitled to an evidentiary hearing only if she alleges a prima facie case for third-party custody, which is not the case here. *Lewis-Miller II*, 710 N.W.2d at 568-69. We therefore conclude that the district court did not err by not holding an evidentiary hearing on her petition.

V. The district court did not abuse its discretion by determining that Stewart alleged a prima facie case for third-party custody.

Sulub argues that the district court erred by granting Stewart's petition because it ignored evidence that she submitted showing that Stewart failed to establish a substantial relationship with A.J. and that placing A.J. with Stewart is not in A.J.'s best interest. We disagree.

We apply the same three-part standard of review to Stewart's petition as we did to Sulub's. Here, our de novo review of the record shows the district court properly credited Stewart's allegations and disregarded Sulub's contrary allegations.⁶

Stewart alleges interested-third-party status based on extraordinary circumstances. He alleges that he has a substantial relationship with A.J. His petition and supporting affidavits allege that he consistently participated in A.J.'s upbringing and care; that A.J. calls him "dad"; that A.J. spends significant time with him despite his separation from mother; and that he continues to provide a room, transportation, and care for A.J. as if she were his own child. Stewart's relationship with A.J. predates mother's death and his petition, and their relationship is not "nominal," "nonexistent," or "limited." *Kayachith*, 683 N.W.2d at 328 (requiring a substantial, pre-existing relationship). The district court did not abuse its discretion by determining that Stewart alleged a substantial relationship with A.J.

⁶ The record is unclear whether the district court considered all of Sulub's explanatory allegations. Under *Boland*, whether to do so is discretionary, and we discern no abuse of discretion in its analysis here. 800 N.W.2d at 186 (stating that the district court *may* consider explanatory statements in opposing affidavits).

However, a substantial relationship alone does not constitute extraordinary circumstances. See *Kayachith*, 683 N.W.2d at 327 (requiring petitioner to, *at minimum*, show a substantial relationship to establish extraordinary circumstances). We note that the district court did not explicitly find extraordinary circumstances. Nevertheless, it implicitly found extraordinary circumstances when it noted that mother and mother's youngest child died in a tragic car accident, noted that father is unknown and had almost no involvement with A.J., and explicitly found that Stewart has a substantial relationship with A.J. See *Prahl v. Prahl*, 627 N.W.2d 698, 703 (Minn. App. 2001) (stating that "[w]e may treat statutory factors as addressed when they are implicit in the findings").

Stewart also makes allegations on each best-interests factor under Minn. Stat. § 257C.04 (2018) and supports them with his affidavit. Affidavits from the fathers of mother's other children as well as Stewart's mother support Stewart's best-interests allegations. Sulub points to no deficiency in Stewart's best-interests allegations. Instead, she points to areas where her allegations and Stewart's allegations conflict or where she alleges Stewart is untruthful. Specifically, she argues that Stewart was never A.J.'s primary caregiver, Stewart's home is not stable or safe due to robberies occurring there, Stewart has an extensive criminal history as well as mental-health and drug-use issues, and Stewart cannot provide for the child because he is unemployed. But, like the district court, we must assume Stewart's allegations to the contrary are true, including that he was a primary caregiver for A.J., his home is stable and safe, his criminal acts are largely in the past, his mental-health and medical-marijuana use does not affect his ability to parent, and he can provide financially for the child. Sulub's allegations that contradict Stewart's are more

appropriate for the evidentiary hearing. *Griese v. Kamp*, 666 N.W.2d 404, 409 (Minn. App. 2003) (holding that conflicting affidavits demonstrate need for evidentiary hearing), *review denied* (Minn. Sept. 24, 2003). To the extent that Sulub's allegations provide context for Stewart's petition, they do not demonstrate that the district court abused its discretion by determining Stewart's petition adequately alleged that it was in A.J.'s best interests to be placed with him.

In sum, we conclude that the district court did not abuse its discretion by determining that Stewart alleged a prima facie case for custody as an interested third party. We therefore conclude that the district court did not err by denying Sulub's motion to dismiss Stewart's petition.

VI. The district court erred by failing to hold an evidentiary hearing prior to granting Stewart's petition.

Sulub argues that the district court erred by granting Stewart's petition without holding an evidentiary hearing. We agree.

After finding that Stewart alleged a prima facie case for third-party custody, the district court should have held an evidentiary hearing. *Lewis-Miller II*, 710 N.W.2d at 568-69. We therefore reverse the district court's grant of Stewart's petition and remand for an evidentiary hearing to determine Stewart's petition.

Affirmed in part, reversed in part, and remanded.