

*This opinion is nonprecedential except as provided by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
A21-1521**

Ronald Jeffrey Smith,
Appellant,

vs.

Brian Robert Kessen, et al.,
Respondents.

**Filed July 11, 2022
Affirmed
Slieter, Judge**

Hennepin County District Court
File No. 27-FA-20-1373

Jack Y. Perry, Scott M. Flaherty, Taft Stettinius & Hollister, L.L.P., Minneapolis, Minnesota; and

Roselyn J. Nordaune, Nordaune & Friesen, P.L.L.C., Wayzata, Minnesota (for appellant)

Jason C. Brown, Barna, Guzy & Steffen, Ltd., Coon Rapids, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant challenges the district court's order denying his request for grandparent visitation. Because the district court acted within its discretion by concluding that

awarding grandfather visitation would interfere with the parent and child relationship, we affirm.

FACTS

Appellant Ronald Jeffrey Smith is the maternal grandfather of two minor children. Grandfather's daughter, the children's biological mother, died on November 22, 2014, the day after the youngest child was born. During the two years after his daughter's death, grandfather saw the children multiple times per week. Initially, he saw the children over 20 times per month in early 2015, steadily declining to approximately six times per month in late 2016.

In late 2016, respondent Brian Robert Kessen (father) began dating respondent Katherine Kessen. During the next two years, grandfather saw the children an average of five to six times per month. Respondents (the parents) were married in September 2018. In May 2019, Katherine Kessen adopted the children and became their legal mother.

In the summer of 2018, grandfather initiated a discussion with the parents about his "future role as grandparent[]," and followed this discussion with a proposed visitation schedule. This schedule did not resolve disagreements between the parents and grandfather over visitation, but the parents agreed to meet with a mediator, whom grandfather arranged, to "resolve any differences we have about visits with the kids."

Grandfather and father met with the mediator on May 24, 2019, and signed an agreement to participate in family therapy, allow grandfather visitation on six dates, schedule additional visits with the children, share the children's extracurricular schedules, and return for additional mediation on August 22. Grandfather and the parents participated

in the second mediation session on August 22, 2019, and signed another agreement. In this agreement, the parties agreed to continue “family coaching” in accordance with the therapist’s recommendations, retain a “Grandparent/Parent Consultant or mediation/arbitration neutral,” share the children’s school and extracurricular activity schedules, and work together to arrange various single-day and overnight visits between grandfather and the children.

On March 3, 2020, grandfather petitioned the district court for grandparent visitation. The parents opposed grandfather’s requested relief.

The parties submitted numerous affidavits, and with the agreement of the parties, the district court considered grandfather’s petition solely upon these affidavits. In its August 17, 2020 order, the district court denied grandfather’s petition, “find[ing], ultimately, that awarding [grandfather] court ordered visitation with the children would interfere with the parent-child relationship.” Grandfather moved for amended findings. In its February 23, 2021 order, the district court amended one finding and denied all other requested findings, noting that “Grandfather is using the motion for amended findings as an opportunity to re-argue the merits of the case before the Court.”

On June 16, 2021, grandfather filed a motion for visitation. The grandparent-visitiation motion was also considered solely upon the affidavits submitted by both of the parties. In its October 1, 2021 order, the district court denied grandfather’s motion concluding again that awarding him visitation would interfere with the parent and child relationship. Grandfather appeals.

DECISION

We review an order denying grandparent visitation for abuse of discretion. *See Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995) (“The trial court has broad discretion to determine what is in the best interests of the child in the area of visitation and its determination will not be overturned absent an abuse of discretion.”). “A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law or delivering a decision that is against logic and the facts on record.” *Woolsey v. Woolsey*, ___ N.W.2d ___, ___, 2022 WL 2136995, at *3 (Minn. June 15, 2022) (quoting *Bender v. Bernhard*, 971 N.W.2d 257, 262 (Minn. 2022)). When conducting clear-error review, “an appellate court’s duty is fully performed after it has fairly considered all the evidence and has determined that the evidence reasonably supports the decision.” *In re Commitment of Kenney*, 963 N.W.2d 214, 222 (Minn. 2021) (quotation omitted). We “need not go into an extended discussion of the evidence to prove or demonstrate the correctness of the findings of the trial court.” *Id.* (quotation omitted).

“A grandparent of a child adopted by a stepparent may petition and a court may grant an order setting visitation with the child if: (1) the grandparent is the parent of: (i) a deceased parent of the child” Minn. Stat. § 257C.08, subd. 6(a) (2020). The district court must “determine[] that the requested visitation: (i) is in the best interests of the child; and (ii) would not interfere with the parent and child relationship.” *Id.*, subd. 6(a)(2).

To protect the constitutional right of fit custodial parents to the care, custody, and control of their children, the petitioning grandparent bears the burden of proving by clear and convincing evidence that the requested visitation is in the best interests of the child and

that it will not interfere with the parent and child relationship. *SooHoo v. Johnson*, 731 N.W.2d 815, 823-24 (Minn. 2007) (considering visitation with a third party the child has resided with for more than two years pursuant to Minn. Stat. § 257C.08, subd. 4 (2006)); *In re C.D.G.D.*, 800 N.W.2d 652, 655-56 (Minn. App. 2011) (applying the standard set forth in *SooHoo* to grandparent visitation), *rev. denied* (Minn. Aug. 24, 2011).

When considering grandparent visitation, the district court “shall consider the amount of personal contact between the . . . grandparents . . . and the child prior to the application.” Minn. Stat. § 257C.08, subd. 1 (2020). The grandparent visitation statute follows “three guiding principles.” *Rohmiller v. Hart*, 811 N.W.2d 585, 595 (Minn. 2012). “First, the statute must give some special weight to the fit custodial parent’s decision regarding visitation. Second, there can be no presumption in favor of awarding visitation. Third, the court must assert more than a mere best-interest analysis in support of its decision to override the fit parent’s wishes.” *Id.* (quotations and citations omitted).

Grandfather argues that the district court misapplied the law “in denying [his] visitation with the children based exclusively on his purported failure to show by clear and convincing evidence that his visitation with the children would not interfere with [the parents’] parenting relationship with the children.” Because the district court *must* determine that awarding visitation will not cause interference with the parent and child relationship and deny visitation if it will cause interference, grandfather’s argument is unpersuasive.¹

¹ Grandfather also argues that the parents “surrender[ed]” the noninterference requirement of grandparent visitation by executing the mediated agreements and requesting visitation

The district court must make two determinations supported by clear and convincing evidence before it awards grandparent visitation: (1) that visitation will be in the child's best interest; *and* (2) it will not interfere with the parent and child relationship. Minn. Stat. § 257C.08, subd. 6 (2020); *C.D.G.D.*, 800 N.W.2d at 656. It cannot rely solely on a best-interest analysis to award visitation against a fit parent's wishes. *Rohmiller*, 811 N.W.2d at 595. The district court correctly applied the law by considering whether visitation would interfere with the parent and child relationship.

In its first order denying grandfather visitation, the district court found that grandfather's actions, taken as a whole, showed a "fixed determination to do what he wants regardless of [the parents'] wishes," which interfered with the parent and child relationship. It specifically noted, and the record supports, that grandfather criticized father's decisions limiting visitation due to the COVID-19 pandemic, criticized the children's enrollment in extracurricular activities that interfered with visitation, refused to respect father's concerns about the children's safety, and dismissed behavioral problems the children exhibited after overnight visits with grandfather. The district court further found that grandfather's behaviors constituted a "significant pattern of disrespect and unwillingness to accept and follow [the parents'] parenting decisions, as well as [to] judge and ignore those decisions."

In its second order denying grandfather visitation, the district court found that grandfather's claims were "strikingly similar to those denied on August 17, 2020" and "not

consistent with those agreements in response to grandfather's first petition. A party may not "obtain review by raising the same general issue litigated below but under a different theory." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Grandfather raises his "surrender" theory for the first time in this appeal. Therefore, we do not address it.

much has changed since that time.” “[T]he crux of this dispute,” the district court noted, is grandfather’s failure “to see or . . . appreciate that since the [parents] began co-parenting the children, . . . the scope of their parenting naturally increased, and the role of the grandparents consequently decreased.”

Our review of the record supports the district court’s conclusion that grandfather failed to demonstrate that visitation would not interfere with the parent and child relationship.²

Finally, grandfather argues that the district court erred by denying visitation “based on ‘interference’ concerns” rather than imposing “readily-available conditions” to accommodate such visitation. This argument fails because the imposition of conditions does not supplant the requirement that grandparent visitation not interfere with the parent and child relationship. *See, e.g., Olson*, 534 N.W.2d at 548-49 n.2, 551 (reinstating trial court’s award of grandparent visitation with conditions attached); *C.G.D.G.*, 800 N.W.2d at 663 (reversing and remanding award of grandparent visitation for entry of award subject to conditions). That is, the district court may impose conditions on visitation only after it has determined that visitation is appropriate. Here, the district court acted within its discretion to conclude that such visitation is not appropriate.

² Grandfather also argues that “[t]he district court’s ‘interference’ finding was erroneously based on [his] valid, good faith pursuit . . . of his statutorily-authorized grandfather visitation rights” and “nothing more than general acrimony.” The record belies grandfather’s argument. As we have discussed, the district court based its interference finding on grandfather’s “pattern of disrespect and unwillingness to accept and follow [the parents’] parenting decisions.”

In sum, the district court acted within its discretion to deny grandfather visitation because it correctly applied the law, and the record supports its findings.

Affirmed.