STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0867

In re the Matter of: E.J.N.V., DOB 12/19/2018,

Angelina Louise Vanderlinde, et al., petitioners,
Respondents,

vs.

Elysa Mae Nason,
Appellant,

Joseph Duane Nason,
Appellant.

Filed December 11, 2023
Affirmed
Halbrooks, Judge[*]

Itasca County District Court
File No. 31-FA-20-1661

Kathryn M. Lammers, Courtney Latcham, Heimerl & Lammers, LLC, Minnetonka, Minnesota (for respondents)

Elysa Nason, La Grande, Oregon (self-represented appellant)

Joseph Nason, La Grande, Oregon (self-represented appellant)

Considered and decided by Gaïtas, Presiding Judge; Slieter, Judge; and Halbrooks, Judge.

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

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

Appellants challenge the district court's award of permanent sole legal and permanent sole physical custody to respondents under Minn. Stat. § 257C.01 (2022), arguing that the district court (1) clearly erred by making best-interests findings unsupported by the record, (2) abused its discretion by failing to award custody to them, the child's biological parents, and (3) erred by disregarding the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act. We affirm.

FACTS

This case arises out of unusual circumstances. Self-represented appellants Joseph and Elysa Nason are married and reside in Oregon. Respondents Angelina and Chad Vanderlinde are married and reside in Minnesota. Joseph Nason and Angelina Vanderlinde are biological siblings. All parties, with the exception of Chad Vanderlinde, are Native American and are enrolled members of an Indian tribe.

The Vanderlindes wanted children but were unable to conceive. In response to the Vanderlindes' inability to have a child, the Nasons, who have eleven children, offered to have a child for the Vanderlindes. Although the Vanderlindes initially refused the offer, they eventually relented and agreed. In December 2018, the child was born in Oregon. The Vanderlindes were present for the child's birth. Angelina was in the delivery room with Elysa and cut the baby's umbilical cord.

When the child was ten days old, the Vanderlindes took him home to Minnesota to live with them. Aside from Elysa's breast milk, which she shipped from Oregon, the

Vanderlindes provided for all of the child's needs. The Nasons visited Minnesota six times after the child moved to Minnesota, but their visits were never for the sole purpose of visiting the child. The regular contact that the Nasons had with him was through phone and video calls. Although the parties discussed the idea of formal adoption, they ultimately decided to continue with their informal agreement. But the Nasons granted the Vanderlindes power of attorney for the child so that they could make decisions regarding his housing, education, and medical care.

Although the arrangement worked well for approximately eighteen months, the Nasons began to feel that the Vanderlindes were not meeting their expectations and keeping them sufficiently involved in the child's life. As a result, the Nasons decided in July 2020 to take the child back to Oregon. Assisted by the police, the Nasons removed the child from the Vanderlindes' home in Minnesota. Chad Vanderlinde's mother, Mary Vanderlinde, testified about the event and stated that, when the Nasons picked up the child, he began to scream. She also testified that "while Chad and Angelina's lives were kind of being destroyed," Elysa was dancing and laughing, and Chad was in tears and Angelina began throwing up once the Nasons and the child drove away. The district court found Mary Vanderlinde's testimony to be credible.

Two days later, the Vanderlindes initiated this third-party custody action and, simultaneously, moved for immediate emergency temporary custody of the child. The district court granted the motion, the order was registered in Oregon, and the Vanderlindes brought him back to Minnesota.

When the child returned to Minnesota, he showed signs of stress and trauma. Angelina and Joseph's father testified at the hearing that the child refused to let the Vanderlindes out of his sight. He often woke up in the middle of the night, worried that the Vanderlindes had left him. In order to address the child's behavior, the Vanderlindes engaged the services of Beth Prewett, Psy.D. Based on nine or ten therapy sessions, Dr. Prewett diagnosed the child with "other trauma and stress deprivation disorder."

Dr. Prewett testified at the hearing that the child played wonderfully with the Vanderlindes during his therapy sessions. She stated that he and the Vanderlindes are "extremely attached/bonded" and that it was obvious that the child had full trust in the Vanderlindes. Dr. Prewett also testified that the child is "clingy" with the Vanderlindes but could not be certain that the eight-day stint in Oregon with the Nasons caused his symptoms.

The district court conducted a four-day evidentiary hearing that began in October 2021. In addition to the parties and Dr. Prewett, the district court heard testimony from Angelina's father and Chad's parents.

Following the evidentiary hearing, the district court granted sole physical and sole legal custody to the Vanderlindes and gave them sole parenting-time rights with the discretion to give the Nasons supervised or unsupervised parenting time.

This appeal follows.

DECISION

I.

The Nasons argue that the district court clearly erred by making best-interests findings that are unsupported by the record. Third-party custody actions are determined pursuant to Minn. Stat. §§ 257.03 and 257C.01 (2022). We review a district court's third-party custody determination for abuse of discretion. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006). A district court abuses its discretion by "making findings unsupported by the evidence or by improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). We uphold a district court's findings of fact unless they are clearly erroneous. Minn. R. Civ. P. 52.01. And we defer to the district court's credibility determinations for witnesses. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

After third-party custody petitioners establish by clear and convincing evidence that they are de facto custodians, they must prove by a preponderance of the evidence that an award of custody in their favor is in the child's best interests. Minn. Stat. §§ 257C.01, .03, subds. 1, 6 (2022). The Nasons do not challenge the district court's de facto custodian determination. Therefore, our review is focused on the best-interests findings made by the district court.

Minn. Stat. § 257C.03, subd. 6 requires a district court to consider 12 factors when determining a child's best interests. *See* Minn. Stat. § 257C.04, subd. 1(a) (2022). The Nasons argue that the district court based its custody decision on one statutory factor only—the length of time the child has lived in a stable, satisfactory environment and the

desirability of maintaining continuity. Minn. Stat. § 257C.04, subd. 1(a)(7) (2022). We disagree.

The district court thoroughly analyzed each statutory factor and made detailed findings based on the evidence presented at the four-day hearing. For example, the district court found that the Vanderlindes "have been the child's primary caretaker for his entire life" and that their relationship is "indistinguishable from that of a child born naturally to their family." In contrast, the district court stated that "[t]he Nasons are able to provide surface-level information about the [c]hild, largely arising from their perspective of parenting and the brief time [the child] was with them in July 2020."

Other best-interests findings made by the district court include:

. . .

> c. [T]he child's primary caretaker.
> Angelina and Chad Vanderlinde have been the [c]hild's primary caretaker for his entire life. They have been his primary caretaker for his entire life, spare a few exceptions which can be measured in hours and days. That this factor weighs in heavily favor of the [p]etitioners' position.
>
> d. [T]he intimacy of the relationship between each party and the child.
>
> > i. Petitioners have an undisputable familial bond with the [c]hild. The relationship between the Vanderlindes and the [c]hild is indistinguishable from that of a child born naturally to their family. For all intents and purposes, they present him as their son, and he recognizes them as mother and father respectively.

e. [T]he interaction and interrelationship of the child with a party or parties, siblings, and any other person who may significantly affect the child's best interests.

. . .

iii. It is evident that the [c]hild is wholly integrated with the nurturing relationships that the Vanderlindes have established with him, and this continued on to the extended family of the Vanderlindes. The Nasons are able to provide surface-level information about the [c]hild, largely arising from their perspective of parenting and the brief time [the child] was with them in July 2020.

f. [T]he child's adjustment to home, school, and community.

i. The [c]hild is well adjusted in his home, his activities, and his community, with the Vanderlindes. Ms. Nason acknowledge this, and answered "yes" when asked by counsel whether [the child] is integrated into the Vanderlinde household and part of their family. The testimony of Dr. Prewett, and Mary and Paul Vanderlinde, in addition to [p]etitioners themselves support that the [c]hild is adjusted well to the Vanderlinde home and community.

ii. The [c]hild has never meaningfully integrated with the Nasons. Other than eight days, including overnights, in the summer of 2020, one overnight with the [c]hild in March 2019, and the first ten days after he was born, the Nasons have never physically spent time with the [c]hild.

g. [T]he length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

i. The [c]ourt finds that the most stable, consistent environment that [the child] has known has been [p]etitioners' home and family. The combined testimony indicates that the Vanderlindes provide everything [the child] needs and they do so consistently. This includes professional recommendations and services, including speech services.

ii. The solitary disruption to the [c]hild's stability was when the [Nasons] took him to Oregon against the Vanderlindes' will. Instead of planning for [the child's] needs for stability and security, the Nasons simply set their own desires to have [the child] back as first priority.

. . .

j. [T]he capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any.

i. Both the Vanderlindes and Nasons value Native American culture, ascribe to various native practices, and are raising or would raise the [c]hild accordingly, beside some slightly different perspectives about what composes these belief systems. Foremost, a chief example of this is where the Vanderlindes trimmed the [c]hild's hair, which the Nasons protest for religious reasons.

k. [T]he child's cultural background.

i. All parties in this matter, with the exception of Mr. Vanderlinde, are Native American. Specifically, they are all Ojibwe by birth and upbringing. Likewise, this is the [c]hild's cultural background. While in a familial setting, this would infer nearly identical cultural upbringings in either family, the Vanderlindes can more inclusively involve him in Ojibwe

> culture in Minnesota; opportunities for exposure and upbringing in Native American culture exists in Oregon, it is not Ojibwe.
>
> . . .
>
> (quotations omitted).

In general, the district court found the child to be "well[-]adjusted in his home, his activities, and his community." In support of this finding, the district court found the testimony of Dr. Prewett, Chad's parents, and the Vanderlindes themselves to be credible.

It is clear from the district court's order that it understood the importance of this decision to all of the parties and that it made a thorough assessment of all of the evidence. Because the district court's best-interests findings under section 257C.04 are well-supported by the record, they are not clearly erroneous.

II.

The Nasons contend that the district court erred by disregarding their constitutional rights, as biological parents, to parent the child. While the U.S. Constitution protects a fit parent's fundamental right to determine the care, custody, and control of her children, *Troxel v. Granville*, 530 U.S. 57, 66 (2000), that right is not absolute. Both the United States Supreme Court and the Minnesota Supreme Court have recognized that a state may interfere with the fundamental right of a parent if it is necessary to protect a child's "well-being." *SooHoo v. Johnson*, 731 N.W.2d 815, 822 (Minn. 2007) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

Minnesota's common law presumed that a biological parent was entitled to custody of his or her child, but that this presumption could be overcome in certain situations, one

of which was the existence of extraordinary circumstances of a grave and weighty nature that supported awarding custody of a parent's child to someone who was not that child's biological parent. *See, e.g.*, *In re Custody of N.A.K.*, 649 N.W.2d 166, 174, 176 (Minn. 2002) (discussing, and citing cases addressing, this common law presumption). After the common law presumption discussed in *N.A.K.* developed, and apparently in direct response to the U.S. Supreme Court's *Troxel* decision, *see In re Kayachith*, 683 N.W.2d 325, 328 n.1 (Minn. App. 2004), *rev. denied* (Minn. Sept. 29, 2004), the legislature enacted Chapter 257C, addressing the ability of "de facto custodians" and "interested third parties" to obtain custody of a child who was not their biological child. *See* 2002 Minn. Laws ch. 304, §§ 1, 13 (now codified as Chapter 257C).

Later, this court noted that the definitions and procedures involved in a district court's determination, under Chapter 257C, that a person is "de facto custodian" or an "interested third party" incorporated the pre-Chapter 257C common law presumption, and that, as a result, district courts proceeding under Chapter 257C no longer needed to separately address the pre-Chapter 257C common law presumption. *See In re Custody of A.L.R.*, 830 N.W.2d 163, 167-69 (Minn. App. 2013) (discussing the evolution of the law on this point).

Here, the district court determined that the Vanderlindes are the de facto custodians of the child. *See* Minn. Stat. § 257C.01, subd. 2. Once the district court made this determination, chapter 257C precluded the district court from giving the Nasons custody preference based on their status as biological parents. *See* Minn. Stat. 257C.04, subd. 1(c) (2022). Instead, the best-interests-of-the-child analysis is applied to award custody

between a biological parent and a third party. *J.W. ex rel. D.W. v. C.M.*, 627 N.W.2d 687, 692-93 (Minn. App. 2001), *rev. denied* (Minn. Aug. 15, 2001).

III.

The Nasons assert that the district court erred by failing to comply with the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963 (2022), and the Minnesota Indian Family Preservation Act (MIFPA), Minn. Stat. §§ 260.751-.835 (2022), when making its custody determination. We disagree. "The *de novo* standard of review typically applied to a district court's reading of a Minnesota statute also applies to a review of a district court's reading of ICWA." *In re Welfare of Child. of S.B.*, A19-0225, 2019 WL 6698079 at *2 (Minn. App. 2019), *rev. denied* (Minn. Jan. 9, 2020).

The district court found that it is uncontested that the child meets the definition of an "Indian child" under the statutes. But the Nasons argue that the Vanderlindes disregarded ICWA's notice requirement when initiating this custody proceeding. In any involuntary custody proceeding, the party seeking custody must notify the Indian child's tribe "by registered mail, with return receipt requested, of the pending proceedings and of their right of intervention." 25 U.S.C. § 1912(a). The Vanderlindes notified the tribes of the pending third-party dispute by registered mail but failed to send the notification with "return receipt requested." *Id.* The district court found the Vanderlinde's failure to request a return receipt was inadvertent and that the notice, nevertheless, was in substantial compliance with the statute.

We have held that "substantial compliance" satisfies the notice requirements under ICWA. *See In re Welfare of V.R.*, No. C2-90-1765, 1991 WL 42614, at *1 (Minn. App.

Apr. 2, 1991), *rev. denied* (Minn. May 23, 1991). Other jurisdictions agree. *See, e.g.*, *In re Dependency & Neglect of A.L.*, 442 N.W.2d 233, 236 (S.D. 1989) (stating that actual notice of the proceeding through certified mail was sufficient under ICWA); *In re B.J.E.*, 422 N.W.2d 597, 599-600 (S.D. 1988) ("[T]here was substantial compliance with . . . ICWA and the guidelines so as to give the trial court jurisdiction over [the child]."); *State ex rel. Juv. Dep't of Lane Cnty. v. Tucker*, 710 P.2d 793, 798 (Or. App. 1985) (holding that a letter identifying the child and stating the right to intervene was sufficient).

We are satisfied that the Vanderlindes' notice to the tribes constituted "substantial compliance" despite their failure to send the notification with return receipt requested. The record reflects that the notices were delivered and that White Earth Nation confirmed that it would not intervene in this custody dispute. Because the Vanderlindes substantially complied with ICWA's notice requirements, the district court did not err in finding the notices sufficient.

The Nasons assert that ICWA allows Indian parents to regain custody of their Indian child "upon demand." *See* 25 C.F.R. § 23.103 (a)(1)(ii) (2016). But the regulation describes only when ICWA applies; it does not provide the Nasons the right to regain custody of the child upon demand. *Id.* ("ICWA includes requirements that apply whenever an Indian child is the subject of . . . a voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand."). The Nasons make a similar argument under MIFPA, which states that a parent or Indian custodian may, in the context of voluntary foster-care placement, "withdraw consent to a child placement at

any time." Minn. Stat. § 260.765, subd. 4 (Supp. 2023). This section of MIFPA is inapplicable to third-party-custody disputes.

The Nasons further assert that, under ICWA, the proceeding required the testimony of a qualified expert witness. The relevant statute provides:

> No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(e). As noted above, this proceeding concerned a custody determination. As a result, the provision relied upon by the Nasons does not apply.[1] In sum, we conclude that the district court did not err in its application of ICWA and MIFPA.

Affirmed.

[1] The Nasons argue on appeal that they were entitled to representation by an attorney in this matter. Because this issue was not raised in the district court, we will not address it. *See Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986).