

*This opinion is nonprecedential except as provided by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
A24-0934**

In Re the Custody of N.M.L.J. --

Ebony Reyes, et al.,
Appellants,

vs.

Kathy Jean Newago,
Respondent.

**Filed March 24, 2025
Reversed and remanded
Bjorkman, Judge**

Beltrami County District Court
File No. 04-FA-23-3014

Jennifer L. Thompson, JLT Law & Mediation, Litchfield, Minnesota (for appellants)

Jenny A. Covington, Nelson Mullins Riley & Scarborough LLP, Minneapolis, Minnesota
(for respondent)

Considered and decided by Bjorkman, Presiding Judge; Bond, Judge; and Smith,
John, Judge.*

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

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellants challenge the denial of their petition for third-party custody of a minor child, arguing that the district court (1) erred by applying the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (2018) (ICWA), and the Minnesota Indian Family Preservation Act, Minn. Stat. §§ 260.751-.835 (2024) (MIFPA); and (2) abused its discretion by applying *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471 (Minn. 1981), to deny their petition without an evidentiary hearing. We reverse and remand.

FACTS

This appeal concerns a child, N.L.M.J. (the child), who is now ten years old.¹ The child was the subject of a child-protection proceeding, and in September 2023 the district court transferred permanent legal and physical custody of the child from her parents to respondent Kathy Jean Newago, the child’s maternal great aunt. *In re Welfare of Child of I.E.B.*, No. 04-JV-23-691 (Minn. Dist. Ct. Sept. 29, 2023).

In October 2023, appellant Ebony Reyes, who is the child’s paternal first cousin once removed, and Reyes’s domestic partner appellant Albina Coronado filed a petition seeking third-party custody of the child under Minn. Stat. § 257C.03 (2024). In the petition, Reyes and Coronado allege that the child’s father placed her in their care, and they cared for the child at their residence in California, from August 2020 to February 2022 and

¹ The district court caption incorrectly identifies the child with the initials N.M.L.J. “The title of the action shall not be changed in consequence of the appeal.” Minn. R. Civ. App. P. 143.01. But this opinion uses the child’s correct initials, N.L.M.J.

June 2022 to August 2022. They note that the custody-transfer order placed the child in Newago's sole custody and assert various concerns about the child's health and well-being in Newago's care. They allege that Newago (1) smokes cigarettes around the child, who has begun exhibiting "respiratory issues"; (2) "neglect[s]" the child while she drinks alcohol and gambles at casinos; (3) poorly manages the child's hygiene, including not providing the child clean underwear or ensuring regular bathing; (4) "minimize[s]" the child's trauma; (5) exposes the child, who is part African American, to racial slurs and other "race-based discrimination"; and (6) endangers the child by "frequently" allowing her son, who has criminal-sexual-conduct and manslaughter convictions, to spend time in her home, including overnights.

Newago moved to dismiss the petition, asserting that it was "improperly brought" and should have been filed in the child-protection matter as a motion to modify the custody-transfer order under Minn. Stat. § 260C.521, subd. 2 (2024). She also argued that the child is an Indian child for purposes of ICWA and MIFPA and Reyes and Coronado failed to "serve" all "necessary parties," including the two tribes—Fond Du Lac Band of Chippewa and Leech Lake Band of Ojibwe—that were referenced in the custody-transfer order. And she disputed the allegations in the petition, contending that Reyes and Coronado failed to "meet their burden of proof" that the child is "endangered" in her care. Newago argued that the court should apply *Nice-Petersen*, which requires a parent seeking to modify child custody to present a prima facie case, 310 N.W.2d at 472, and deny the petition without an evidentiary hearing.

Over the course of three hearings, the district court addressed whether Reyes and Coronado had served the tribes with notice of the petition and instructed them to provide service by certified mail. Reyes and Coronado argued that such service is not necessary for a third-party-custody petition, but they served the tribes as instructed before the third hearing. The Leech Lake Band of Ojibwe appeared at all three hearings, but the Fond Du Lac Band of Chippewa did not appear at any.

The district court denied the petition without an evidentiary hearing. It found that the child is an Indian child under ICWA and MIFPA and Reyes and Coronado “failed to serve the necessary parties” for a custody proceeding involving an Indian child. And it determined that, “[s]etting aside the failure of service,” the petition fails the *Nice-Petersen* test for modifying custody.

Reyes and Coronado appeal.

DECISION

A petition for third-party custody must “state and allege” whether the petitioner seeks custody as a “de facto custodian” or as an “interested third party” who can “prove” at least one of the three factors in Minn. Stat. § 257C.03, subd. 7(a). Minn. Stat. §§ 257C.01, subds. 2, 3(a), .03, subd. 2(a)(5) (2024). Those three factors are:

- (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.

Minn. Stat. § 257C.03, subd. 7(a)(1). A petition seeking custody as an interested third party “must be verified by the petitioner or petitioners and its allegations established by competent evidence.” *Id.*, subd. 2(b).

We generally review a district court’s decision regarding third-party custody for abuse of discretion. *In re Custody of A.L.R.*, 830 N.W.2d 163, 166 (Minn. App. 2013). But we review de novo whether the district court applied the correct legal standard in determining whether to grant an evidentiary hearing on a third-party-custody petition. *See Lewis-Miller v. Ross*, 710 N.W.2d 565, 568-69 (Minn. 2006); *cf. Boland v. Murtha*, 800 N.W.2d 179, 184 (Minn. App. 2011) (stating that appellate courts review de novo whether an evidentiary hearing is warranted on custody-modification motion).

I. Reyes and Coronado have not shown reversible error in the district court’s application of ICWA and MIFPA.

The district court determined that the child is an Indian child and that Reyes and Coronado failed to “serve the necessary parties” as required by ICWA and MIFPA. Reyes and Coronado argue that the district court erred by applying ICWA and MIFPA. But as they acknowledge, the court expressly disclaimed any reliance on a service failure as the basis for denying relief by saying that it was “[s]etting aside the failure of service.” As such, any error in the district court’s application of ICWA and MIFPA is harmless and does not warrant reversal. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

II. The district court erred by applying *Nice-Petersen* to deny the third-party-custody petition without an evidentiary hearing.

Reyes and Coronado next assert that the district court erred by applying *Nice-Petersen* to deny their petition without an evidentiary hearing. They contend that the

analysis articulated in that opinion applies solely in the context of modification of parental custody and does not apply to their petition to establish third-party custody under Minn. Stat. § 257C.03. We agree.

In *Nice-Petersen*, a parent moved to modify a child-custody award made as part of a marriage dissolution. *Nice-Petersen*, 310 N.W.2d at 472. The supreme court held that under what is now Minn. Stat. § 518.185 (2024), a party seeking to modify custody under what is now Minn. Stat. § 518.18 (2024) must present a prima facie case by submitting affidavits that contain sufficient facts that, if taken as true, would justify modification. *Id.* If they fail to do so, the district court must deny the motion without an evidentiary hearing. *Id.* But if they do make a prima facie showing, the district court must hold an evidentiary hearing. *Woolsey v. Woolsey*, 975 N.W.2d 502, 508 (Minn. 2022). Nothing in *Nice-Petersen* addresses third-party custody. And nothing in Minn. Stat. § 257C.03 incorporates the statutes that underlie *Nice-Petersen*.

Newago nonetheless urges us to apply *Nice-Petersen* because Reyes and Coronado’s petition effectively seeks to modify a third-party-custody order under Minn. Stat. § 257C.06 (2024), which incorporates the custody-modification procedures outlined in Minn. Stat. § 518.18.² This argument is unavailing for two reasons. First, Newago mischaracterizes the order placing the child in her custody. That order is a transfer of

² We note that this argument is similar to but distinct from the argument she presented to the district court—that Reyes and Coronado should have filed a motion in the child-protection matter to modify the custody-transfer order under Minn. Stat. § 260C.521, subd. 2. This new argument is not properly before us, *see Lewis-Miller*, 710 N.W.2d at 570 (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)), but we address it in the interests of justice.

permanent legal and physical custody from parents to a fit and willing relative under Minn. Stat. § 260C.515, subd. 4(a)(2) (2024). It is not an order establishing third-party custody with a de facto custodian or an interested third party under Minn. Stat. § 257C.03 and, therefore, is not subject to modification under Minn. Stat. § 257C.06. Second, even if we disregarded this distinction, Newago has not identified, and we have not discovered, any legal authority that justifies treating a petition expressly seeking to establish third-party custody under Minn. Stat. § 257C.03 as a motion to modify an existing third-party-custody order under Minn. Stat. § 257C.06. Rather, such a petition must stand or fall under the terms of Minn. Stat. § 257C.03.

As our supreme court has explained, that statute establishes a “two-stage process” for considering petitions. *Lewis-Miller*, 710 N.W.2d at 569. In the first stage, a district court has “discretion to dismiss [the] petition without an evidentiary hearing if the petition and accompanying affidavits alleged facts which, if taken as true, would not be sufficient to satisfy the criteria of Minn. Stat. § 257C.03, subd. 7(a).” *Id.* But if the petition and affidavits satisfy the statutory criteria, then the proceeding moves to the second stage—an evidentiary hearing. *Id.* The supreme court also recognized that this process, because it contains two stages, is “consistent with” that articulated in “typical custody-modification proceedings,” like *Nice-Petersen*. *Id.* But ultimately, the determination of whether a third-party-custody petitioner is entitled to an evidentiary hearing turns not on *Nice-Petersen* or Minn. Stat. § 518.18 but on whether the petition, together with any supporting affidavits, alleges facts that, “if proven, would satisfy the criteria of Minn. Stat. § 257C.03, subd. 7(a).” *Id.* at 570.

The district court did not apply this standard to Reyes and Coronado's petition. It did say that it was taking the allegations in the petition as true, which is consistent with *Lewis-Miller* (and *Nice-Petersen*). But it considered the sufficiency of those allegations only with respect to "modify[ing] custody" under Minn. Stat. § 518.18 and *Nice-Petersen*. It did not identify the criteria of Minn. Stat. § 257C.03, subd. 7(a), or determine whether the allegations of the petition satisfy those criteria. Because that determination is a matter left to the district court's "discretion," *Lewis-Miller*, 710 N.W.2d at 569, it is not within our purview to determine the sufficiency of the petition in the first instance. Accordingly, we reverse and remand for the district court to determine whether the allegations in Reyes and Coronado's petition, taken as true, satisfy the criteria of Minn. Stat. § 257C.03, subd. 7(a), and if so, to conduct an evidentiary hearing.

Reversed and remanded.