FILED
07/16/2024
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 23-0574

DA 23-0574

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 148

IN RE THE PARENTING PLAN OF

L.M.A.R. and N.R.R.:

JESSE B. REHBEIN,

Petitioner and Appellant,

and

DANIELLE C. BUCK,

Respondent and Appellant,

with

ANNETTE REHBEIN and DOUG REHBEIN,

Intervenors, Third-Party Parents,
and Appellees.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DR-18-281(A)
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Kevin S. Brown, Paoli & Brown, PC, Livingston, Montana

Mary Kate Moss, Gravis Law, PLLC, Kalispell, Montana

For Appellee:

Emily von Jentzen, Kaufman Vidal Hileman, Ellingson, PC, Kalispell, Montana

Submitted on Briefs: May 22, 2024

Decided: July 16, 2024

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Jesse Rehbein (Jesse) and Danielle Buck (Danielle) appeal the September 6, 2023 Amended Final Parenting Plan and Findings of Fact, Conclusions of Law, and Order issued by the Eleventh Judicial District Court, Flathead County. The parenting plan gave a third-party parental interest to Jesse's father and stepmother, Doug and Annette Rehbein (the grandparents), over Jesse and Danielle's two children, N.R.R. and L.M.A.R.

¶2 We affirm and restate the issue on appeal as follows:

> *Whether the District Court erred by granting the grandparents a parental interest in N.R.R. and L.M.A.R. under § 40-4-228, MCA, instead of § 40-9-102, MCA, and over the objection of the children's natural, fit parents.*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Jesse and Danielle are the natural parents of L.M.A.R. and N.R.R. In January 2018, the Department of Child and Family Services (the Department) removed the children from Jesse and Danielle's care. The Department removed the children based on a number of concerns, including the parents' failure to address N.R.R.'s serious dental needs, N.R.R.'s lack of education, L.M.A.R.'s testing positive for methamphetamines and THC as well as being behind on her wellness appointments, Jesse and Danielle's history of domestic violence and their struggle with substance abuse, and their lack of motivation and parenting skills to care for the children.

¶4 The Department placed the children with the grandparents in March 2018, and the children have been in their care ever since. In April 2018, Jesse and the Department entered an agreement that resulted in Jesse starting therapy, facilitating N.R.R.'s participation in therapy, undergoing drug testing, taking parenting classes, and addressing the children's

medical, dental, and educational needs. Danielle also maintained some contact with the children, although she refused to wear a drug patch and undergo treatment. In October 2018, the Department determined Jesse was able to safely parent the children. Also in October 2018, the grandparents petitioned for guardianship of both children. Jesse voluntarily signed the consent documents agreeing to the guardianship. The grandparents were appointed as guardians in February 2019.

¶5 During the guardianship, the grandparents have allowed for supervised visits between the children and Jesse and Danielle. Visitation was limited when Jesse was incarcerated for unrelated offenses from April to December 2019. After he was released, he reunited with Danielle and helped her get sober. Visitation increased gradually to include overnights on the weekends. The frequency of visitation ranged from every weekend to every other weekend.

¶6 On April 13, 2022, Jesse and Danielle filed a Motion to Terminate the Guardianship. On May 6, 2022, the grandparents filed a Petition to Intervene and requested the court to grant them a third-party parental interest under § 40-4-228, MCA. In August 2022, the parties stipulated to the appointment of a Guardian ad Litem (GAL). The GAL investigated and delivered a report that recommended the grandparents be granted a parental interest, the children continue residing with the grandparents, and Jesse and Danielle continue to have supervised visitation. The District Court issued its Final Amended Parenting Plan along with its Findings of Fact, Conclusions of Law, and Order on September 6, 2023. The parenting plan designated the grandparents as third-party parents and provided the children

shall reside primarily with the grandparents with Jesse and Danielle having unsupervised parenting time every other weekend.

¶7 In the District Court's Findings of Fact and Conclusions of Law, it relied on § 40-4-228, MCA to grant the grandparents a third-party parental interest over the children. Jesse and Danielle argued the Montana Supreme Court has previously held in *Schwarz v. Schwarz*, 2018 MT 48, ¶ 9, 390 Mont. 366, 414 P.3d 285, that grandparents were required to seek visitation rights under § 40-9-102, MCA. However, the District Court acknowledged the Montana Legislature's subsequent amendment to Title 40 that declared a grandparent is not precluded from seeking third-party parental status as long as they meet the requirements under the statute.

STANDARD OF REVIEW

¶8 This Court reviews a district court's findings of fact regarding parenting plans and related agreements for clear error. *King v. Chilcott (In re Parenting of K.J.K.)*, 2020 MT 224, ¶ 17, 401 Mont. 204, 472 P.3d 155. "A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if our review of the record convinces us that the district court made a mistake." *Chilcott*, ¶ 17. We review a district court's interpretation and application of statutes for correctness. *Chilcott*, ¶ 17.

DISCUSSION

¶9 *Whether the District Court erred by granting the grandparents a parental interest in N.R.R. and L.M.A.R. under § 40-4-228, MCA, instead of § 40-9-102, MCA, and over the objection of the children's natural, fit parents.*

¶10 Section 40-4-228, MCA, pertains to parenting and visitation between a natural parent and a third party. It allows a court to award a parental interest to a third person when it is shown by clear and convincing evidence "the natural parent has engaged in conduct that is contrary to the child-parent relationship; and the nonparent has established with the child a child-parent relationship, . . . and it is in the best interests of the child to continue that relationship." Section 40-4-228(2), MCA. A child-parent relationship is defined as one "in which a person provides or provided for the physical needs of a child by supplying food, shelter, and clothing and provides or provided the child with necessary care, education, and discipline," or exists "through interaction, companionship, interplay, and mutuality that fulfill the child's psychological needs for a parent as well as the child's physical needs," or "meets or met the child's need for continuity of care by providing permanency or stability in residence, schooling, and activities outside of the home." Section 40-4-211, MCA.

¶11 When considering the best interest of a child, the court shall consider factors including, but not limited to:

> (a) the wishes of the child's parent or parents; (b) the wishes of the child; (c) the interaction and interrelationship of the child with the child's parent or parents and siblings and with any other person who significantly affects the child's best interest; (d) the child's adjustment to home, school, and community; (e) the mental and physical health of all individuals involved; (f) physical abuse or threat of physical abuse by one parent against the other parent or the child; (g) chemical dependency, as defined in 53-24-103, or chemical abuse on the part of either parent; (h) continuity and stability of care; (i) developmental needs of the child; (j) whether a parent has knowingly failed to pay birth-related costs that the parent is able to pay, which is considered to be not in the child's best interests; (k) whether a parent has knowingly failed to financially support a child that the parent is able to support, which is considered to be not in the child's best interests; (l) whether

> the child has frequent and continuing contact with both parents, which is considered to be in the child's best interests unless the court determines, after a hearing, that contact with a parent would be detrimental to the child's best interests. In making that determination, the court shall consider evidence of physical abuse or threat of physical abuse by one parent against the other parent or the child, including but not limited to whether a parent or other person residing in that parent's household has been convicted of any of the crimes enumerated in 40-4-219(8)(b); (m) adverse effects on the child resulting from continuous and vexatious parenting plan amendment actions.

Section 40-4-212, MCA.

¶12 The court does not need to find the natural parents unfit before awarding a third-party parental interest. Section 40-4-228(3), MCA. Additionally, the Montana Legislature has pointed out "that while it is in the best interests of a child to maintain a relationship with a natural parent, a natural parent's inchoate interest in the child requires constitutional protection only when the parent has demonstrated a timely commitment to the responsibilities of parenthood." Section 40-4-227(2)(a), MCA. Further, "a parent's constitutionally protected interest in the parental control of a child should yield to the best interests of the child when the parent's conduct is contrary to the child-parent relationship." Section 40-4-227(2)(b), MCA.

¶13 Section 40-9-102, MCA, pertains to grandparent and grandchild visitation rights. A district court may grant a grandparent reasonable rights of contact with the child. Section 40-9-102(1), MCA. Unlike § 40-4-228, MCA, the court must determine whether a parent is fit if they object to grandparent-grandchild contact. Section 40-9-102(2), MCA. The court may grant the grandparent's petition over the objection of an unfit parent only if it is in the best interests of the child. Section 40-9-102(3), MCA. The court may grant the grandparent's petition over the objection of a fit parent only if "based upon clear and

convincing evidence, that the contact with the grandparent would be in the best interest of the child and that the presumption in favor of the parent's wishes has been rebutted." Section 40-9-102(4), MCA.

¶14 In *Schwarz*, we held that a grandparent seeking a visitation request with a child could only do so through an action brought under § 40-9-102, MCA, because that statute is specific to grandparents. *Schwarz*, ¶ 12. However, in response to *Schwarz*, the Montana Legislature enacted § 40-9-201, MCA, which provided that a grandparent is not precluded from seeking relief under Title 40, Chapter 4. More specifically, § 40-9-202, MCA, states a grandparent retains the right "to seek a parental interest, visitation, or parenting plan under Title 40, chapter 4."

¶15 We find the District Court did not err in its decision to apply the third-party parent statute (§ 40-4-228, MCA), rather than the grandparent visitation statute (§ 40-9-102, MCA). The District Court correctly pointed out the Montana Legislature established that a grandparent is not barred from seeking a third-party parental interest under § 40-4-228, MCA. In fact, § 40-9-202, MCA, explicitly provides that, in addition to seeking relief under the grandparent visitation statute, a grandparent retains the right to seek a parental interest under § 40-4-228, MCA. For this reason, Jesse and Danielle's argument that the court should have applied the factors required for consideration of grandparent visitation under § 40-9-102, MCA, is not persuasive.

¶16 We also find the District Court correctly applied § 40-4-228, MCA, to grant the grandparents a third-party parental interest in this case. Based on the record, there is clear and convincing evidence that Jesse and Danielle, the natural parents, were engaged in

conduct contrary to their child-parent relationships. For example, when the Department removed the children, N.R.R. suffered from serious dental needs and lack of education, L.M.A.R. tested positive for methamphetamines and THC and was behind on her wellness appointments. Additionally, Jesse and Danielle had a history of domestic violence, and both struggled with substance abuse.

¶17 There is also clear and convincing evidence the grandparents established a child-parent relationship with the children, and it would be in the children's best interest to remain in the grandparents' care. For example, as the court pointed out, for the past five years the grandparents have provided a safe, secure, and stable home, provided necessary medical, mental health, and dental care, enrolled the children in educational programs, provided food and clothing, arranged extracurricular activities, and provided financial support, health insurance, and payment of uninsured expenses. Additionally, the grandparents were legally appointed as the children's guardians, with Jesse's voluntary consent, from February 2019 to the present.

¶18 Although the District Court did not provide a line-by-line analysis under § 40-4-212, MCA, of whether staying with the grandparents would be in the children's best interests, we conclude there is sufficient evidence in the record, as detailed in the facts above, to support the court's decision.

¶19 Jesse and Danielle also argue on appeal the District Court erred because it determined they were fit parents, and the court is required to presume that a fit parent's wishes are in the best interest of the child. While the District Court did find Jesse and Danielle to be fit parents that have progressed markedly since the children were removed

from their care, the fitness of the natural parents is not a consideration under § 40-4-228, MCA. Nonetheless, Jesse and Danielle argue the court should have given deference to their wishes.

¶20 We find the District Court did not err. If the court determines the natural parents acted contrary to the child-parent relationship, the nonparent has established a child-parent relationship, and it is in the child's best interest, then the fitness of the natural parents is not a consideration under § 40-4-228, MCA. *See In re Parenting of M.M.G.*, 2012 MT 228, 366 Mont. 386, 287 P.3d 952 (holding if the third-party petitioners could demonstrate they had established a child-parent relationship with M.M.G., the District Court would have jurisdiction to consider whether to grant the petitioners a parental interest in M.M.G. even though the mother's parental rights had not been terminated). Here, the court did not consider Jesse and Danielle's fitness as parents when determining placement of the children. However, the court did take Jesse and Danielle's fitness into consideration when determining what visitation to grant them. Although the GAL recommended supervised visits, the court granted Jesse and Danielle unsupervised visits every other weekend based on its finding they were fit to parent. However, based on the damage that Jesse and Danielle had already inflicted on the children, the fact the children seemed to regress in therapy when contact with their parents increased, and the well-established child-parent relationship with the grandparents, the court did not err, despite Jesse and Danielle's fitness to parent, in finding a parental interest relationship between the grandparents and the children and adopting a parenting plan in the best interest of the children.

CONCLUSION

¶21 The District Court did not err by deciding the case under § 40-4-228, MCA, rather than § 40-9-102, MCA, because grandparents may seek relief under that statute. Additionally, the record shows there is evidence the grandparents meet the requirements under § 40-4-228, MCA, thus, the District Court did not err by granting them a third-party parental interest. Finally, the District Court was not required to consider the fitness of the natural parents under § 40-4-228, MCA, when granting a third-party parental interest to the grandparents.

¶22 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER