NOT DESIGNATED FOR PUBLICATION

No. 102,885

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS, ex rel. SEC.
SOCIAL AND REHABILITATION SERVICES
and RACHEL T. WHALEY (now Deceased) and
JENNA WHALEY, a Minor Child, by and
Through Next Friend, RACHEL T. WHALEY,
Plaintiffs,

and TERRY WHALEY (Grandfather),
Appellee/Cross-appellant,

v.

MATT YARMER,
Appellant/Cross-appellee.

MEMORANDUM OPINION

Appeal from Atchison District Court; ROBERT J. BEDNAR, judge. Opinion filed September 3, 2010. Affirmed in part, reversed in part, and remanded with directions.

Gerald R. Kuckelman, of Garrity & Kuckelman, of Atchison, for appellant/cross-appellee.

John F. Thompson, of John F. Thompson, P.C., of Leavenworth, for appellee/cross-appellant.

Before LEBEN, P.J., GREEN and CAPLINGER, JJ.

LEBEN, J.: Both parties in this grandparent-visitation case have appealed the district court's order, which granted the grandfather unsupervised visitation with his granddaughter over the father's objection but also required ongoing drug-testing of the

grandfather over his objection. We have concluded that the drug-testing order, which was entered without any specific limits on how testing results might be used or disseminated, violated the grandfather's rights. We have also concluded that the district court's grant of unsupervised visitation to the grandfather was proper. But we are unable to say whether the district court would have granted unsupervised visitation had it known that its drug-testing order might be unlawful. We therefore remand the case to the district court to enter appropriate orders on both issues under the legal guidance provided in this opinion.

Terry Whaley is the maternal grandfather of J.W., whose mother has died. J.W. was only 1-year-old when her mother died in September 2006. Before her mother's death, Terry had substantial contact both with J.W. and her half-brother, Ja. W. After her mother's death, Terry cared for both J.W. and Ja. W. briefly until J.W.'s father, Matt Yarmer, obtained custody of J.W. about a month after the mother's death. Yarmer was not the father of Ja. W., and Terry has adopted Ja. W.

At a court hearing in 2007, the district court found that Terry had a substantial relationship with J.W. but approved Matt's visitation plan, which gave Terry only a supervised visit with J.W. for 2 hours once a month. In 2009, Terry asked for unsupervised visitation. Matt opposed unsupervised visitation both in 2007 and in 2009 based on Terry's known past drug usage: he admitted he had first smoked marijuana in 1970; he was convicted of two counts of sale of marijuana in 1997; and he was convicted of possession of methamphetamine, possession of drug paraphernalia, and possession of alprazolam in 2004. Terry claimed that he had stopped using drugs in 1998 and that his 2004 convictions arose out of his holding drugs for someone else. In 2009, Terry submitted clean drug-test results and said he had completed a drug-counseling program ordered by the court after his 2004 conviction.

The district court modified the visitation order to allow Terry one unsupervised visitation with J.W. for 4 hours on 1 weekend day each month. The district court found that Matt's limitation of Terry's contact with his grandchild to only limited and supervised visitation had become unreasonable in light of Terry's lack of involvement with drugs in the past 2 years. But the district court also ordered that Terry be subjected to random drug-testing by court services staff; if he failed a test, visitation would revert back to the old schedule for supervised visitation until Terry passed two more tests.

The District Court's Order Granting Limited but Unsupervised Visitation to Terry Was Permissible.

Matt appeals the order granting unsupervised visitation to Terry on two grounds. First, he claims that the evidence didn't show that his proposal for supervised visitation was unreasonable so, as the parent, his right to control his child's upbringing should have been respected. Second, he claims that unsupervised visitation isn't in J.W.'s best interests.

Our legislature has provided for grandparent visitation in K.S.A. 38-129. Such visitation may be granted "upon a finding that the visitation rights would be in the child's best interests and when a substantial relationship between the child and the grandparent has been established." K.S.A. 38-129(a). These rights extend to grandparents like Terry, whose daughter, the child's mother, has died. K.S.A. 38-129(b).

In addition to these statutory provisions, a fit parent has a fundamental and constitutionally protected liberty interest in controlling the upbringing of his or her child, so there are constitutional limitations on nonparent visitation that is ordered over the objection of a child's parents. See generally *Troxel v. Granville*, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000). When considering a request for grandparent visitation, the district court must presume that the parent is acting in the child's best interests, and the

parent's wishes about what is appropriate grandparent visitation may not be overridden unless they are unreasonable. *In re Cathey*, 38 Kan. App. 2d 368, Syl. ¶¶ 3-4, 165 P.3d 310 (2007); *In re Creach*, 37 Kan. App. 2d 613, Syl. ¶¶ 5, 7, 155 P.3d 719 (2007).

The district court found that the statutory requirements—child's best interests and established and substantial relationship between child and grandparent—were present. In addition, the district court found that Terry had not used drugs in the intervening 2 years since he had obtained supervised visitation. Based on that, the district court found that Matt's proposal to continue only limited and supervised visitation unreasonable. On appeal, we must review the evidence in the light most favorable to Terry since the district court, which heard the evidence, ruled in his favor. If substantial evidence supports the district court's findings, we must uphold them. *Kansas Dept. of SRS v. Paillet*, 270 Kan. 646, 653, 16 P.3d 962 (2001). We then consider independently whether those findings are sufficient to support the district court's legal conclusion. *In re Creach*, 37 Kan. App. 2d at 617-18.

Taking the evidence in the light most favorable to Terry, he has been involved in J.W.'s life since her birth: he took an active role in visiting her before her mother died, and he cared for her for about a month after that. The district court found that Terry's visits with J.W. had gone well for the past 2 years and that no evidence suggested that he'd used drugs during that time. Terry also testified that the limited and supervised visitations were having a negative effect both upon his relationship with J.W. and on J.W.'s relationship with her half-brother. Although the district court did not state exactly why it found Matt's plan for limited and supervised visitation unreasonable, that finding appears to have been based upon these facts, which are supported by substantial evidence.

Based on this evidence, we must consider whether these findings were sufficient to support the district court's conclusion that Matt's visitation plan was unreasonable. Even with the required presumption in favor of a natural parent's visitation plan, we believe that the district court could conclude on this evidence that it was unreasonable. Visits had gone well for the past 2 years, but the evidence suggested that continuing the supervised-visitation format on essentially a permanent basis was undermining the established relationship between J.W. and Terry, as well as the separate relationship between J.W. and Ja. W. In addition, given the lack of drug usage for the past 2 years, the risk of Terry's continued drug usage—especially with drug testing—could be considered minimal. Thus, especially with the risk of drug usage lessened through court-ordered drug testing, the district court could conclude that Matt's limited visitation plan was unreasonable. The district court could also properly conclude that Terry's visitation plan was in J.W.'s best interests on the same basis. So the district court's order granting limited but unsupervised visitation, even over Matt's objection, did not interfere with his constitutional rights as a parent and was authorized by K.S.A. 38-129.

As Entered, the District Court's Drug-Testing Order Is Unlawful.

Terry has appealed the district court's order that he submit to random drug-testing as a condition of his unsupervised visitation, claiming that it violates the Fourth Amendment's prohibition on unreasonable searches. Both sides agree that the court's drug-testing order is subject to Fourth Amendment protection, and we accept their assumption. Compare *Luminella v. Marcocci*, 814 A.2d 711, 720-22 (Pa. Super. 2002) (assuming for purposes of analysis that the Fourth Amendment applied in challenge to court-ordered drug-testing of parent in custody case) with *Doe v. Senechal*, 431 Mass. 78, 84, 725 N.E.2d 225 (2000) ("The civil litigation here concerns private litigants, and Senechal points to no authority for his proposition that the Fourth Amendment has any application in this context.").

The Fourth Amendment's prohibition on unreasonable searches has been defined to mean that a warrantless search, such as the one ordered here, is presumed to violate the Fourth Amendment unless a recognized exception to that rule applies. *State v. Fitzgerald*, 286 Kan. 1124, 1127, 192 P.3d 171 (2008). The parties agree here that the exception that might apply is the special-needs exception, which recognizes that there may be some circumstances that arise outside the law-enforcement arena in which a governmental interest creates a special need that makes the requirements of obtaining a warrant based on probable cause impractical. *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 829, 153 L. Ed. 2d 735, 122 S. Ct. 2559 (2002); *State v. Martinez*, 276 Kan. 527, 534, 78 P.3d 769 (2003).

In *Earls*, the United States Supreme Court said that a balancing test determines whether a special-needs search is permissible. Under that test, a court examines (1) the nature of the privacy interest compromised by the search and (2) the character and nature of the intrusion, including whether any procedures would limit the use of information gained through the intrusion. The court then balances these considerations with the nature and immediacy of the governmental interest used to justify the intrusion and the efficacy of the search in meeting those interests. 536 U.S. at 830-34.

Both parties presume in their briefs that the legitimacy of the drug-testing order in this case is governed by the special-needs balancing test announced in *Earls*. An argument could be made that the special-needs test does not apply in a case like this one, in which there is individualized suspicion that Terry might be using drugs based on his own prior drug use. See *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1213 (10th Cir. 2003) (special-needs cases involve a "lack of individualized suspicion of wrongdoing, and [a] concomitant lack of individualized stigma based on such suspicion"); *Benavidez v. City of*

Albuquerque, 101 F.3d 620, 623-24 (10th Cir. 1996) (finding that special-needs doctrine did not apply to drug test based upon individual suspicion rather than random or uniform selection process; thus, reasonable suspicion must support the search). But the parties have assumed that the *Earls* balancing test applies, and we will determine the propriety of the drug-testing order based on that assumption. We reserve consideration of whether that test properly applies to a drug-testing order in a child-custody or visitation case until the parties have raised and properly briefed the argument.

We first consider the nature of the privacy interest compromised by the search. Pennsylvania's intermediate appellate court has noted that parties involved in civil litigation generally have a diminished expectation of privacy with regard to matters related to the litigation and that parents involved in child-custody disputes have "an even lower reasonable expectation of privacy." *Luminella*, 814 A.2d at 722-23. As that court notes, matters at "the very core" of a parent's privacy interests—"home life and child rearing practices"—become the central focus of these lawsuits. 814 A.2d at 723. We agree that there is necessarily some diminished expectation of privacy with respect to matters reasonably related to child-custody and visitation disputes. Even so, a parent or grandparent certainly still retains *some* reasonable expectation of privacy, even if it is less than would be expected in the absence of civil litigation.

We next consider the intrusion being made, including whether any procedures would limit the use of information gained through the intrusion. Random drug-testing certainly is a substantial intrusion on Terry's privacy, and the district court made no explicit limitations on how the test results could be used. Matt argues that the district court "did not direct Court Services to forward the testing to the court, law enforcement or any one else." Likewise, however, the district court did not *prohibit* either court staff or Matt from doing so.

The State's interest in this case is the consideration of the best interests of the child, a statutory factor for granting grandparent visitation. The district court found that Terry had an existing and substantial relationship with J.W., but the court also obviously had at least some lingering concern about possible drug use that the court wanted to protect against. Random drug-testing is one means to protect against continued drug use, whether by a person on parole or probation, a person working at a jobsite, or a parent or grandparent entrusted with a child's welfare.

When we balance these interests and concerns, we conclude that while drug-testing might well be an appropriate mechanism for ensuring that Terry remains an appropriate person to care for J.W. without supervision, the district court's failure to enter any orders limiting the use or dissemination of the drug-test results constitutes an invasion of Terry's privacy interests well beyond what would be required to meet the State's interest in this case. *Cf. Earls*, 536 U.S. at 833-34 (upholding special-needs drug-testing of high-school students involved in competitive extracurricular activities in part because the test results were not turned over to law enforcement or used for additional disciplinary sanctions); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 658, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995) (upholding special-needs drug-testing of high school athletes in part because the test results were "disclosed only to a limited class of school personnel who have a need to know" and not given to law enforcement). In the absence of any limitation on the use or dissemination of the test results, we conclude that the drug-testing requirement violates Terry's Fourth Amendment rights.

CONCLUSION

The parties have appealed two aspects of a single court order. Matt appealed the legality and propriety of the district court's decision to grant Terry unsupervised visitation

over Matt's objection; we have found that order appropriate based on the district court's factual findings. Terry has appealed the legality of the district court's drug-testing order, and we have found that the order as entered violated Terry's Fourth Amendment Rights. So we have struck down one part of a two-part court order.

We cannot say whether the district court would have ordered unsupervised visitation if it could not have a drug-testing order in place. We also note that the district court could potentially impose a drug-testing order in this case under appropriate restrictions on the use and dissemination of the test results.

We affirm the district court's order granting unsupervised grandparent visitation to Terry. We reverse the district court's order requiring that Terry submit to random drug-testing. Because the district court's order for drug-testing may have been a necessary condition to its award of unsupervised visitation, however, we remand the case to the district court with authority to enter whatever modified orders it may deem advisable, consistent with the legal rulings made in this opinion.