IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-1034

IN THE MATTER OF THE GUARDIANSHIP OF L.Y.

G.Y. and K.Y.,

Guardians-Appellants,

And Concerning,

S.W.,

Mother-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR

STORY COUNTY

THE HONORABLE STEPHEN A. OWEN, JUDGE

APPELLEE'S AMENDED APPLICATION FOR FURTHER REVIEW OF THE COURT OF APPEAL'S DECISION FILED MAY 26, 2021

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QUESTION PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS VIOLATED THE CONSTITUTIONALLY PROTECTED, FUNDAMENTAL LIBERTY INTEREST OF THE MOTHER TO PARENT HER CHILD AND PROVIDE FOR HER CARE, CUSTODY AND CONTROL.

II. WHETHER A PARENTAL PREFERENCE EXISTS AND SHOULD BE CONSIDERED IN ACTIONS TO TERMINATE A MINOR GUARDIANSHIP UNDER THE UNIFORM MINOR GUARDIANSHIP PROCEEDINGS ACT AS SET OUT IN IOWA CODE CHAPTER 232D.

III. WHETHER THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE MINOR CHILD'S INTEREST IN CONTINUING THE GUARDIANSHIP UNDER IOWA CODE CHAPTER 232D OUTWEIGHED THE INTEREST OF THE BIOLOGICAL MOTHER, SPECIFICALLY FAILING TO GIVE DEFERENCE TO THE FACTUAL FINDINGS OF THE DISTRICT COURT, EXPECIALLY IN DETERMINING THE CREDIBILITY OF WITNESSES.

IV. WHETHER APPELLATE ATTORNEY FEES ARE RECOVERABLE IN ACTIONS FOR TERMINATION OF MINOR GUARDIANSHIPS.

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STATEMENT SUPPORTING FURTHER REVIEW

On May 26, 2021, the Court of Appeals overturned the Honorable Judge Stephen A. Owen's decision to terminate the voluntary guardianship of L.Y. The Court of Appeals failed to recognize a parental preference in the mother, thereby violating her constitutionally protected liberty interest in parenting her child, and in one decision, potentially upending decades of case law protecting this basic fundamental right. The Court of Appeals refused to recognize a parental preference and concluded that termination of the guardianship would do "significant harm to L.Y. at this time and that harm outweighs the mother's interest in termination." *In the Matter of the Guardianship of L.Y.*, 20-1034, May 26, 2021 (Iowa App.), *9-10.

First, the Court of Appeals has entered a decision that is in direct conflict with the basic fundamental and constitutionally protected right of a parent to parent their child without unwarranted state intrusion. The fundamental right in question has been deemed by the United States Supreme Court as well as this Court to be perhaps the oldest of the fundamental liberty interests recognized and among "the basic civil rights of man." *Santosky v. Kramer*, 455 U.S. 745 (1983); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *Callender v. Skiles*, 591 N.W.2d, 182, 190 (Iowa 1999); *In re Bruce*, 522 N.W.2d 67, 72 (Iowa 1994); *Olds v. Olds*, 356 N.W.2d 571, 574 (Iowa 1984); *Santi v. Santi*, 633 N.W.2d

312, 318 (Iowa 2001); *In re Marriage of Howard*, 661 N.W.2d 183, 188 (Iowa 2003). Because the Court of Appeals decision violates the fundamental, constitutional right of the mother, the decision must be reviewed.

Second, this Court has also recognized a presumption that a child's welfare is best served in the care and control of parents. This presumption creates a parental preference that a natural parent is preferred over a non-parent. *Risting v. Sparboe*, 162 N.W. 592, 594 (Iowa 1917). In *Santi*, 633 N.W.2d at 321, it was determined that the statute in question was constitutionally flawed because it did not give fit parents the presumption that their decision-making "will benefit their children, not harm them." Without this presumption, the visitation statute effectively permitted courts to second-guess parental decisions. Thus, the statue was not narrowly tailored to serve any compelling state interest. *Id*. The Court of Appeals refused to recognize a parental preference as it relates to the minor guardianship statute and determined that it was "constitutionally prohibited" from recognizing such a preference. This interpretation of the statute, eliminating the parental preference is reversible error as any such reading would make the statute unconstitutional on its face. This Court has found that failure of the statute to give the presumption of fitness to parents renders it unconstitutional on its face. *Id.* A parental preference does and should exist when determining if a minor guardianship is to be terminated. This is long established

through case law and places a burden on the guardians to show that continuation of the guardianship is in the child's best interest or that harm would come to the child if the guardianship is not continued. *Stanley v. Aiken*, No. 09-0723, 2010 WL 2602172, at *4 (Iowa Ct. App. June 30, 2010); *Zvorak v. Beireis*, 519 N.W.2d 87, 89 (Iowa 1994); *In re Guardianship of M.I.D.*, No. 17-1481, 2018 WL 5840802, at *3 (Iowa Ct. App. November 7, 2018).

Third, the decision of the Court of Appeals shows that their decision was based on a finding that the disruption to L.Y. may have an impact on her mental health and that the guardians had done a good job of providing for her day-to-day care. This violates the cases establishing that without concrete evidence of a disruptive effect on the child, the continuity and stability of remaining in a familiar setting is insufficient to overcome the termination of the guardianship. *Northland v. Starr*, 581 N.W.2d 210, 212 (Iowa Ct. App. 1998); *In re Guardianship of Stewart*, 369 N.W.2d 820, 824 (Iowa 1985); *Painter v. Bannister*, 258 Iowa 1390, 1396, 140 N.W.2d 152, 156 (1966); *In re Guardianship of Sams*, 256 N.W.2d 570, 572 (Iowa 1977).

Proof of unfitness is constitutionally necessary to justify interference in the relationship between a natural parent and their child. See *Quilloin v. Walcott*, 464 U.S. 246, 255 (1978); *In re Guardianship of C.R.*, 2015 WL 576385 at *5, (Iowa

Ct. App. 2015); *In the Matter of Guardianship of S.K.M.*, 2017 WL 5185427 at *6 (Iowa Ct. App. 2017).

Fourth, the Court of Appeals completely disregarded the factual findings of the District Court and failed to give any weight to these findings. The burden of proof under the statute is on the guardians to show by clear and convincing evidence that the guardianship should not be terminated. The District Court is the best position to determine credibility of the witnesses who testified before it. The District Court appropriately assessed credibility and the Court of Appeals recognized this but simply chose to ignore the very detailed and thoughtful findings of the district court. *In re Guardianship of Sams*, 256 N.W.2d 570, 572 (Iowa 1977); see also *Guardianship of Plucar*, 72 N.W.2d 455, 457 (Iowa 1955). In equity cases, deference is given to the district court's factual findings, especially in determining the credibility of witnesses. *Iowa R. App. P*. 6.904(3)(g); *In re Guardianship of Knell*, 537 N.W.2d 778, 781 (Iowa 1995).

The Court of Appeals determined that the mother was not entitled to attorney fees because fees are generally only recoverable by statute or under a contract. No provision under chapter 232D provides for the recovery of attorney fees so the request was denied. The Court of Appeals failed to recognize that appellate attorney fees can be awarded in guardianship proceedings despite the lack of a statutory

provision or contract. *In re Guardianship of G.G.*, 799 N.W.2d 549, 554 (Iowa Ct. App. 2011).

This case also presents an issue of broad public importance and since the new statute was instituted, several cases have been before the Court, but none have addressed the constitutionality or parental preference. Guardianships serve an important purpose for parents and children in times when a child needs someone else to step up and provide care and when a parent is not in a position to provide the necessary care to their child. This can easily be argued to be one of the most important societal interests. With that being said, the important fundamental rights of parents must be considered and carefully protected while still keeping innocent children free from harm. That Court of Appeals decisions fails to do this.

This case and the Court of Appeals interpretation of the minor guardianship statute, creates a constitutional question that must be reviewed by this Court. The statute is constitutionally flawed if there is no recognition of a parental preference. The interpretation of this statute and the preference is one of first impression as it has not been before the court since the new statute was enacted and must be determined as it involves one of the most important rights recognized, the right of a parent to parent their child. Because the Court of Appeals made a decision that should have been made by the Supreme Court, the Supreme Court must now grant

this application to review the case for all of the reasons set forth herein. *Iowa R. App. P.* 6.1103(1)(b)(1); *Iowa R. App. P.* 6.1103(1)(b)(2); *Iowa R. App. P.* 6.1103(1)(b)(4).

ARGUMENT

ISSUE I

WHETHER THE COURT OF APPEALS VIOLATED THE CONSTITUTIONALLY PROTECTED, FUNDAMENTAL LIBERTY INTEREST OF THE MOTHER TO PARENT HER CHILD AND PROVIDE FOR HER CARE, CUSTODY AND CONTROL.

The Supreme Court of the United States and this Court, have long held that parenting is a fundamental right, and among "the basic civil rights of man." *See Santosky v. Kramer*, 455 U.S. 745 (1983); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *Callender v. Skiles*, 591 N.W.2d, 182, 190 (Iowa 1999); *In re Bruce*, 522 N.W.2d 67, 72 (Iowa 1994); *Olds v. Olds*, 356 N.W.2d 571, 574 (Iowa 1984); *Santi v. Santi*, 633 N.W.2d 312, 318 (Iowa 2001); *In re Marriage of Howard*, 661 N.W.2d 183, 188 (Iowa 2003).

Guardianship proceedings concerning conflicting custodial claims of parents and nonparents implicate a parent's fundamental liberty interest in parental autonomy. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). In any action concerning custody of a child, the determining factor is the best interest of the child. *In re Sams*,

256 N.W.2d 570, 572 (Iowa 1977); *In re Guardianship of Roach*, 778 N.W.2d 212, 214 (Iowa Ct. App. 2009). In determining the child's best interest, the court must take into account the strong societal interest in preserving the natural parent-child relationship. Also, the court must consider the long-range interests as well as the immediate interest of the child. *In re Guardianship of Knell*, 537 N.W.2d 781 (Iowa 1995). In considering the best interest of the children, the law raises a strong presumption that the children's welfare will be best served in the care and control of the natural parents. *Stanley v. Aiken*, No. 09-0723, 2010 WL 2602172, at *4 (Iowa Ct. App. June 30, 2010); *Zvorak v. Beireis*, 519 N.W.2d 87, 89 (Iowa 1994); *In re Guardianship of M.I.D.*, No. 17-1481, 2018 WL 5840802, at *3 (Iowa Ct. App. November 7, 2018).

In the instant case, the new statute as applied to the mother, is unconstitutional and violates the due process clause because the State has infringed upon S.W.'s fundamental right to provide for the care, custody and control of her daughter on the basis it may affect her mental health which may be harmful to her. There is no concrete evidence this will happen and the Court of Appeals failed to acknowledge that the mother was well aware of L.Y.'s involvement with therapy and that she recognized this would have to continue to provide a healthy transition for her daughter. S.W. knows the importance of counseling and she herself sought

counseling from the difficult situation of not being able to have custody of her daughter. (Tr. Pg. 24-25). There is no evidence that S.W. would not provide her daughter with the proper mental health counseling she needs. In fact, the record establishes the opposite. S.W. knew she would need to continue L.Y.'s counseling and was committed to doing so. She was also committed to maintaining a relationship between L.Y. and the guardians.

The Court of Appeals was overly concerned with the lack of custody agreement between the parents in this matter. The biological father did not revoke his consent to the guardianship and only acknowledged that he would seek a custody order if the guardianship were terminated. The Court of Appeals decision mentions this concern on two separate occasions in its decision, even describing it as a complication. *In the Matter of the Guardianship of L.Y.*, 20-1034, May 26, 2021 (Iowa App.) *7 fn.3, 9. The fact that the parents are divorced and would need a modification to their divorce decree is not and cannot be a basis for finding that the guardianship should not terminate.

"In deciding this question, we emphasize that divorce or pending divorce do not alone diminish the fundamental interest of parents who make caretaking decisions. Divorce opens the door for courts to resolve disputes between parents, but it does not make parents unfit to make decisions in the best interest of their children.

To conclude that a divorce alone permits the state to make choices for an objecting parent (or parents) likely violates the core *Troxel* precept granting a presumption in favor of a fit parent's decisions regarding their children." *In re Marriage of Howard*, 661 N.W.2d 183, 188 (Iowa 2003).

Divorce, by necessity, permits the state to intervene to resolve immediate and direct disputes that arise between parents over custody and visitation. Nevertheless, divorce is not the sine qua non of a compelling state interest when non-parents seek to challenge parental decision-making. Instead, a compelling state interest arises when substantial harm or potential harm is visited upon children. *Howard* at 190.

The District Court decision adequately addressed this concern by making it clear that the mother was the only parent seeking termination of the guardianship and that L.Y. would be returned to the home of her mother pending modification of the parent's decree to provide legal/physical custody, visitation and support. (App. Pg. 28-42).

ISSUE II

WHETHER A PARENTAL PREFERENCE EXISTS AND SHOULD BE CONSIDERED IN ACTIONS TO TERMINATE A MINOR GUARDIANSHIP UNDER THE UNIFORM MINOR GUARDIANSHIP PROCEEDINGS ACT AS SET OUT IN IOWA CODE CHAPTER 232D.

Beginning January 1, 2020, all facets of a minor guardianship are now governed by *Iowa Code* 232D. The former provisions concerning guardianships

under *Iowa Code* 633.552 through 633.562 were repealed. Under the prior statute, the legislature had provided for a statutory preference favoring custody with a natural parent. While this specific statutory preference has been repealed, the preference in a natural parent was established by the Court and must be recognized in interpreting whether or not to terminate a minor guardianship. Specifically, the Court has found:

> "Something more than the material things of life is essential to the nurture of a child, and that something is the father's and the mother's love, or as near its equivalent as may be. Recognizing this, the law raises a strong presumption that the child's welfare will be best subserved in the care and control of parents, and in every case a showing of such relationship, in the absences of anything more, makes out a prima facie case for parents claiming the custody of their children. "Indeed," as said in one case, "this presumption is essential to the maintenance of society, for without it man would be denaturalized, the ties of family broken, the instincts of humanity stifled, and one of the strongest incentives to the propagation and continuance of the human race destroyed."
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> "Recognition of what is for the best interest of the child will seldom interfere with the natural rights of the parent to the custody thereof, and never unless essential to its welfare or for the good of society."

Risting v. Sparboe, 179 Iowa 1133, 1136-1139, 162 N.W. 592, 594 (Iowa 1917).

The failure of a statute to give the presumption of fitness to a parent renders it unconstitutional on its face. *In re Marriage of Howard*, 661 N.W.2d 183, 192 (Iowa 2003); citing *Santi*, 633 N.W.2d at 321.

Recognizing that the non-parental party is an excellent caretaker for the child is rarely strong enough to interfere with the presumption in favor of a parent. *Northland v. Starr*, 581 N.W.2d 210, 212 (Iowa Ct. App. 1998). The court has acted in some cases to remove a child from a conscientious, well-intentioned custodian with a history of providing good care to the child and placed the child with a natural parent. *Zvorak*, 519 N.W.2d at 89. The guardians have the burden to overcome a parental preference and show that the child's best interests require a continuation of the guardianship. *Stewart*, 369 N.W.2d at 824. If returning a child to the custody of the parent is "likely to have a seriously disrupting and disturbing effect upon the child's development, this fact must prevail." *Painter v. Bannister*, 258 Iowa 1390, 1396, 140 N.W.2d 152, 156 (1966). Absent any concrete evidence of a disruptive effect on the child, however, the continuity and stability of remaining in a familiar setting is insufficient to overcome the presumption favoring a parent. *Stewart*, 369 N.W. 2d at 825.

Because of the fundamental constitutional rights implicated, a nonparent bears the burden of persuasion throughout guardianship proceedings, including initial

appointment, modification, or termination to rebut the presumption favoring parental custody by providing clear and convincing evidence of parental unsuitability. *In re Guardianship of M.E.*, No. 16-1178, 2017 WL 2465791, at *6 (Iowa Ct. App. June 7, 2017) (citing *In re Guardianship of Blair*, No. 01-1565, 2003 WL 182981, at *5 (Iowa Ct. App. Jan. 29, 2003) (citing *In re Guardianship of Hedin*, 528 N.W.2d, 567, 581 (Iowa 1995)).

Iowa cases have emphasized that parents should be encouraged in time of need to look for help in caring for their children without the risk of losing custody. The presumption preferring parental custody is not overcome by a mere showing that such assistance was obtained. Nor is it overcome by showing that those who provided the assistance love the child and would provide a good home. These circumstances are not alone sufficient to overcome the preference for parental custody. *Sams* at 573. See also *Stewart* at 823.

The mother recognized that under the old statutory framework the parental preference was codified. The mother also recognized that statute had been repealed. What is not clear and even less so by the Court of Appeals decision, is that the parental preference continues to be a valid, constitutional requirement to issues involving the parent child relationship. This preference must be recognized and is

established by the court regardless of its inclusion in the code. Without this, the statue would be constitutionally flawed on its face.

S.W. is entitled to a parental preference and this preference, along with her constitutional right to parent her daughter, makes termination of guardianship the only option. The State cannot infringe on her fundamental rights, which includes a presumption that she will and has done what is in her daughter's best interest.

A recent Court of Appeals case determined that the father had not properly raised a constitutional challenge and therefore it was not addressed. In addition, that case is vastly different and conflictual with this case. The father relied on Iowa's "long standing public policy that, absent a powerful countervailing interest, a parent should always have the right to raise their child." In that particular case, the father did not have an established relationship with the child and the Court determined that would be harmful to the child. In contrast to this case, the Court encouraged the father to get to know S.P.-G. better as a parental figure. *In the Matter of the Guardianship of S.P.-G.*, 954 N.W.2d 793 (Iowa Ct. App. 2020). The facts concerning the relationship between the father and S.P.-G. are not at all similar to the relationship S.W. had maintained with L.Y. In S.P.-G, the Court of Appeals at least determined that there was something the father could do to regain custody of his child. The interpretation of the statute by the Court of Appeals in this case has

left S.W. with nothing more that she can do to regain custody of L.Y. The Court of Appeals has effectively terminated her parental rights.

ISSUE III

WHETHER THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE MINOR CHILD'S INTEREST IN CONTINUING THE GUARDIANSHIP UNDER IOWA CODE CHAPTER 232D OUTWEIGHED THE INTEREST OF THE BIOLOGICAL MOTHER, SPECIFICALLY FAILING TO GIVE DEFERENCE TO THE FACTUAL FINDINGS OF THE DISTRICT COURT, EXPECIALLY IN DETERMINING THE CREDIBILITY OF WITNESSES.

The new statutory provisions governing minor guardianships are now set forth in *Iowa Code* 232D. Specific to this action is 232D.503(2) which provides:

> The court shall terminate a guardianship established pursuant to section 232D.203 if the court finds that the basis for the guardianship set forth in section 232D.203 is not currently satisfied unless the court finds that the termination of the guardianship would be harmful to the minor and the minor's interest in continuation of the guardianship outweighs the interest of a parent of the minor in the termination of the guardianship.
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> *Iowa Code* 232D.203(2) (Iowa Supp. 2020).

In determining what would be harmful, the Court has previously relied on proof that a parent is "unfit". Proof of unfitness is constitutionally necessary to justify continued interference in the relationship between a natural parent and her child. In order for a guardian to meet the burden that the guardianship should

continue, a parent has to be unfit. "At a minimum, this requires evidence the parent cannot provide the child with reasonable parental care, meaning nurturing and protection adequate to meet the child's physical, emotional, and mental health needs and that that parent's inability to provide reasonable parental care poses a substantial and material risk of harm to the child." *In the Matter of the Guardianship of S.K.M.*, 2017 WL 5185427 at *6 (Iowa Ct. App. 2017) citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). Under these requirements, S.W. is not "unfit" and there is no risk of harm to L.Y. The Court of Appeals decision finding that harm would come to L.Y. because her parents do not have a custody order in place, that she knows what to expect in the home of the guardians and that her mental health might suffer if this is changed, does not and cannot establish unfitness of S.W. or that there is a risk of harm to L.Y. As in *S.K.M.,* there are none of the typical factors establishing unfitness of the mother in this case.

The court pays close attention to the credibility findings of the trial court because it had the opportunity to observe and listen to the parties and other witnesses, including the minor child. *Stewart* at 824 (citing *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984)). The district court did an excellent job of detailing in its written order the credibility findings of the parties and their witnesses. This court does not have to question how or why the district court determined credibility

because the court very clearly explained it for each witness. The district court made a determination that the most weight was to be given to the testimony offered by S.W. The conclusion was based on her demeanor and composure throughout the proceedings and that it was devoid of "any exaggeration or minimization." (App. Pg. 28-42). The district court's credibility determinations are solid and the Court of Appeals failure to give weight to these findings are grounds for review by this court.

The district court correctly determined that there was no basis for the guardianship and that the best interest of L.Y. would be served by placing her in the custody of her natural mother, S.W. S.W. had reached security and stability and that the basis for the guardianship of L.Y. is not currently satisfied. (App. Pg. 28-42).

After S.W. and M.Y. had separated, they placed L.Y. in the home of G.Y. and K.Y. because she was attending school and dance. S.W. wanted L.Y. to have stability while she moved back in with her parents in Webster City. (Tr. Pg. 12). On February 3, 2014, S.W. was asked to sign an affidavit regarding the guardianship proceedings. She questioned whether the guardianship was temporary before signing the affidavit because she knew she would not sign or agree to the guardianship if it were not temporary. (Tr. Pg. 13, 15).

From February, 2014 until the time of trial on termination of the guardianship, S.W. had taken various steps to try to terminate the guardianship. This has included consulting with two different attorneys prior to consulting and hiring a third attorney to file her request to terminate the guardianship. (Tr. Pg. 20, 21, 83, 86, 100). This also included talking with M.Y., L.Y.'s father, about terminating the guardianship proceedings. (Tr. Pg. 22, 138). S.W. also asked G.Y. and K.Y. to terminate the guardianship through a letter and in text messages. None of which were responded to. S.W.'s lack of personal and direct requests to the guardians were based on the intimidation she felt from G.Y. and K.Y. and fear the requests would have a direct effect on her ability to see and spend time with L.Y. (Tr. Pg. 51, 65, 69-73) (App. Pg. 44).

The Court found that terminating the guardianship was in L.Y.'s best interest. There was no shortage of findings to support that the guardianship was no longer in L.Y.'s best interest.

In June, 2018, L.Y. started to see a clinical psychologist, Dr. Judy Rudman. L.Y. was wanting to spend more time with her parents. (Tr. Pg. 115-116). The district court found that "therapeutic intervention was required in order to restore L.Y.'s sense of security and her relationship to her parents and a sense that she is valued by them." The district court very boldly and correctly concluded: "that had

the guardianship been terminated years earlier as requested by S.W., L.Y. would not have developed the psychological turmoil requiring the therapeutic intervention described here." (App. Pg. 28-42). The same mental health concerns the Court of Appeals relied on for not terminating the guardianship.

Dr. Rudman provided testimony that children do best in their core families. This is because kids want to be connected to their mom and their dad. That is what society values and what kids know. The situation where L.Y. was struggling because she wanted more time with her mom is clear evidence of this and could have been avoided if G.Y. and K.Y. had terminated the guardianship when first requested by S.W.. (Tr. Pg. 122). It is also why the Court of Appeals reliance on the testimony of Dr. Rudman is so misplaced. There was no evidence or testimony by Dr. Rudman that L.Y. would be damaged if placed in her mother's care. See *In the Matter of the Guardianship of L.G.*, 2020 WL 2988230 at *3 (Iowa Ct. App. 2020).

There is no doubt there would always be a chance that the mental health of a child could suffer with any big change they face in life. This would be true of anyone. That alone does not outweigh the critical and previous fundamental right of a parent to care for their child. The Court of Appeals fails to acknowledge that the reason L.Y. was required to see a therapist in the first place is that she struggled with her relationship with her biological parents and being valued by them.

Just because guardians are able and fit to continue having custody over a minor does not overcome a parent's fundamental right to parent or the parental presumption. *Doan Thi Hoang Anh v. Nelson*, 245 N.W.2d 511, 518 (Iowa 1976). This is because the law recognizes that returning the minor child to a parent's custody is in the best interest of the child. *See id*; *see also Sams*, 256 N.W.2d at 573. The Court has repeatedly held that, "Absent concrete evidence of a disruptive effect on the child, the continuity and stability of remaining in a familiar setting is insufficient to overcome the presumption favoring the parent." *Stewart*, 369 N.W.2d at 825 (emphasis added).

S.W. acknowledged that G.Y. and K.Y. had provided a good home for L.Y. and taken good care of her. At the same time, the district court believed that S.W.'s actions in not allowing her own family to advocate on her behalf with G.Y. and K.Y. supported her testimony that she was intimidated by G.Y. and K.Y. and believed that jeopardizing the relationship also risked losing her parenting time with L.Y. (App. Pg. 28-42). One thing that is important to take note of is the credibility findings of the district court concerning G.Y. and K.Y. testimony:

> "The court appreciates the degree to which the paternal relatives love L.Y. and focus on her immediate and future needs and desires. Their testimony however was rather self-congratulatory. Overall, their demeanor was subtly infused with a degree of elitism that supported the mother's testimony that she is intimidated by the paternal side of L.Y.'s extended family. The court concludes that

> the G.Y. and K.Y. intend no such intimidation. They are an accomplished, loving and close-knit family. Nevertheless, their particular status in the community, accomplishments and lack of communication with the mother support a worldview in which their preferences and values predominate. This can be intimidating to those who have experienced the world from a less privileged vantage point." (App. Pg. 30).

While there will certainly be some level of disruption for L.Y. upon return to S.W.'s home, it will not be harmful. L.Y. has a close bond with S.W. and her extended family. She visits regularly. She has been to S.W.'s home where she has lived for three years. L.Y. has her own room and there are no other children in the home. S.W. has a good job and is able to provide support for L.Y. S.W. was clear that she understood L.Y. would need to continue to see Dr. Rudman to help with the transitions and was committed to making that happen. S.W. was also very aware of the need for L.Y. to have a continued relationship and contact with her grandparents and her father.

The district court considered L.Y.'s preference in the overall best interest determination and found that it did not outweigh S.W.'s fundamental right to parent.

> "Termination of the guardianship will not deprive L.Y. of the benefits of a deep and healthy relationship with her extended family. Placement of L.Y. with her mother will in fact continue to foster those important extended familial relationships. S.W. has internalized the pain and empathizes deeply with those who have lost relationships with children. She has experienced it herself. Surviving this experience imbues in her a deep understanding of the importance of fostering and maintaining those relationships. She

> has approached her relationship with the G.Y. and K.Y. first with gratitude. Although hard feelings have developed, she continues to speak highly of the important role they play in L.Y.'s life. The court has no doubt that the G.Y. and K.Y. may not have the daily experience with L.Y., they will not be deprived of a healthy, appropriate and ongoing relationship with her as paternal grandparents."
>
> "The foregoing leads the court to conclude that termination of the guardianship would not be harmful to L.Y. What is harmful is the continued trauma she experiences by being caught in the middle of three homes. She deserves a single home with a stable parent in which her needs are met. It would be a home base for her physically and emotionally. That home is with her mother." (App. Pg. 28-42).

The Court of Appeals did not give the appropriate deference to the District Court findings. One has to wonder why the Court of Appeals commented about the decision of the District Court when it clearly gave no consideration to it. "Although we have determined reversal is appropriate, we wish to note our appreciation for the juvenile court's thoughtful, thorough ruling in this difficult case having complex issues of fact and law." *In the Matter of the Guardianship of L.Y.*, 20-1034, May 26, 2021 (Iowa App.) *10 fn.6.

ISSUE IV

WHETHER APPELLATE ATTORNEY FEES ARE RECOVERABLE IN ACTIONS FOR TERMINATION OF MINOR GUARDIANSHIPS.

S.W. should be awarded attorney fees and costs on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the

parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). This court is to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981). An award of appellate attorney fees was appropriate in a guardianship where the district court's finding of "overwhelming evidence" that the father was a capable father. *In re Guardianship of C.G.*, 799 N.W.2d 549, 554 (Iowa Ct. App. 2011). The district court order in this case also found what can be described as "overwhelming evidence" that S.W. is a good mother and capable of parenting L.Y. and that the guardianship should be terminated.

S.W.'s financial position was such that she was earning $17.50 per hour working full-time as a 9-1-1 dispatcher. G.Y. and K.Y. are both employed; K.Y.as a registered nurse and G.Y. as co-owner of a construction business and sole owner in advanced waterproofing business. (Tr. Pg. 196, 227-228). S.W. testified that her lack of financial resources had been a barrier to terminating the guardianship proceedings sooner. (Tr. Pg. 86). It appears from the record that G.Y. and K.Y. are in a better financial position to pay attorney fees than S.W. S.W. was forced to defend this appeal.

The Court of Appeals failed to make any determination as to the validity of S.W.'s request for appellate attorney fees.

CONCLUSION

The mother requests this matter be accepted for further review, that the Appellate Court Decision be vacated, and the District Court Decision terminating the guardianship be affirmed.

CERTIFICATE OF COMPLIANCE

I certify that this Amended Application for Further Review complies with the type-volume limitation of *Iowa R. App. P.* 6.903(1)(g)(1) because it contains 5,397 words, excluding the parts of the Application exempted by *Iowa R. App. P.* 6.903(1)(g)(1).

This Amended Application complies with the typeface requirements of *Iowa R. App. P.* 6.903(1)(e) and the type-style requirements of *Iowa R. App. P.* 6.903.(1)(f) because it has been prepared using Microsoft Office Word 2010 in typeface point 14 Times New Roman.

CERTIFICATE OF FILING

I certify that I filed the attached Amended Application for Further Review by filing an electronic copy thereof to the Clerk of the Supreme Court, 1111 East Court Avenue, Des Moines, Iowa 50319 on the 10th day of September, 2021.

CERTIFICATE OF SERVICE

I certify that on the 10th day of September, 2021, I served the attached Amended Application for Further Review on all other parities to this appeal by electronically filing a copy of the brief on Andrew Howie, attorney for the Appellant.

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