IN THE SUPREME COURT OF IOWA

IN THE MATTER OF
THE GUARDIANSHIP OF L.Y., A PROTECTED MINOR.

G.Y and K.Y.,	)	
	)	
Guardians-Appellants-Resisters,	)	
	)	S.C. NO. 20-1034
vs.	)	
	)	
S.W.,	)	
	)	
Mother-Appellee- Applicant.	)	

APPEAL FROM
THE IOWA DISTRICT COURT FOR STORY COUNTY
THE HONORABLE STEPHEN A. OWEN, JUDGE

RESISTANCE TO APPELLEE'S APPLICATION FOR FURTHER REVIEW OF THE COURT OF APPEALS' RULING, FILED MAY 26, 2021

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Questions Presented

1. The court of appeals did not violate Mother's constitutionally protected fundamental liberty interest in her parent-child relationship when it determined to continue the guardianship.

2. Under the IMGPA, the Iowa Legislature repealed the statutory parental preference in guardianship proceedings, so it is inapplicable to this case.

3. The court of appeals did not err in determining that terminating the guardianship would be harmful to L.Y. and L.Y.'s interest in continuing the guardianship outweighs Mother's interest in terminating it.

4. The court of appeals did not err when it held the IMGPA did not authorize appellate attorney fee awards.

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Statement in Support of Resistance to Application for Further Review

This case concerns the voluntary guardianship of the paternal grandparents, G.Y. and K.Y., of their grandchild, L.Y., which had been in place since February 2014, when L.Y. was five years-old. This case involves the recently enacted "Iowa Minor Guardianship Proceedings Act" (IMGPA), effective January 1, 2020, which repealed and replaced the previous statutes governing guardianships. *See* 2019 Iowa Acts ch. 56 (H.F. 591). Though this guardianship was created under the old statutory provisions, Iowa Code sections 633.552 through 633.562, the IMGPA governs the management, continuation, and termination of the guardianship. *See id.* § 45. Under the IMGPA, in June 2020, Mother moved to terminate the guardianship. After Mother's nomination, the court appointed a "court visitor", per Iowa Code section 232.305 (2021). In the written report, the visitor recommended the court continue the guardianship because:

> A) The Protected Minor wants the Guardianship to continue;

> B) The Guardians have provided care and shelter for the Protected Minor for the majority of her life;
> C) That it is important for the emotional and mental health of the Protected Minor to maintain a sense of stability and place.

(App. at 22-24.) After an evidentiary trial in July 2020, the district court granted Mother's motion, when L.Y. was 11 years- old. The grandparents appealed and the court of appeals reversed utilizing the recently published opinion, *Matter of Guardianship of S.P.-G.*, 954 N.W.2d 793 (Iowa Ct. App. 2020)

This case is about stability. The one constant in L.Y.'s life has been her grandparents. Mother has been in and out of L.Y.'s life, sporadically visiting. Mother rarely, if ever, participated in parental obligations like doctor's visits and school conferences, but was there sporadically for the play times. The legislature provided that, when considering terminating a guardianship, stable environments can and should outweigh a parent's desire to regain custody. This is that case.

In her application for further review, Mother first argues the court of appeals' opinion violates the constitutionally recognized

fundamental liberty interest a parent has with her child. (*See* App. Fur. Rev. p7-9, p15-20 ("ISSUE I").) The cases she relies upon are grandparent-visitation cases, not guardianships, and are inapplicable here. (*See id.*) Second, adopting the IMGPA, the legislature expressly repealed the previous parental preference in Iowa Code section 633.559 (2019). Mother wrongly argues it still applies. Third, the court of appeals properly concluded that the disruption caused by terminating the guardianship would detrimentally impact L.Y. Contrary to Mother's argument, that evidence was sufficient to maintain the guardianship. Fourth, Mother wrongly asserts that she should have received an appellate attorney fee award.

The court of appeals properly interpreted and applied the new statute while applying it to the facts to reach a well-reasoned and sound decision. None of Mother's arguments justifies granting further review. *See* Iowa R. App. P. 6.1103(1)(b).

Statement of the Facts

When the court granted guardianship of L.Y. in March 2014, L.Y. was four years-old and had been residing with the grandparents since September 2013. That guardianship had continued uninterrupted and without any problem since that time. Mother's motion to terminate the guardianship, filed June 10, 2020, was her first formal attempt to regain custody of L.Y.

At the time of trial, L.Y. was eleven years-old and attending sixth grade in the grandparents' school district. Mother was twenty-eight years-old, unmarried, had no other children, and was residing in Woolstock with her current boyfriend. Father lived in Eldora with his wife, one child, and expecting their next child.

The grandparents had been married for thirty-four years residing in Story City for the past twenty-seven years. Their house is large with a big yard and "[r]oom to run", multiple bedrooms, bathrooms, and L.Y. has her own bedroom. K.Y. is a registered pediatric nurse working in pediatrics at the McFarland Clinic. G.Y. owns a business and has been in the concrete construction industry

for forty-five years.

L.Y. was born in 2009 to her unmarried parents; Mother was only sixteen years-old at the time. From L.Y.'s birth through May 2010, Mother resided with her parents in Webster City, while Father lived with his parents (G.Y. and K.Y.) in Story City. During that time, L.Y. was in the care of both Mother and Father while Mother attended high school: resided with Mother Sunday through Thursday, then with Father Thursday through Sunday. After Mother graduated high school in May 2010, she and L.Y. moved in with Father at G.Y. and K.Y.'s (the grandparents') home. Though Mother and Father married in February 2011, they continued to reside in the grandparents' home. From 2010 through 2013, Mother deferred nearly all her parenting duties to the grandparents. As Father explained, he and Mother did not primarily care for L.Y. "We didn't have to deal with the cooking. [The grandparents] did that. You know, they pretty much helped raise her."

2013 was a tumultuous year for L.Y. After more than three years (since May 2010) of residing with the grandparents, Mother,

Father, and L.Y. moved into their own home in Story City in July 2013. Only two months later in September 2013, Mother and Father decided to separate because their marriage was "falling out." Mother left to reside with her parents in Webster City. Father remained in their marital home. However, L.Y. returned to live with the grandparents in Story City on September 10, 2013, because, as Mother testified: "For stability. [L.Y.] was in school and doing dance." Mother explained that she and Father's plan at the time was "[for Father] and I to figure out our relationship and to figure out what – how our future would look with [L.Y.]." Though L.Y. remained in the grandparents' care, Mother maintained contact with her, visiting on weekends which she admitted was "ample" time.

During the years leading up to the time of trial, the guardianship worked and L.Y. flourished. The grandparents provided a stable home, consistent parenting, and positive influence throughout L.Y.'s young life. L.Y. enjoys living with her grandparents. She has a close family. She loves her school and has

many friends. She participates in church. Staying with the grandparents allowed L.Y. to have regular contact with both Mother and Father.

Though gainfully employed since the guardianship's establishment in February 2014, Mother provided no financial support for L.Y. Mother claimed she paid for 5% of L.Y.'s clothing. Mother admitted she made a conscious decision *not* to provide more for L.Y.

In the year prior to trial, Mother had received professional counselling for "high anxiety and depression". She claimed that her "depression and anxiety issues" were "under control". The grandparents were concerned for Mother's stability regarding her mental state.

Since 2014, Mother claimed that she spoke with attorneys about terminating the guardianship. Father testified that he remembered Mother discussing with him about terminating the guardianship on only two occasions in the past six years. Other than one unsigned and undated letter that Mother claimed she

wrote to the grandparents in 2018, Mother offered no corroborating evidence supporting her desire to end the guardianship. In that letter, Mother admitted:

> I know I haven't been the best mother but all I have ever wanted was to become a mom. I may not have wanted to to be a mom at such a young age but I did and I tried my hardest to be a good mom. I thank you for taking [L.Y.] in when [Father] and i went through our separation. It gave me peace knowing she was in a stable place. All i have ever wanted for [L.Y.] is the best.

Since September 2013, Mother has essentially been an absent parent, visiting L.Y. only "[t]wo to three weekends out of the month" and a week during the summer – never a "full-time mom". K.Y. testified that Mother's visitation was "sporadic … it might be two weekends in a row and then maybe not one, and then one, or it might be once every four to six weeks[.]" G.Y. expressed his disappointment in Mother's failure to maintain regular contact with L.Y. He told of how inconsistent Mother had been with L.Y., observing that L.Y. was often depressed, anxious, and even in tears waiting for Mother to call her. To arrange a visit, all Mother had to do was call in advance. When Mother did call, "lots of times it is last

minute … maybe call on Thursday night or Friday morning" asking for L.Y. to stay with her that weekend. The few times Mother's requests were not met concerned Mother's late request and L.Y. already had commitments.

L.Y. had attended the Roland-Story school district her entire life. Since L.Y. started pre-school to present (more than six years), Mother had attended *none* of L.Y.'s school conferences. K.Y. had been to all of them. Mother claimed she was "uneducated about it all", yet she never bothered to contact the grandparents saying she wanted to attend a school conference. If L.Y. resided with Mother, she would have to switch schools to attend the Clarion-Goldfield school district.

The grandparents have taken care of all of L.Y.'s medical and dental needs. Since she left L.Y. in the grandparents' care in September 2013, Mother had attended *one* of L.Y.'s doctor visits and *none* of her dentist visits.[1] Mother never took L.Y. to any of her

[1] Instead of taking responsibility for her inaction, Mother blamed the grandparents as shown during her cross-examination:

dance classes but was able to attend one of her dance recitals. Mother had managed to attend between "a couple" and "five to six" of L.Y.'s volleyball games and basketball games during the past two years.

Father wanted the grandparents' guardianship to continue. When Mother raised terminating the guardianship in 2020, Father told her that it was in L.Y.'s "best interests to stay where she is at" because the grandparents' home "always has a stable environment … [n]ever had problems with upbringing … Her

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> Q. Okay. And is there any reason you haven't been proactive in seeking out going to doctor's appointments or dentist appointments?
> A. I was never told. They were usually pre-scheduled with [K.Y.]
> Q. Okay. You can text [K.Y.]; is that correct?
> A. Yes.
> Q. Have you ever texted her or called her or asked her and told her that you wanted to be present at these appointments?
> A. I have made it clear that I am not opposed to going and taking [L.Y.]
> Q. Okay. But you have never asked specifically when it has occurred; is that correct?
> A. Correct.

attitude and the way she was brought up is very good … she enjoys all that stuff, and … [doing] this for her is a blessing." Father had concerns about Mother's instability in relationships. Father admitted that, if the court terminated the guardianship, he would seek "full custody" of L.Y. in litigation with Mother.

Argument

1. The court of appeals did not violate Mother's constitutionally protected fundamental liberty interest in her parent-child relationship when it determined to continue the guardianship .

Mother argues that the court of appeals' "decision violates the fundamental constitutional right of the mother, [so] the decision must be reviewed." (App. Fur. Rev p8.) She also argues "the new statute as applied to the mother is unconstitutional and violates the due process clause because the State has infringed upon [Mother's] fundamental right to provide for the care, custody and control of her daughter on the basis it may affect her mental which may be harmful to her." (App. Fur. Rev. p13.) First, Mother did not preserve error on the constitutionality of the IMGPA generally or section

232D.503(2) specifically. Second, such broad attacks are unsupported by the trial record, and provide no basis for this court to grant further review. *See* R. 6.1103(1)(b).

A. Mother failed to preserve error regarding whether the IMGPA as applied by the district court and court of appeals constitutionally violates Mother's fundamental liberty interest in the parent-child relationship.

In both the district court's proceedings and her appellate briefing, Mother *never* argued that the IMGPA violates her constitutional right to parent her child. The court of appeals never addressed Mother's constitutional rights in its opinion because Mother never raised them. (*See generally* Ct. App. Ruling.) Now, in her application for further, for the first time in this case's history, she raises constitutional issues.

It is improper for this Court to address constitutional issues that were neither raised nor decided in the district court or court of appeals. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997).

> Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal. A party challenging a statute on constitutional grounds must do so at the earliest available time in the progress of the case. A failure to

> make the challenge in a timely manner leaves nothing for the appellate courts to review.

Id. (citations omitted). In a recently published decision, the Iowa Court of Appeals addressed the IMGPA for the first time. *Matter of Guardianship of S.P.-G.*, 954 N.W.2d 793 (Iowa Ct. App. 2020). There, like here, the parent appealing the district court's refusal to terminate the guardianship under the IMGPA mentioned a "constitutional basis" to challenge the statute for the first time on appeal in a reply brief. *Id.* at 797 n.6. The court of appeals justifiably refused to address that point. *Id.* This court should reject Mother's constitutional argument for failing to preserve error. *McCright*, 569 N.W.2d at 607; *see also Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

B. If error is preserved, the court of appeals did not violate Mother's constitutional rights.

Mother has a fundamental constitutional right to parent her child free from unjustified State interference. *See Hensler v. City of*

Davenport, 790 N.W.2d 569, 581 (Iowa 2010) (citing cases regarding the fundamental constitutional liberty interest of exercising parental rights over children). The IMGPA recognizes that principle in its express language defining when and how a court determines whether to terminate an existing guardianship. *Matter of Guardianship of S.P.-G.*, 954 N.W.2d 793, 797 (Iowa Ct. App. 2020) (identifying the nature of the interest of the parent under § 232D.503(2)). The court of appeals recognized and applied that principle here. (Ct. App. Ruling p7 (citing *S.P.-G.* at 797; *Hensler*, 790 N.W.2d at 581.) Thus, the court of appeals did not err.

Next, Mother specifically claims that the court of appeals erred because there was "no evidence that [Mother] would not provide [L.Y.] with the proper mental health counseling she needs … and [Mother] would need to continue L.Y.'s counseling and was committed to doing so." (App. Fur. Rev. p14.) Yet, Mother ignores the other facts in the trial record that supports the court of appeals' opinion, namely:

> Of most significant concern to us, L.Y. began seeing a therapist at age nine to address anxiety and "perfectionist tendencies." And she has expressed anxiety to her therapist about termination of the guardianship. Her therapist testified, "[F]rom a therapeutic standpoint, I believe it would be best to keep [L.Y.] in her current environment. She has been there all of her life." The therapist raised concerns that L.Y. would have difficulty adjusting to life in her mother's care. Moreover, L.Y. told her therapist she wanted to stay with her grandparents. She also wrote a letter to that effect, which was admitted as an exhibit. So we believe terminating the guardianship and removing L.Y. from the paternal grandparents' care at this tender age would lead to harm.

(Ct. App. Ruling p7.) Those facts lead to the proper conclusion that the harm to L.Y. outweigh Mother's constitutional right to parent.[2] (*See id.*) This court should deny further review.

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[2] Mother's second point regarding the fact that L.Y.'s parents are divorced in and of itself is not material here because neither the district court nor court of appeals used that fact to determine whether to terminate the guardianship. (*See* Ct. App. Ruling p3 n.3 (noting only that L.Y.'s divorced parents have no custody arrangement between them).) Except that without a custodial arrangement between L.Y.'s parents, the instability of with which parent L.Y. would reside amplifies the harm to L.Y. by terminating the guardianship. (*See* Ct. App. Ruling p9 ("Most aspects of L.Y.'s life would be up in the air until the parents reached a custodial arrangement.").)

2. Under the IMGPA, the Iowa Legislature repealed the statutory parental preference in guardianship proceedings, so it is inapplicable to this case.

When adopting the IMGPA, the legislature expressly repealed Iowa Code section 633.559 which was the former statutory preference favoring the minor child's parents "over all others" as guardian for the child. *See* 2019 Iowa Acts ch. 56 § 43; *see also* Iowa Code § 633.559 (2019). "The Act went into effect on January 1, 2020, and applies retroactively." *S.P.-G.*, 954 N.W.2d at 795. Thus, merely because Mother is L.Y.'s parent no longer carries a statutory preference in her favor. *See id.*

In the appellate brief and her application for further review, Mother admits this repeal. (App. Fur. Rev. p16; *see* Ct. App. Ruling p8 (noting she admitted its repeal).) However, Mother argues now that, despite the repeal, "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." (App. Fur. Rev. p16 (citing *Risting v. Sparboe*, 162 N.W. 592, 594 (Iowa 1917).) The court of appeals correctly disposed of Mother's argument:

> Chapter 232D governs these proceedings. It does not include a parental preference. And we are "constitutionally prohibited" from revising Chapter 232D. S.P.-G., 954 N.W.2d at 797 (quoting Hansen v. Haugh, 149 N.W.2d 169, 172 (Iowa 1967)); see Iowa Const. art III, § 1. So we cannot recognize a parental preference.

(Ct. App. Ruling p8); *see also Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa 2016) ("We determine legislative intent from the words chosen by the legislature, not what it should or might have said.").[3]

Mother also argues that the grandparents had to prove by "clear and convincing evidence [Mother's] unsuitability." (App. Fur. Rev. p17-18 ((citing *In re Guardianship of M.E.*, No. 16-1178, 2017 WL 2465791, at *6 (Iowa Ct. App. 2017).) Under the IMGPA, that is incorrect. Because this guardianship was created *with* parental

[3] Mother also argues that the IMGPA's "failure to give the presumption of fitness to a parent renders it unconstitutional on its face." (App. Fur. Rev. p16-17 (citing *In re Marriage of Howard*, 661 N.W.2d 183, 185 (Iowa 2003).) Again, Mother has failed to preserve error on her constitutional claim. *McCright*, 569 N.W.2d at 607; *Meier*, 641 N.W.2d at 537. If Mother preserved error, *Howard* is inapplicable as it concerned a grandparent visitation statute, not the guardianship statute. Mother cites no authority that the parental-preference formerly under section 633.559 is rooted in the constitution. (*See generally* App. Fur. Rev. "ISSUE II".)

consent, terminating the guardianship is governed by Iowa Code section 232D.503(2), not section 232D.503(3). *See S.P.-G.*, 954 N.W.2d at 795 n.4. Section 232D.503(2) carries no such "clear and convincing" requirement. Under section 232D.503(3), the legislature expressly requires guardians "to prove by clear and convincing evidence that the guardianship should not be terminated", *but only* if the guardianship was established under section 232D.204 – guardianships established *without* parental consent. Section 232D.503(2) has a completely different burden of proof. If the legislature intended to require guardians to prove by clear and convincing evidence that the guardianship should remain over a parent's objection, the legislature could have said that, but did not. *See id.; Homan*, 887 N.W.2d at 166 ("'expressio unius est exclusio alterius,' meaning expression of one thing is the exclusion of another. It is an established rule of statutory construction that 'legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.'")

3. The court of appeals did not err in determining that terminating the guardianship would be harmful to L.Y. and L.Y.'s interest in continuing the guardianship outweighs Mother's interest in the terminating it.

Applying section § 232D.503(2), the court of appeals correctly determined that "the termination of the guardianship would be harmful to [L.Y.] and [L.Y.'s] interest in continuation of the guardianship outweighs [Mother's] interest … in the termination of the guardianship." As previously argued, the trial record shows that terminating the guardianship would be harmful to L.Y. as shown by L.Y.'s therapist's testimony. (*See* Ct. App. Ruling p7.) Further, Mother's lack of parenting showed her indifference to L.Y.'s emotional health and needs. *See S.P.-G.*, 954 N.W.2d at 795. In sharp contrast to Mother's minimal parenting, L.Y. has thrived in her grandparents' stable home.

Mother claims that the court had to determine she was "unfit" to parent L.Y. (App. Fur. Rev. "ISSUE III".) The court of appeals implicitly reached that conclusion when it found:

> While the mother has maintained contact with L.Y., she has had little involvement with the nitty gritty of caring for her. The mother has never attended any of L.Y.'s school conferences, nor has she ever inquired about doing so. The mother has only attended one of L.Y.'s doctor appointments and no dentist appointments since 2014. Initially, K.Y. told the parents about appointments; but because the parents did not come along, K.Y. stopped informing them and just took on the duty herself. So we question whether either parent would be ready to take on these essential duties.

(Ct. App. Ruling p6-7.)

At the time of the July 2020 trial, L.Y. was eleven years-old. From her birth until she was one year-old, L.Y. spent nearly half of her days cared for by the grandparents. For all but two months since May 2010, L.Y. had resided with the grandparents full-time. Since September 2013 – more than half of L.Y.'s life – the grandparents have been her *only* constant parental figures. (*Id.*) During that time, Mother wholly trusted them to raise her daughter and admitted L.Y. has thrived in their care to become the "well behaved, intelligent" "athletic" girl she is today. Mother admitted the grandparents have been "a blessing in [her] daughter's life".

In sharp contrast, Mother was a parent of convenience. Since

Mother left L.Y. in the grandparents' care in September 2013, Mother had never been a full-time mother. She visited but only a few days each month, never attending school conferences or medical appointments, rarely seeing L.Y. at her extracurricular activities, and providing no financial support. Mother was the "fun parent" who was able to spend playtime with L.Y. a few days each month while never having to accomplish the expected responsibilities of parenthood. Mother's minimal parenting shows that she "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 the parent's inability to provide reasonable parental care poses a substantial and material risk of harm to the child." *Matter of Guardianship of S.K.M.*, No. 16-1537, 2017 WL 5185427, at *6 (Iowa Ct. App. 2017).

L.Y., L.Y.'s father, and the grandparents wanted the guardianship to continue. Mother admitted that placing L.Y. in her care would change L.Y.'s "stable environment a great deal". Every witness, Mother included, admitted that L.Y. and Mother had

ample contact while the grandparents managed L.Y.'s daily care. Mother's instability in home and parenting duties, shows that terminating the guardianship would be harmful to L.Y. and L.Y.'s interest in continuing the guardianship outweighs Mother's interest in the guardianship's termination.

A. Terminating the guardianship would be harmful to L.Y.

The trial record shows that returning L.Y. to her Mother's physical care would be harmful to L.Y. For six years, Mother was an absent parent except a few weekends each month. So, L.Y. naturally developed a strong bond with her grandparents while thriving under their care. The court of appeals correctly summarized the evidence:

> L.Y. has lived in the paternal grandparents' home for the majority of her life, roughly ten of eleven years, where she could reasonably anticipate where she would attend school, what extracurricular activities she could participate in, who would serve as her physician, and who would provide her day-to-day care. In short, terminating the guardianship would remove L.Y. from the only long-term home she knows, and her life would lack any of the stability she desperately requires. And as a result, we believe, her mental health would suffer significantly.

(Ct. App. Ruling p10.)

Mother took no action to terminate the guardianship until 2020.[4] It is not the grandparents' fault that Mother never bothered to exercise her legal rights to terminate the guardianship sooner. Mother knew where L.Y. was; she knew L.Y. was thriving in the grandparents care; Mother took advantage of the grandparents by contributing little to L.Y.'s financial support while seeing her daughter grow and thrive in their care. The guardianship existed because of Mother not the grandparents. The grandparents did nothing wrong. In fact, the grandparents did everything right.

L.Y. had developed anxiety toward her parents. Mother acknowledged this anxiety was based on L.Y.'s "concerns of [] when her parents were going to show up for her." When she learned of that, Mother admitted: "I didn't know how to respond to it."

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4 Mother's random suggestion to end the guardianship that she allegedly made in 2018 is meaningless without action. Words without action bear little consideration. *See In Interest of J.L.W.*, 523 N.W.2d 622, 624 (Iowa Ct. App. 1994) ("[A]ctions speak louder than words. Intent can be shown through conduct.").)

Addressing L.Y.'s situation, the grandparents sought professional help through counselling sessions with Dr. Rudman. Rudman had twenty-five years' experience as a clinical psychologist, practicing in Iowa for the past twenty-three years. Rudman had twenty-four sessions with L.Y. since June 2018 when L.Y. was nine years-old and in the third grade. When asked why the grandparents sought Rudman's help, Rudman testified that they

> brought her in because they felt that she seemed more anxious. She was crying really easily. She had some perfectionistic tendencies, and she was kind of getting upset with herself, being afraid to make mistakes and it was – she was getting upset at home, but also at school. … [T]hey wanted to address her anxiety issues.

L.Y. was troubled by her parents' lack of wanting to spend more time with her. Based on her treatment of L.Y., Rudman recommended that L.Y. remain the grandparents' care:

> She has been there all her life. That is the home that she knows and possibly increase and create more structure with visitation with [Mother] and dad so that there is a better routine. Kids thrive, especially middle schoolers, and especially with all of the unknowns of our current environment with COVID and changes in school, the

> more routine and the more that she can expect a schedule, the better it will be for her emotional health and just for her sense of belonging.

L.Y. admitted to Rudman that "she likes and feels connected with her school and her friends … that she feels safe and attended to with her grandparents." L.Y. does not want to leave her grandparents' custody because she considered living with them to be her "home."

B. L.Y.'s interest in continuing the guardianship outweighs Mother's interest in the guardianship's termination.

The court of appeals properly identified L.Y.'s interest. (Ct. App. Ruling p8 (citing *S.P.-G.*, 954 N.W.2d at 797).) Specifically, whether terminating the guardianship would be contrary to L.Y.'s best interests. (Ct. App. Ruling p8.) L.Y. wanted to remain in her grandparents' care. L.Y. told the court her desire. L.Y. wanted to remain in the only school district she had ever known. She desired the stability only her grandparents provided. L.Y. also admitted that having regular contact with the grandparents after she started living with Mother full-time would not be enough time with them.

Explaining why, L.Y. testified: "Because sometimes [Mother] says things but then she never really does it."

When assessing the weight to afford a child's preference, the court considers many factors, including: 1) the child's age and educational level; 2) the strength of the preference; 3) the intellectual and emotional makeup of the child; 4) relationships with family members; 5) the reasons for the decision; 6) the advisability of recognizing the preference; and 6) the realization that the court cannot be aware of all the factors that influence the child's decision. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-59 (Iowa Ct. App. 1985). Here, the court found that L.Y. was a "delightful" "very smart, delightful and kindhearted child with a bright future." Yet, the district court "afford[ed] it less weight" because of its incorrect perception that L.Y.'s desire to remain was due to her "desire to be with friends and most importantly, her desire to avoid upsetting the adults in her life". L.Y.'s desires bolstered not weakened her credibility.

L.Y. did not want to upset her mother. She loved her

grandparents and had thrived in their care. If L.Y. sought to avoid causing pain to any of the adults in her life, it was to avoid telling her mother that she did not want to reside with her. That desire was based on significant evidence in the trial record showing that L.Y. had the maturity to realize she had become "very smart, delightful and kindhearted child with a bright future" because of her grandparents not mother.

Two witnesses, one a friend the other an aunt, who each had known L.Y. for years, provided strong summaries for maintaining the guardianship

- "I think that [L.Y.] is happy with where she is. She has a fantastic support structure, fantastic discipline, and that girl is loved more than – more than, yes. She is so loved.
- "She is a very anxious girl, and in that she finds her peace at home, and that has been her home all but three months of her life."

4. The court of appeals did not err when it held the IMGPA did not authorize appellate attorney fee awards.

The court of appeals held: "No section in chapter 232D provides for recovery of attorney fees." (Ct. App. Ruling p10.) Iowa has the long-recognized rule that a party has no legal basis to have the opposing party to pay his or her attorney fees in the absence of a statute or contract allowing such an award. *(S*ee Ct. App. Ruling p10 (citing *Quad City Bank & Tr. v. Elderkin & Pirnie, P.L.C.*, 870 N.W.2d 249, 259 (Iowa Ct. App. 2015).) Mother fails to address that point. (*See* App. Fur. Rev. "ISSUE IV".) Instead, she wrongly assumes the court may award attorney fees and launches into an argument that, in the court's discretion, she should receive attorney fees from the grandparents because they "are in a better financial position to pay attorney fees than [Mother]." (App. Fur. Rev. p28.) The court of appeals correctly determined that the court has no statutory authority to grant an attorney fee award, so no basis exists for the Supreme Court to grant further review on this issue. *See* R. 6.1103(1)(b).

Section 232D.503 does not mention awarding attorney fees in an action to terminate a guardianship. *See* § 232D.503; *see generally* Iowa Code ch. 232D. Section 232D.505 handles the allocation of "expenses", which includes "[c]osts of legal expenses of the minor and the parent." § 232D.505(1)(a). However, "the court may order *the minor or the parent* to pay all or part of" those expenses, not a third-party such as the grandparents as we have here. § 232D.505(1)(a) (emphasis added). Again, "expressio unius est exclusio alterius". *Homan*, 887 N.W.2d at 166.

The only legal authority Mother cites in support of obtaining an award of appellate attorney fees is *In re Guardianship of C.G.*, 799 N.W.2d 549, 554 (Iowa Ct. App. 2011). *C.G.* relies on Iowa Code section 633.551, which no longer applies to guardianship proceedings under the IMGPA. *See* § 232D.105 (establishing that conservatorships are still governed by Iowa Code ch. 633, not ch. 232D, and petitions for guardianships and conservatorships "shall not be combined").) Therefore, without contractual or statutory authority, each litigant pays his or her own attorney fees. *See*

D.M.H. by Hefel v. Thompson, 577 N.W.2d 643, 647-48 (Iowa 1998).

Even if this court finds that Mother may recover appellate attorney fees from the grandparents, the circumstances do not justify such an award. Mother relies on *C.G.*, to justify an award of appellate attorney fees. Unlike *C.G.*, the trial court here did *not* find "overwhelming evidence" that Mother was "good" and capable of parenting L.Y. The grandparents only acted out of L.Y.'s best interests. Their desire to maintain the guardianship was justified at trial and now on appeal. Further, considering Mother contributed little financially to the grandparents for their care of L.Y., having Mother pay her own attorney fees is justified.

Conclusion

The court of appeals properly interpreted and applied the IMGPA. The district court erred in terminating the guardianship and the court of appeals properly reversed. There is no legal or factual basis for this Court to grant further review.

Respectfully submitted,

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Certificate of Service

Pursuant to Iowa Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on the 24th day of June 2021, the Resistance to Application for Further Review was filed with the Supreme Court via EDMS and electronically served on all parties of record.

/s/ Andrew B. Howie
Andrew B. Howie

Certificate of Compliance with Typeface Requirements, And Type-Volume Limitation

This resistance complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this resistance has been prepared in a proportionally spaced typeface using Century in 14 point, and contains 5,497 words, excluding the parts of the resistance exempted by Iowa R. App. P. 6.1103(4)(a), or

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/s/ Andrew B. Howie
Signature

June 24, 2021
Date

IN THE COURT OF APPEALS OF IOWA

No. 20-1034
Filed May 26, 2021

IN THE MATTER OF THE GUARDIANSHIP OF L.Y.,

G.Y. and K.Y., Guardians,
Appellants,

vs.

S.W., Mother,
Appellee.

Appeal from the Iowa District Court for Story County, Stephen A. Owen, District Associate Judge.

Guardians appeal from an order terminating a minor guardianship. **REVERSED AND REMANDED.**

Andrew B. Howie of Shindler, Anderson, Goplerud & Weese, P.C., West Des Moines, for appellants.

Dani L. Eisentrager, Eagle Grove, for appellee.

Heard by Doyle, P.J., and Mullins and May, JJ.

MAY, Judge.

Paternal grandparents, G.Y. and K.Y., appeal the termination of their guardianship over their grandchild, L.Y.[1] We reverse and remand.

I. Background Facts

In 2009, the mother, then sixteen years old, gave birth to L.Y. At the time, the mother lived with her parents. L.Y. would stay with the mother Mondays through Thursdays; then L.Y. would stay with the father at the paternal grandparents' home Thursday evenings through Sunday mornings. After the mother graduated high school in 2010, she and L.Y. moved in with the father and paternal grandparents.

The mother and father married in February 2011. They continued to live with the paternal grandparents. Then, in July 2013, the mother, father, and L.Y. moved out of the paternal grandparents' home. Less than three months later, in September, the couple separated. L.Y. went to live with her paternal grandparents so she would be in a stable environment. The mother would see L.Y. on weekends.

Then in February 2014, the parents consented to a guardianship with the paternal grandparents serving as L.Y.'s guardians. Following the establishment of the guardianship, the mother continued to have contact with L.Y. through phone contact, weekend visits,[2] and a week-long visit during the summertime.

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[1] L.Y. was eleven years old at the time of the hearing.

[2] According to the mother, she usually has two to three weekend visits per month. K.Y. disagreed and testified that the mother does not have consistent visits with L.Y.

In January 2016, the mother and father officially divorced. But their decree did not establish physical care or custodial rights to L.Y. for either parent. Instead, their decree stated, "[E]ach party desires that the guardianship be continued at the present time. The guardianship shall continue." Both parents signed the decree, approving it as to both "form and content."

In 2018, the mother wrote a letter to the paternal grandparents requesting the termination of the guardianship. The paternal grandparents never responded, and the mother never brought it up in person with them. On another occasion, the mother sent a text message to the father and K.Y. about ending the guardianship. This did not lead to any changes.

The mother now lives in a single-family home, where she has a bedroom for L.Y. The mother shares the home with her boyfriend. She feels ready and able to parent L.Y. So, in June 2020, she initiated these proceedings by filing a motion to terminate the guardianship.

Following a hearing, the court terminated the guardianship. The paternal grandparents appeal.

We will discuss additional facts as necessary.

II. Standard of Review

Actions to terminate guardianships are equitable in nature. *In re Guardianship of B.J.P.*, 613 N.W.2d 670, 672 (Iowa 2000). And we review equitable actions de novo. Iowa R. App. P. 6.907. We give weight to the factual findings of the district court, but we are not bound by them. *In re Guardianship of Stewart*, 369 N.W.2d 820, 822 (Iowa 1985).

III. Discussion

"The Iowa Minor Guardianship Proceedings Act created '[c]hapter 232D and transferred jurisdiction of guardianships for minors to the [j]uvenile [c]ourt.' The Act went into effect on January 1, 2020, and applies retroactively. So, like the juvenile court, we apply chapter 232D (2020). We find its meaning in its words." *In re Guardianship of S.P.-G.*, 954 N.W.2d 793, 795 (Iowa Ct. App. 2020) (alterations in original) (citations omitted).

A. Grounds for Guardianship

As a preliminary issue, we address the paternal grandparents' claim that because grounds for creating a guardianship under Iowa Code section 232D.203 are still satisfied, we need not address whether to terminate it. Section 232D.203(1) provides:

> 1. The court may appoint a guardian for a minor if the court finds *all of the following*:
> a. The parent or parents having legal custody of the minor understand the nature of the guardianship and knowingly and voluntarily consent to the guardianship.
> b. The minor is in need of a guardianship because of any one of the following:
> (1) The parent having legal custody of the minor has a physical or mental illness that prevents the parent from providing care and supervision of the child.
> (2) The parent having legal custody of the minor is incarcerated or imprisoned.
> (3) The parent having legal custody of the minor is on active military duty.
> (4) The minor is in need of a guardianship for some other reason constituting good cause shown.
> c. Appointment of a guardian for the minor is in the best interest of the minor.

(Emphasis added.) The paternal grandparents suggest there are grounds for the guardianship because L.Y. "is in need of a guardianship for some other reason

constituting good cause shown." *See* Iowa Code § 232D.203(1)(b)(4). This overlooks the qualifying language in the statute that requires "all of the following" conditions be met, including the parent's consent to the guardianship. *See id.* § 232D.203(1)(a)–(c). Here, the mother unequivocally revoked her consent to the guardianship by initiating these proceedings to terminate it. So grounds for creating a guardianship under section 232D.203 are no longer met, and we must determine whether to terminate the existing guardianship.

B. Terminating the guardianship

> Iowa Code section 232D.503 governs the termination of guardianships. Subsection 232D.503(2) provides that, when a guardianship is established with parental consent, it shall be terminated
>
> > 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.

S.P.-G., 954 N.W.2d at 795 (footnotes omitted).

As noted, when a parent revokes their consent to a guardianship, as the mother did here, "the basis for the guardianship set forth in section 232D.203 is no[longer] satisfied." *See* Iowa Code § 232D.503(2); *see also id.* § 232D.203(1)(a) (permitting the court to establish a guardianship under section 232D.203 when "[t]he parent or parents having legal custody of the minor understand the nature of the guardianship and knowingly and voluntarily consent to the guardianship"). "When that occurs, subsection 232D.503(2) requires termination of the guardianship unless (1) termination would be harmful to the child and (2) the child's 'interest in continuation of the guardianship outweighs the

interest of a parent.'" *S.P.-G.*, 954 N.W.2d at 796 (quoting Iowa Code § 232D.503(2)).

So, because the mother revoked her consent to the guardianship, we must determine if termination of the guardianship would harm L.Y. and whether L.Y.'s interest in continuing the guardianship outweighs the mother's interests in terminating the guardianship. *See id.* In completing this analysis, we ask four questions. *Id.* Those four questions are: "(1) Would termination be harmful to [L.Y.]? (2) What is the [mother]'s interest in terminating the guardianship? (3) What is [L.Y.]'s interest in continuing the guardianship? (4) Does [L.Y.]'s interest in continuing the guardianship 'outweigh' the [mother]'s interest in terminating the guardianship?" *Id.* (footnote omitted).

1. Harm to L.Y.

We begin by considering whether termination would be harmful to L.Y. *See id.* The district court determined "termination of the guardianship would not be harmful to [L.Y]." Based on our de novo review of the record, we respectfully disagree. While the mother has maintained contact with L.Y., she has had little involvement with the nitty gritty of caring for her. The mother has never attended any of L.Y.'s school conferences, nor has she ever inquired about doing so. The mother has only attended one of L.Y.'s doctor appointments and no dentist appointments since 2014. Initially, K.Y. told the parents about appointments; but because the parents did not come along, K.Y. stopped informing them and just

took on the duty herself. So we question whether either parent would be ready to take on these essential duties.[3]

Of most significant concern to us, L.Y. began seeing a therapist at age nine to address anxiety and "perfectionist tendencies." And she has expressed anxiety to her therapist about termination of the guardianship. Her therapist testified, "[F]rom a therapeutic standpoint, I believe it would be best to keep [L.Y.] in her current environment. She has been there all of her life." The therapist raised concerns that L.Y. would have difficulty adjusting to life in her mother's care. Moreover, L.Y. told her therapist she wanted to stay with her grandparents. She also wrote a letter to that effect, which was admitted as an exhibit. So we believe terminating the guardianship and removing L.Y. from the paternal grandparents' care at this tender age would lead to harm.

2. The mother's interest

"We next identify the nature of 'the interest of a parent of the minor in the termination of the guardianship.'" *Id.* (quoting Iowa Code § 232D.503(2)). The mother asserts a general fundamental interest in parenting L.Y., which we recognize. *See Hensler v. City of Davenport*, 790 N.W.2d 569, 581 (Iowa 2010) ("One of the oldest fundamental liberty interests consistently recognized by the Supreme Court is the interest of parents in the care, custody, and control of their children.").

[3] We must acknowledge this complication: Because the parents do not have any agreement about physical care or custody, we do not know with any certainty which parent would serve as L.Y.'s physical caregiver following termination of the guardianship.

She also claims there is a parental preference. At the same time, she acknowledges that, although the preference was previously codified, it was recently repealed. *See* Iowa Code § 633.559 (2019), *repealed by* Iowa Minor Guardianship Proceedings Act, 2019 Iowa Acts ch. 56, § 43. Still she contends that because our caselaw recognized a parental preference prior to codification, *see Risting v. Sparboe*, 162 N.W. 592, 594 (Iowa 1917), the parental preference lives on through caselaw in spite of the recent statutory changes eliminating the preference. We disagree. Chapter 232D governs these proceedings. It does not include a parental preference. And we are "constitutionally prohibited" from revising Chapter 232D. *S.P.-G.*, 954 N.W.2d at 797 (quoting *Hansen v. Haugh*, 149 N.W.2d 169, 172 (Iowa 1967)); *see* Iowa Const. art III, § 1. So we cannot recognize a parental preference.

3. L.Y.'s interest

Next, we identify the nature of L.Y.'s interest. *See S.P.-G.*, 954 N.W.2d at 797. We conclude, "for purposes of subsection 232D.503(2), '[L.Y.]'s interest in continuation of the guardianship' depends on the degree to which termination of the guardianship would be contrary to [L.Y.]'s best interest." *Id.*

4. Weighing the interests

Finally, we must determine whether L.Y.'s "interest in continuation of the guardianship outweighs the interest of [the mother's] in the termination of the guardianship." Iowa Code § 232D.503(2). When weighing the two interests, we conclude L.Y.'s interest carries the day.

We note this case presents a welcome problem, so many people love and care for L.Y. and want to contribute to her loving home. Certainly, the mother's

love for L.Y. is robust and enduring. The paternal grandparents have demonstrated their love through their meticulous stewardship of L.Y. for eleven years. The father also expressed his sincere love and affection for L.Y. And extended paternal and maternal family members expressed their genuine affection for L.Y. It is our hope that all continue to be active members of L.Y.'s life. But we must reach a determination of who is currently best equipped to care for L.Y. day to day.

We believe termination of the guardianship would do significant harm to L.Y. at this time and that harm outweighs the mother's interest in termination. The upheaval to L.Y.'s life would just be too great.

One might suggest that, because terminating a guardianship always creates some upheaval, that alone is not enough to overcome a parent's interest in terminating the guardianship. We need not consider that contention because this case is unique. L.Y.'s therapist made clear that stability is crucial for L.Y.'s mental health given her struggles with anxiety. Yet, because the parents have no formal custodial agreement, terminating the guardianship would leave open the most basic question of where L.Y. would live.[4] Most aspects of L.Y.'s life would be up in the air until the parents reached a custodial arrangement.[5] She would not know where she would attend school, which extracurricular activities she could

[4] At oral argument, counsel for the mother referenced facts outside of our record regarding L.Y.'s current placement. We may not consider counsel's representations. "We are limited to the record before us and any matters outside the record on appeal are disregarded." *In re Marriage of Keith*, 513 N.W.2d 769, 771 (Iowa Ct. App. 1994).

[5] The father testified that if the guardianship were terminated he would "go for full custody."

continue, or whether it would still be feasible for her to continue to see her current therapist. Conversely, L.Y. has lived in the paternal grandparents' home for the majority of her life, roughly ten of eleven years, where she could reasonably anticipate where she would attend school, what extracurricular activities she could participate in, who would serve as her physician, and who would provide her day-to-day care. In short, terminating the guardianship would remove L.Y. from the only long-term home she knows, and her life would lack any of the stability she desperately requires. And as a result, we believe, her mental health would suffer significantly.

Accordingly, we conclude subsection 232D.503(2) does not require termination of the guardianship at this time. So we reverse the juvenile court's termination of the guardianship. We remand to the juvenile court for entry of an order reinstating the guardianship.[6]

C. Attorney fees

The mother requests appellate attorney fees. However, "[g]enerally, attorney fees are recoverable only by statute or under a contract." *Quad City Bank & Tr. v. Elderkin & Pirnie, P.L.C.*, 870 N.W.2d 249, 259 (Iowa Ct. App. 2015) (citation omitted). No section in chapter 232D provides for recovery of attorney fees. So we do not award any.

REVERSED AND REMANDED.

[6] 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 involving complex issues of fact and law.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
20-1034	In re Guardianship of L.Y.

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