

IN THE SUPREME COURT OF IOWA

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

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

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

APPELLANTS' BRIEF AND
REQUEST FOR ORAL ARGUMENT

Andrew B. Howie
SHINDLER, ANDERSON, GOPLERUD
& WEESE, P.C.
5015 Grand Ridge Drive, Suite 100
West Des Moines, Iowa 50265
515-223-4567; Fax: 515-223-8887
howie@sagwlaw.com
ATTORNEY FOR APPELLANTS

Table of Contents

	Page
Table of Authorities	4
Statement of Issues Presented for Review	6
Routing Statement	8
Statement of the Case.....	8
Nature of the case	8
Course of proceedings and disposition in district court	9
Statement of the Facts.....	10
Argument.....	19
1. Summary of argument.....	19
2. Standard of review and preservation of error for all issues raised in this appeal.....	20
3. The district court erred by terminating the guardianship.	21
A. Legal principles governing the termination of guardianships.	21
B. The basis for the guardianship is still currently satisfied...	24
C. If the basis for the guardianship is not currently satisfied, returning L.M.Y. to Mother’s custody would be harmful to L.M.Y. and L.M.Y.’s interest in continuing the guardianship outweighs Mother’s interest in the guardianship’s termination.	26
1) Returning L.M.Y. to Mother’s custody would be harmful to L.M.Y.....	27

2) L.M.Y.'s interest in continuing the guardianship
outweighs Mother's interest in the guardianship's
termination. 29

Conclusion..... 31

Request for Oral Argument..... 32

Certificate of Service 33

Certificate of Compliance with Typeface Requirements and Type-Volume
Limitation..... 33

Table of Authorities

Cases	Page
<i>Halstead v. Halstead</i> , 259 Iowa 526 144 N.W.2d 861 (1966)	30
<i>In Interest of J.L.W.</i> , 523 N.W.2d 622 (Iowa Ct. App. 1994).....	28
<i>In re Guardianship of Knell</i> , 537 N.W.2d 778 (Iowa 1995)	20, 24
<i>In re H.M.S.</i> , No. 15-0898, 2016 WL 1130963 (Iowa Ct. App. 2016)	23
<i>In re Marriage of Ales</i> , 592 N.W.2d 698 (Iowa Ct. App. 1999)	20
<i>In re Marriage of Ellerbroek</i> , 377 N.W.2d 257 (Iowa Ct. App. 1985).....	30
<i>In re Marriage of Fox</i> , 559 N.W.2d 26 (Iowa 1997).....	21
<i>In re Marriage of Gensley</i> , 777 N.W.2d 705 (Iowa Ct. App. 2009).....	21
<i>In the Matter of the Guardianship of D.B.</i> , No. 17-1559, 2018 WL 4360946 (Iowa Ct. App. 2018).....	23
<i>Jones v. Jones</i> , 175 N.W.2d 389 (Iowa 1970)	30
<i>Matter of Guardianship & Conservatorship of D.D.H.</i> , 538 N.W.2d 881 (Iowa Ct. App. 1995).....	20
<i>Matter of Guardianship of L.G.</i> , No. 19-1631, 2020 WL 2988230 (Iowa Ct. App. 2020).....	23
<i>Matter of Guardianship of Stewart</i> , 369 N.W.2d 820 (Iowa 1985).....	20

Statutes and Rules	Page
Iowa Code § 232D.106 (2020 Supp.)	23
Iowa Code § 232D.203 (2020 Supp.)	22, 24
Iowa Code § 232D.204 (2020 Supp.)	22
Iowa Code § 232D.503(2) (2020 Supp.)	22, 24, 26
Iowa Code § 633.552-633.562 (2019).....	21
Iowa R. App. P. 6.904(3)(g).....	21
2019 Iowa Acts ch. 56 (H.F. 591).....	21, 23

Statement of Issues Presented for Review

1. Summary of argument
2. Standard of review and preservation of error for all issues raised in this appeal.

In re Guardianship of Knell, 537 N.W.2d 778 (Iowa 1995)

In re Marriage of Ales, 592 N.W.2d 698 (Iowa Ct. App. 1999)

In re Marriage of Fox, 559 N.W.2d 26 (Iowa 1997)

In re Marriage of Gensley, 777 N.W.2d 705 (Iowa Ct. App. 2009)

Matter of Guardianship of Stewart, 369 N.W.2d 820 (Iowa 1985)

Matter of Guardianship & Conservatorship of D.D.H., 538 N.W.2d 881
(Iowa Ct. App. 1995)

Iowa R. App. P. 6.904(3)(g)

3. The district court erred by terminating the guardianship.

A. Legal principles governing the termination of guardianships.

In re H.M.S., No. 15-0898, 2016 WL 1130963 (Iowa Ct. App. 2016)

In the Matter of the Guardianship of D.B., No. 17-1559, 2018 WL 4360946
(Iowa Ct. App. 2018)

In re Guardianship of Knell, 537 N.W.2d 778 (Iowa 1995)

Matter of Guardianship of L.G., No. 19-1631, 2020 WL 2988230
(Iowa Ct. App. 2020)

Iowa Code § 232D.106 (2020 Supp.)

Iowa Code § 232D.203 (2020 Supp.)

Iowa Code § 232D.204 (2020 Supp.)

Iowa Code § 232D.503(2) (2020 Supp.)

Iowa Code § 633.552-633.562 (2019)

2019 Iowa Acts ch. 56 (H.F. 591)

B. The basis for the guardianship is still currently satisfied.

Iowa Code § 232D.203 (2020 Supp.)

Iowa Code § 232D.503(2) (2020 Supp.)

C. If the basis for the guardianship is not currently satisfied, returning L.M.Y. to Mother's custody would be harmful to L.M.Y. and L.M.Y.'s interest in continuing the guardianship outweighs Mother's interest in the guardianship's termination.

Iowa Code § 232D.503(2) (2020 Supp.)

1) *Returning L.M.Y. to Mother's custody would be harmful to L.M.Y.*

In Interest of J.L.W., 523 N.W.2d 622 (Iowa Ct. App. 1994)

2) *L.M.Y.'s interest in continuing the guardianship outweighs Mother's interest in the guardianship's termination.*

Halstead v. Halstead, 259 Iowa 526 144 N.W.2d 861 (1966)

In re Marriage of Ellerbroek, 377 N.W.2d 257 (Iowa Ct. App. 1985)

Jones v. Jones, 175 N.W.2d 389 (Iowa 1970)

Routing Statement

This case should be transferred to the Court of Appeals because no basis exists for the Supreme Court to retain this case for appellate review. *See* Iowa R. App. P. 6.1101. Further, this case should be transferred to the Court of Appeals because it involves questions that can be resolved by applying existing legal principles. *See* R. 6.1101(3)(b).

Statement of the Case

Nature of the case

The ward of this case is L.M.Y., the daughter of M.Y. (“Father”) and S.W. (“Mother”). G.Y. and K.Y.¹ are the parents of M.Y. and grandparents of L.M.Y. In March 2014, the court granted the grandparents guardianship of L.M.Y. In June 2020, Mother moved to terminate the guardianship. This appeal derives from the district court’s order terminating the grandparents’ guardianship and placement of L.M.Y. in Mother’s custody. This appeal is from a final order. *See* Iowa R. App. P. 6.103(1).

¹ Identified jointly as “the grandparents”, except when needing to refer to each individually for clarity.

Course of proceedings and disposition in district court

On February 19, 2014, the grandparents filed a “Petition for Appointment of Guardians (Involuntary)” of their granddaughter, L.M.Y. (App. at 6-7). Father and Mother contemporaneously filed affidavits with the petition showing their consent to L.M.Y.’s guardianship and her placement in the grandparents’ custody. (App. at 8-10, 11-13.) On March 31, 2014, the court conducted a hearing, granted the petition, and appointed the grandparents co-guardians of L.M.Y. (App. at 14-16.)

On June 10, 2020, Mother filed a motion for termination of guardianship. (App. at 17-18.) After Mother’s nomination, the court appointed Mark Olberding, a practicing attorney, as the “court visitor”, per Iowa Code section 232.305 (2020 Supp.). (App. at 19-20, 21, 22-24.) Olberding filed a written report in compliance with his appointment recommending 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); *see* Iowa Code § 232D.305(5) (2020 Supp.). The visitor also recommended that the court set a visitation schedule between L.M.Y. and her parents. (*Id.*)

The court heard evidence and argument regarding Mother's motion on July 23, 2020. (Tr. 1:all; App. at 29). Though he was not directly involved in the proceedings, Father also appeared at the hearing. (Tr. 5:16-19.) The court visitor participated at the trial, questioning and listening to witnesses. (*See* Tr. 5:1-13.) At the close of evidence, the visitor reiterated he was "convinced that it is in the best interests of [L.M.Y.] to remain in the guardianship of her grandparents." (Tr. 260:20-23.) On July 27, 2020, the lower court granted Mother's motion, terminated the guardianship, and placed L.M.Y. in the Mother's care. (App. at 41.). The grandparents appeal. (App. at 43.)

Statement of the Facts

When the court granted guardianship of L.M.Y. in March 2014, L.M.Y. was four years-old and had been residing with the grandparents since September 2013. (Tr. 12:17-19, 40:13-24; *see* Tr. 175:12-18.) That guardianship had continued uninterrupted and without any problem since that time. (*See generally* Docket Record.) Mother's motion to terminate the guardianship, filed June 10, 2020, was her first attempt to regain custody of L.M.Y. (*Id.*; *see* App. at 17-18.)

At the time of trial, L.M.Y. was eleven years-old and attending sixth grade at the school in the grandparents' school district. (Tr. 7:9-12, 44:17-22, 175:12-18.) Mother was twenty-eight years-old. (Tr. 7:2-5.) Mother was unmarried, had

no other children, and was residing in Woolstock with her current boyfriend. (Tr. 22:20-23:3, 23:21-24.) Father lived in Eldora with his wife, one child, and expecting their next child. (Tr. 136:22-25, 137:9-16.)

The grandparents had been married for thirty-four years and had resided in Story City for the past twenty-seven years. (Tr. 195:10-21, 227:11-16.) Their house is large with a big yard and “[r]oom to run”, multiple bedrooms, bathrooms, and L.M.Y. has her own bedroom. (Tr. 227:19-24). K.Y. is a registered nurse working in pediatrics at the McFarland Clinic. (Tr. 196:9-14.) G.Y. owns his business and has been in the concrete construction industry for forty-five years. (Tr. 227:25-228:7.)

L.M.Y. was born in 2009 to her unmarried parents; Mother was only sixteen years-old at the time. (Tr. 7:13-14.) From L.M.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. (Tr. 7:15-8:10.) During that time, L.M.Y. was in the care of both Mother and Father while Mother attended high school: residing with Mother Sunday through Thursday, then with Father Thursday through Sunday. (Tr. 8:10-22, 39:13-22, 92:12-20, 196:19-197:10.) After Mother graduated from high school in May 2010, she and L.M.Y. moved in with Father at G.Y. and K.Y.’s (the grandparents’) home. (Tr. 8:8-14, 39:20-40:6.) Though Mother and Father married in February 2011, they continued to

reside in the grandparents' home. (Tr. 9:8-11, 11:23-25, 40:7-12.) From 2010 through 2013, Mother deferred nearly all her parenting duties to the grandparents. (Tr. 145:2-11.) As Father explained, he and Mother did not primarily care for L.M.Y. (Tr. 145:2-11.) "We didn't have to deal with the cooking. [The grandparents] did that. You know, they pretty much helped raise her." (Tr. 145:2-11.)

2013 was a tumultuous year for L.M.Y. After more than three years (since May 2010) of residing with the grandparents, Mother, Father, and L.M.Y. moved into their own home in Story City in July 2013. (Tr. 11:23-25.) Only two months later in September 2013, Mother and Father decided to separate because their marriage was "falling out." (Tr. 12:1-5, 40:10-19.) Mother returned to reside with her parents in Webster City. (Tr. 12:8-11.) Father remained in their marital home. (Tr. 12:12-14.) However, L.M.Y. returned to live with the grandparents in Story City on September 10, 2013, because, as Mother testified: "For stability. [L.M.Y.] was in school and doing dance." (Tr. 12:17-19, 40:13-24; *see* Tr. 145:12-23 (Father: "We decided it wasn't best for us to stay together, and not knowing where our lives were going, we decided it was best for [L.M.Y.] to go to a stable home where she wouldn't have to worry about things.")) 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.M.Y.]."

(Tr. 12:20-24.) Though L.M.Y. remained in the grandparents' primary care, Mother maintained contact with her, visiting on weekends which she admitted was "ample" time. (Tr. 13:2-7, 50:13-23, 59:15-25.)

The grandparents initiated the guardianship action in February 2014. (Pet. for Guardianship.) Mother and Father each filed an affidavit consenting to it. (App. at 8-10, 11-13.) Mother stated that she "believe[d] it is in my child's best interests that [the grandparents] be appointed as Guardians." (App. at 12.) Mother and Father formalized their divorce in January 2016, 2½ years after L.M.Y. began residing alone with the grandparents and without Mother and Father, and nearly two years after this guardianship was in effect. (App. at 47-49; *see* Tr. 31:11-32:1.) In their divorce proceedings, Mother did not question the guardianship and confirmed that L.M.Y.'s custody was governed by the guardianship. (Tr. 31:11-32:1; *see* App. at 47-49.)

For the years leading up to the time of this trial, the guardianship worked and L.M.Y. flourished. (*See* Tr. 209:17-25, 231:18-232:13.) The grandparents had provided a stable home, consistent parenting, and positive influence throughout L.M.Y.'s young life. (*Id.*) L.M.Y. enjoyed living with her grandparents. (*Id.*) She has a close family. (*Id.*) She loved her school and had many friends. (*Id.*) She participated in church. (Tr. 239:20-240:10.) Staying with the grandparents allowed L.M.Y. to have regular contact with both Mother and Father. (*See* Tr.

209:17-25, 231:18-232:13.) In the same respect, K.Y. expressed her concern against terminating the guardianship:

I guess the stability. Knowing that [L.M.Y.] has had a constant through these years to be put into a position that she may not have someone there to pick her up, someone there on time, someone, you know, to be working with her with her homework and getting her places.

(Tr. 220:8-17.)

From February through October 2014, Mother worked at Verizon Wireless in Fort Dodge. (Tr. 18:11-14.) Then, she worked for U.S. Cellular in Webster City for two years, then for Friends Forever for three years. (Tr. 18:15-19:5.) She began her most-recent employment in October 2019 working for the Wright County Communication Center as a 9-1-1 law enforcement dispatcher. (Tr. 19:6-25; *see* App. at 50.)

Though gainfully employed the entire time since the guardianship's establishment in February 2014, Mother provided no financial support for L.M.Y. (Tr. 32:20-21.) Mother claimed she paid for 5% of L.M.Y.'s clothing. (Tr. 48:18-25.) Mother admitted she made a conscious decision *not* to provide more for L.M.Y. (Tr. 49:1-6.)

In the year prior to trial, Mother had received professional counselling for “high anxiety and depression”. (Tr. 24:13-25:2.) She claimed that her “depression

and anxiety issues” were “under control”. (Tr. 25:3-6.) The grandparents were concerned of Mother’s stability regarding her mental state. (Tr. 234:17-235:2.)

Since 2014, Mother claimed that she spoke with attorneys about terminating the guardianship. (Tr. 20:20-21:24, 100:15-19; *but see* Tr. 93:8-11, 104:1-5.) Father testified that he remembered Mother discussing with him about terminating the guardianship on only two occasions in the past six years. (Tr. 138:6-15.) 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. (App. at 44; *see* Tr. 41:14-18, 51:9-22, 67:4-14, 214:12-215:24.) 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.M.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.M.Y.] is the best.

(App. at 44 (typographical errors in original); *see* Tr. 52:11-53:8.) At trial, Mother claimed she took no action to terminate the guardianship because she found the grandparents “intimidating”. (Tr. 34:25-35:13, 71:12-24.)

Father doubted Mother’s claim that she was intimidated by the grandparents. (Tr. 147:18-24.) K.Y. also doubted Mother’s claim explaining,

Many times over the years she lived with us, [Mother] would tell us that she felt like we were more of a family to her than her own

family was. She always felt like she could talk to us ... she would sit and visit with us for 45 minutes, an hour, hour and a half, whatever, and sit and visit with us and ... felt like it was still her home. She would just walk right in, you know.

(Tr. 203:12-204:6.)

Since September 2013, Mother has essentially been an absent parent, visiting L.M.Y. only “[t]wo to three weekends out of the month” and a week during the summer – never a “full-time mom”. (Tr. 50:13-51:4, 58:8-10, 59:15-25.) 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[.]” (Tr. 199:16-200:2; *see* Tr. 228:8-22.) G.Y. expressed his disappointment in Mother’s failure to maintain regular contact with L.M.Y. (Tr. 229:20-230:8.) He told of how inconsistent Mother had been with L.M.Y. observing that L.M.Y. was often depressed, anxious, and even in tears waiting for Mother to call her. (Tr. 229:20-230:8.) To arrange a visit, all Mother had to do was call in advance. (Tr. 200:21-24.) When Mother did call, “lots of times it is last minute ... maybe call on Thursday night or Friday morning” asking for L.M.Y. to stay with her that weekend. (Tr. 200:25-201:6.) The few times Mother’s requests were not met concerned Mother’s late request and L.M.Y. already had commitments. (Tr. 202:12-22.)

L.M.Y. had attended the Roland-Story school district her entire life. (Tr. 44:17-22, 206:1-6.) Since L.M.Y. started pre-school to present (more than six years), Mother had attended *none* of L.M.Y.'s school conferences. (Tr. 44:23-25; *cf.* 206:7-11 (K.Y. had been to all of them).) Mother claimed she was “uneducated about it all”, yet she never even bothered to contact the grandparents saying she wanted to attend a school conference. (Tr. 45:1-8, 73:19-25.) If L.M.Y. returned to reside with Mother, she would have to switch schools to attend the Clarion-Goldfield school district. (Tr. 27:11-18, 54:21-25.)

The grandparents have taken care of all of L.M.Y.'s medical and dental needs. (Tr. 47:18-22.) Since she left L.M.Y. in the grandparents' care in September 2013, Mother had attended *one* of L.M.Y.'s doctor visits and *none* of her dentist visits.² (Tr. 45:13-46:3; *see* Tr. 211:1-14 (K.Y. notified Mother at first,

² Instead of taking responsibility for her inaction, Mother blamed the grandparents as this exchange during her cross-examination shows, (Tr. 47:3-17):

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?

but when Mother stopped coming, “I just [made the appointments] as part of my role as taking care of her”).) Mother never took L.M.Y. to any of L.M.Y.’s dance classes but was able to attend one of her dance recitals. (Tr. 46:21-47:2.) Mother had managed to attend between “a couple” and “five to six” of L.M.Y.’s volleyball games and basketball games during the past two years. (Tr. 46:4-20.)

Father wanted the grandparents’ guardianship to continue. (Tr. 138:16-21, 148:9-11.) When Mother raised terminating the guardianship in 2020, Father told her that it was in L.M.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 attitude and the way she was brought up is very good ... she enjoys all that stuff, and ... [doing] this for her is a blessing.” (Tr. 138:16-139:7; *see* Tr. 142:11-18, 151:3-13.) Father had concerns about Mother’s instability because Mother’s relationship with her current boyfriend was “on and off a couple of times”. (Tr. 142:19-143:4, 154:4-16.) Due to those concerns, Father admitted that, if the court terminated the guardianship, he would seek “full custody” of L.M.Y. in litigation with Mother. (Tr. 157:8-13; *see* Tr. 54:4-17.)

A. I have made it clear that I am not opposed to going and taking [L.M.Y.]

Q. Okay. But you have never asked specifically when it has occurred; is that correct?

A. Correct.

Argument

1. Summary of argument

At the time of the July 2020 trial, L.M.Y. was eleven years-old. From her birth until she was one year-old, L.M.Y. spent nearly half of her days cared for by the grandparents. (Tr. 41:3-13.) For all but two months since May 2010, L.M.Y. had resided with the grandparents full-time. (*Id.*; Tr. 63:12-24.) Since September 2013 – more than half of L.M.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.M.Y. has thrived in their care to become the “well behaved, intelligent” “athletic” girl she is today. (Tr. 53:12-17, 60:9-61:18, 198:9-14; *see* Tr. 88:13-15.) Mother admitted the grandparents have been “a blessing in [her] daughter’s life”. (Tr. 53:9-11.)

In sharp contrast, Mother was a parent of convenience. Since Mother left L.M.Y. in the grandparents’ care in September 2013, Mother had never been a full-time mother. She visited regularly but only a few days each month, never attending school conferences or medical appointments, rarely seeing L.M.Y. at her extracurricular activities, and providing no financial support. Mother was the “fun parent” who was able spend playtime with L.M.Y. a few days each month while never having to accomplish the expected responsibilities of parenthood.

Though it is commendable that after eleven years Mother finally sought to establish herself as L.M.Y.'s primary daily caregiver, her efforts are too little too late. Ripping L.M.Y. from the only home she can remember and placing her with Mother, who has never shown she could care for L.M.Y. as a single parent, is not in L.M.Y.'s best interests.

L.M.Y., L.M.Y.'s father, and the grandparents wanted the guardianship to continue. The trial record does not support the district court's decision to terminate this long-established guardianship. Mother's instability in home and parenting duties, show that the original basis to establish the guardianship still exists. Even if Mother was stable, terminating the guardianship would be harmful to L.M.Y. and L.M.Y.'s interest in continuing the guardianship outweighs Mother's interest in the guardianship's termination. This court should reverse.

2. Standard of review and preservation of error for all issues raised in this appeal.

For actions seeking to terminate an established guardianship, appellate review is de novo. *Matter of Guardianship & Conservatorship of D.D.H.*, 538 N.W.2d 881, 883 (Iowa Ct. App. 1995); see *In re Guardianship of Knell*, 537 N.W.2d 778, 780 (Iowa 1995); *Matter of Guardianship of Stewart*, 369 N.W.2d 820, 822 (Iowa 1985). In a de novo review, the court has "a duty to examine the entire record and adjudicate anew rights on the issues properly presented." *In re Marriage of Ales*,

592 N.W.2d 698, 702 (Iowa Ct. App. 1999). Though not bound by them, the appellate court gives weight to the fact findings of the district court, especially in determining the credibility of witnesses. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997). The entire proceeding concerned whether to terminate the grandparents' guardianship of L.M.Y., so all issues raised by this appeal were properly preserved for review. *See In re Marriage of Gensley*, 777 N.W.2d 705, 718-19 (Iowa Ct. App. 2009) (holding that an issue not presented to the trial court will not be considered for the first time on appeal).

3. The district court erred by terminating the guardianship.

This case is about stability. The one constant in L.M.Y.'s life has been the grandparents. Mother has been in and out of L.M.Y.'s life, sporadically visiting. Mother rarely, if ever participated in, parental obligations like doctor's visits and school conferences, but was there 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.

A. Legal principles governing the termination of guardianships.

This case involves the recently enacted "Iowa Minor Guardianship Proceedings Act" (IMGPA). *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 (“This Act applies to guardianships and guardianship proceedings of minors established or pending before, on, or after January 1, 2020.”). Per the IMGPA, guardianships of minor children may be created with or without parental consent. Iowa Code § 232D.203 (2020 Supp.) (with parental consent); § 232D.204 (without parental consent). Here, the district court properly concluded that this guardianship was originally established *with* parental consent because Mother and Father each filed affidavits in support of the petition. (App. at 8-10, 11-13, 38.)

When considering a motion to terminate a guardianship created with parental consent, the court

shall terminate a guardianship ... 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.

Iowa Code § 232D.503(2) (2020 Supp.).

Interpreting the new statute, the district court correctly noted that section 232D.503(2) fails to specifically address which party has the burden of proof and the level of that burden. (App. at 38-39.) But, correctly concluded:

In civil proceedings such as this where the statute does not provide appropriate guidance, the court falls back on a recognized standard in civil proceedings in which the movant [Mother] prove up the relief sought in the motion by a preponderance of evidence.

(App. at 39); *see* Iowa Code § 232D.106 (2020 Supp.) (“The rules of civil procedure shall govern guardianship proceedings concerning a minor who is alleged to be in need of a guardianship except as otherwise set forth in this chapter.”); *see also In re H.M.S.*, No. 15-0898, 2016 WL 1130963, at *3 (Iowa Ct. App. 2016) (holding that when “a petition to terminate is filed, the petitioner must show the guardianship is no longer necessary”). Also, 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 (H.F. 591); *see also* Iowa Code § 633.559 (2019). Thus, merely because Mother is L.M.Y.’s parent no longer carries a statutory preference in her favor. *Id.*

When applying the statutory framework, the court’s overarching consideration must include a finding that the termination of the guardianship is in the child’s best interests. *Matter of Guardianship of L.G.*, No. 19-1631, 2020 WL 2988230, at *2 (Iowa Ct. App., filed June 3, 2020). The court shall determine both the child’s “immediate and long-term interests.” *In the Matter of the Guardianship of D.B.*, No. 17-1559, 2018 WL 4360946, at *2 (Iowa Ct. App., filed Sep. 12, 2018). Finally, the court “may look at a parent’s past performance as indicative of future care the parent may provide. If return of custody to the

natural parent would seriously disrupt and disturb the child’s development, that fact prevails.” *Id.* (citing *Knell*, 537 N.W.2d at 782.)

B. The basis for the guardianship is still currently satisfied.

The statutory threshold inquiry to determine whether to terminate the guardianship asks the court to compare the original basis for the guardianship with the current circumstances. § 232D.503(2). In other words, the guardianship is terminated if “the basis for the guardianship set forth in section 232D.203 is not currently satisfied[.]” *Id.* Section 232D.203 provides that a guardianship established with the parent’s consent is needed

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

§ 232D.203(1)(b) (emphasis added). There was no evidence of the first three bases, so Mother’s desire to terminate the guardianship could be denied “for some other reason constituting good cause.” § 232D.203(1)(b)(4). Here, the district court found the basis for the guardianship “is not satisfied because ... the parents have achieved security and stability in their lives. [Mother] is a capable

and appropriate parent able to immediately assume permanent care and custody of [L.M.Y.]. The continuation of the guardianship only creates further instability for [L.M.Y.].” (App. at 39.) That is in error.

Mother had not “achieved security and stability” in residence or relationships. The primary reason mother consented to the guardianship in 2014 was due to her immaturity and instability. Six years later, she had barely improved. Even if she had improved, L.M.Y. had not used her stability to spend more time with L.M.Y. or contribute financially toward raising L.M.Y. Instead, she saw L.M.Y. only a few days each month completing no basic obligations a parent should. Because the original basis for the guardianship existed – mother’s instability – the threshold inquiry was not satisfied so the guardianship should continue.

In evaluating mother’s lifestyle since 2014, the court acknowledged she had a “difficult personal history”. (App. at 29.) Though the court “assigned the most weight to the testimony offered by [Mother] herself”, it then ignored mother’s admissions of her indifferent attitude toward L.M.Y. (*See* App. at 29.) In contrast to the court’s ultimate conclusion, the trial record reveals mother’s words in support of her stability are refuted by her inaction and indifference toward provided proper parental care for L.M.Y. This court should reverse and reinstate the guardianship.

- C. If the basis for the guardianship is not currently satisfied, returning L.M.Y. to Mother's custody would be harmful to L.M.Y. and L.M.Y.'s interest in continuing the guardianship outweighs Mother's interest in the guardianship's termination.**

Even if the district court properly concluded that the original basis for the guardianship is no longer satisfied, the lower court should have denied Mother's request because the trial record shows "the termination of the guardianship would be harmful to [L.M.Y.] and [L.M.Y.'s] interest in continuation of the guardianship outweighs [Mother's] interest ... in the termination of the guardianship." *See* § 232D.503(2). L.M.Y. has thrived in the stable home and parenting of the grandparents. Mother's instability in relationships extended to her own parents. Since Mother graduated from high school in May 2010, Mother's mother admitted she had not had "much contact with her." (Tr. 93:5-11.) She too blamed the grandparents for her own inaction. (Tr. 93:12-15.)

Mother admitted that placing L.M.Y. in her care would change L.M.Y.'s "stable environment a great deal". (Tr. 59:8-10.) The upheaval caused by removing L.M.Y. from the home L.M.Y. has loved nearly her entire life is not worth providing more contact with Mother, especially because every witness, Mother included, admitted that L.M.Y. and Mother had ample contact while the grandparents managed L.M.Y.'s daily care

1) Returning L.M.Y. to Mother's custody would be harmful to L.M.Y.

The trial record shows that returning L.M.Y. to her Mother's physical care would be harmful to L.M.Y.; the district court erred in finding otherwise. For six years, Mother consented to the guardianship. During that time, Mother was an absent parent except a few weekends each month. So, L.M.Y. naturally developed a strong bond with her grandparents while thriving under their care.

Revealing the district court's incorrect analysis of the evidence under the statutory framework, the court turns the Grandparents' excellent performance as L.M.Y.'s primary caregiver into a criticism by stating that L.M.Y. would not question her "origin" or how she perceives her value by her Mother "had the guardianship been terminated years earlier as requested by" Mother (App. at 39.) It is not the grandparents' fault that Mother never bothered to exercise her legal rights to terminate the guardianship sooner. Mother knew where L.M.Y. was; she knew L.M.Y. was thriving in the grandparents care; Mother took advantage of the grandparents by contributing little to L.M.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. Mother took no action to terminate the guardianship until 2020. Randomly suggesting to end it 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.”.)

L.M.Y. had developed anxiety toward her parents. (Tr. 115:18-116:10.) Mother acknowledged this anxiety was based on L.M.Y.’s “concerns of [] when her parents were going to show up for her.” (Tr. 37:11-17.) When she learned of that, Mother admitted: “I didn’t know how to respond to it.” (Tr. 37:18-19.)

Addressing L.M.Y.’s situation, the grandparents sought professional help through counselling sessions with Dr. Rudman, who had earned a “Ph.D. in clinical and health psychology with a specialization in child psychology.” (Tr. 112:19-25.) Rudman had twenty-five years’ experience as a clinical psychologist, practicing in Iowa for the past twenty-three years. (Tr. 113:1-6.) Rudman had twenty-four sessions with L.M.Y. over the past two years since June 2018 when L.M.Y. was nine years-old and in the third grade. (Tr. 113:13-18, 114:7-10, 115:13-17.) 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.

(Tr. 113:19-114:6.) L.M.Y. was troubled by her parents' lack of wanting to spend more time with her. (Tr. 115:18-116:10.) Based on her treatment of L.M.Y., Rudman recommended that L.M.Y. should 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.

(Tr. 118:4-19.) L.M.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.” (App. at 45.) L.M.Y. does not want to leave her grandparents' custody because she considered living with them to be her “home.” (App. at 45.)

2) L.M.Y.'s interest in continuing the guardianship outweighs Mother's interest in the guardianship's termination.

L.M.Y. wanted to remain in her grandparents' care. (Tr. 179:16-180:1; App. at 46; *see* Tr. 56:19-58:7.) L.M.Y. told the court her desire. (Tr. 179:16-180:1; App. at 46; *see* Tr. 56:19-58:7.) Specifically, L.M.Y. wanted to remain in the only school district she had ever known. (App. at 46; *see* Tr. 56:19-58:7.) She desired the stability only her grandparents provided. (*See* Tr. 58:5-7.) L.M.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. (Tr. 180:2-9.) Explaining why, L.M.Y. testified: “Because sometimes [Mother] says things but then she never really does it.” (Tr. 180:2-9.)

Iowa’s appellate courts have instructed that 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); *see Jones v. Jones*, 175 N.W.2d 389, 391 (Iowa 1970) (“[W]hen a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his or her wishes, though not controlling, may be considered by the court, with other relevant factors, in determining child custody rights.”); *see also Halstead v. Halstead*, 259 Iowa 526, 535, 144 N.W.2d 861, 866 (1966) (“Children too have rights which should be jealously guarded by the courts.”). Here, the court found that L.M.Y. was a “delightful” “very smart, delightful and kindhearted child with a bright future.” (App. at 30 n2, 36.) Yet, the district court “afford[ed] it less weight” because of its incorrect perception that L.M.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”. (*See App.* at 30.)

L.M.Y.’s desires bolstered not weakened L.M.Y.’s credibility.

L.M.Y. did not want to upset her mother. She loved her grandparents and had thrived in their care. If L.M.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. (*See App.* at 46.) That desire was based on significant evidence in the trial record showing that L.M.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. (*See App.* at 30.)

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

- “I think that [L.M.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.” (Tr. 240:11-18.)
- “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.” (Tr. 246:16-21.)

Conclusion

This court should reverse the district court and reinstate the guardianship.

Request for Oral Argument

Counsel for Appellant respectfully requests to be heard in oral argument upon submission of this case.

Respectfully submitted,

/s/ Andrew B. Howie

Andrew B. Howie, AT0003716

SHINDLER, ANDERSON, GOPLERUD
& WEESE, P.C.

5015 Grand Ridge Drive, Suite 100

West Des Moines, Iowa 50265

515-223-4567; Fax: 515-223-8887

howie@sagwlaw.com

ATTORNEY FOR APPELLANTS

Certificate of Service

Pursuant to Iowa Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on the 8th day of December 2020, the Brief 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 brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

this brief has been prepared in a proportionally spaced typeface using Garamond in 14 point font and contains 5,361 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

this brief has been prepared in a monospaced typeface using Garamond in 14 point font and contains _____ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2) .

/s/ Andrew B. Howie

Signature

December 8, 2020

Date