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' REPLY 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

Cases **Page**

Statutes and Rules

Statement of Issues Presented for Review

1. The district court erred by terminating the guardianship.

Iowa Code § 232D.203 (2020 Supp.)

Iowa Code § 232D.503(2) (2020 Supp.)

Iowa Code § 633.559 (2019)

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

A. Efforts to terminate guardianships established *with* parental consent are governed by the preponderance of the evidence of what is in the minor child's best interests.

Homan v. Branstad, 887 N.W.2d 153 (Iowa 2016)

In re Guardianship of Roach, 778 N.W.2d 212 (Iowa Ct. App. 2009)

In re M.S., 889 N.W.2d 675 (Iowa Ct. App. 2016)

Matter of Guardianship of L.O., No. 19-1976, 2020 WL 6157812 (Iowa Ct. App. 2020)

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

Iowa Code § 232D.204 (2020 Supp.)

Iowa Code § 232D.503(2) (2020 Supp.)

Iowa Code § 232D.503(3) (2020 Supp.)

B. The grandparents proved that terminating 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.

Iowa Code § 232D.503(2) (2020 Supp.)

2. This court should deny Mother's request that the grandparents pay her appellate attorney fees.

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

Homan v. Branstad, 887 N.W.2d 153 (Iowa 2016)

In re Guardianship of C.G., 799 N.W.2d 549 (Iowa Ct. App. 2011)

Van Sloun v. Agans Bros., 778 N.W.2d 174 (Iowa 2010)

Williams v. Van Sickel, 659 N.W.2d 572 (Iowa 2003)

Iowa Code ch. 232D

Iowa Code § 232D.105 (2020 Supp.)

Iowa Code § 232D.503 (2020 Supp.)

Statement of the Case

L.M.Y., who is the ward of this case, is the daughter of M.Y. ("Father") and S.W. ("Mother"). G.Y. and K.Y.[1] are the parents of M.Y. and paternal grandparents of L.M.Y. Mother admits that the grandparents timely filed a notice of appeal. (Appellee's Br. p7; *see* App. at 43.)

Statement of the Facts

The grandparents' main brief accurately reflects the relevant facts necessary to decide this appeal. However, in response to Mother's statement of the facts, the grandparents provide this supplement.

In her brief, Mother writes: "While the parties were all residing in the [grandparents'] home, [Mother] was the primary caretaker of L.M.Y. during the day as she was not working." (Appellee's Br. p8.) That statement is not supported by the trial record, and Mother failed to cite any part of the record supporting that statement. *See* Iowa R. App. P. 6.903(2)(g)(3) ("All portions of the statement shall be supported by appropriate references to the record …").

---

[1] Identified jointly as "the grandparents", except when needing to refer to each individually for clarity.

Mother claims the grandparents "regularly" denied her requests for additional visits with L.M.Y. (Appellee's Br. p9-10.) But, Mother's testimony during cross-examination refutes that claim:

> Q. Okay. So they are allowing you *ample* visitation to see her on a regular basis through these years, haven't they?
> A. Yes.
> Q. And other than the couple of times they have always been open to allowing you to see and have time with the child, is that not correct?
> A. Yes.

(Tr. 59:22-60:4 (emphasis added).)

Though Mother claims that she made "several attempts to have the guardianship terminated" since 2015, she offered no proof and no one ever contacted the grandparents in that regard. (*See* Appellee's Br. p10.) At trial, Mother admitted that the first time she directly raised terminating the guardianship with the grandparents was 2018 with her letter. (Tr. 65:2-66:24; *see* App. at 44.) Otherwise, she only raised the issue with L.M.Y. who was very young. (*Id.*)

Argument

1. The district court erred by terminating the guardianship.

Mother cites the wrong legal burden in support of her argument, particularly the previous statutory "parental preference" formerly found in Iowa Code section 633.559 (2019), which was repealed by the recently enacted "Iowa

Minor Guardianship Proceedings Act" (IMGPA). *See* 2019 Iowa Acts ch. 56 (H.F. 591). By adopting the IMGPA and making it applicable "to guardianships and guardianship proceedings of minors established or pending before, on, or after January 1, 2020", the Iowa legislature statutorily overruled the previous caselaw regarding parental preference as well as the applicable burdens of proof required by parties seeking to terminate an existing guardianship. *See id.* §§ 43 & 45. Applying the IMGPA to this case, the district court correctly determined "that termination of this guardianship is guided by Iowa Code section 232D.503(2), as the guardianship was established *by consent* of the parents." (App. at 38 (emphasis added)); *see* Iowa Code § 232D.203 (2020 Supp.) (guardianships established *with* parental consent). Under that new standard, the district court erred in terminating the guardianship.

A. Efforts to terminate guardianships established *with* parental consent are governed by the preponderance of the evidence of what is in the minor child's best interests.

Because this guardianship was created *with* parental consent, terminating the guardianship is governed by Iowa Code section 232D.503(2), not section 232D.503(3). Mother wrongly argues that the grandparents can only have the guardianship continue by "providing clear and convincing evidence of parental unsuitability." (Appellee's Br. p16 (citing *In re Guardianship of M.E.*, No. 16-1178, 2017 WL 2465791, at *6 (Iowa Ct. App. June 7, 2017).) Section 232D.503(2)

carries no such 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.

Section 232D.503(2) expressly provides that the court can choose to refuse to terminate a guardianship if terminating the guardianship is "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." *See* Iowa Code § 232D.503(2). If the legislature intended to require guardians to prove by clear and convincing[2] evidence that the guardianship should remain over a parent's objection, the legislature could have said that, but did not. *See id.*

Employing established legal principles regarding statutory construction, section 232D.503(2) does not require the heightened "clear and convincing"

---

[2] *In re M.S.*, 889 N.W.2d 675, 679 (Iowa Ct. App. 2016) (citation omitted):

> Clear and convincing evidence is more than a preponderance of the evidence and less than evidence beyond a reasonable doubt. It is the highest evidentiary burden in civil cases. It means there must be no serious or substantial doubt about the correctness of a particular conclusion drawn from the evidence.

evidence that the parent was unsuitable in order to defeat an action to terminate a guardianship. In 2016, the Iowa Supreme Court discussed the rules of statutory construction:

> When interpreting statutory provisions, we have previously stated,
>
> > The goal of statutory construction is to determine legislative intent. We determine legislative intent from the words chosen by the legislature, not what it should or might have said. Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used. Under the guise of construction, an interpreting body may not extend, enlarge, or otherwise change the meaning of a statute.
>
> Further, we have said, "legislative intent is derived not only from the language used but also from 'the statute's "subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations."'" We also give weight to explanations attached to bills as indications of legislative intent.
>
> We will not consider what the legislature "should or might have said" when it constructed a statute. In determining legislative intent, we may also look to the maxim "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."
>
> Additionally, we aim to give meaning to the statutory changes the general assembly enacts. "When an amendment to a statute adds or deletes words, a change in the law is presumed unless the remaining language amounts to the same thing." When considering statutory amendments, we must assume that the general assembly "sought to accomplish some purpose" and the amendment "was not a futile exercise."

Homan v. Branstad, 887 N.W.2d 153, 166 (Iowa 2016) (citations omitted).

In the absence of language heightening the burden of proof, the most fundamental principle guiding the court's analysis of whether to terminate a parent-consented guardianship is not parental preference but rather the minor child's best interests. *See In re Guardianship of Roach*, 778 N.W.2d 212, 214 (Iowa Ct. App. 2009).

> Losing focus of this overarching premise would defeat the central purpose of litigating the custody of the child. It is not a strong-arm contest of the adults involved, but a review of the factors that will best serve [the minor child's] immediate and long-term needs.

Id.; *accord Matter of Guardianship of L.O.*, No. 19-1976, 2020 WL 6157812, at *2 (Iowa Ct. App., filed Oct. 21, 2020) (interpreting *Roach*, holding the termination of a guardianship is "essentially a question of custody"). *See id.* at 213. Without a "parental preference" binding the court's analysis, the Iowa Court of Appeals concluded that "efforts to terminate a guardianship are ultimately 'child custody determination[s],' so they 'draw[] from the same child custody principles enumerated in dissolution of marriage cases.'" *L.O.*, 2020 WL 6157812, at *2 (quoting *Roach*, 778 N.W.2d at 215). Those well-established "child custody principles" that courts utilize when determining whether to terminate a guardianship is akin to changing the existing custody order.

> To change a custodial provision, the applying party must establish by a preponderance of evidence that conditions since the decree

> was entered have so changed that the child's best interests make it expedient to make the requested change. Once custody has been fixed, it should only be disturbed for the most cogent of reasons.

Roach, 778 N.W.2d at 215. Thus, the preponderance of evidence shows that terminating the guardianship is not in L.M.Y.'s best interests. *See* § 232D.503(2).

B. The grandparents proved that terminating 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.

Mother's instability and lack of consistent parenting of L.M.Y. shows that terminating the guardianship would be harmful to L.M.Y. and continuing the guardianship would be in L.M.Y.'s best interests. Though the natural parent-child relationship was preferred concerning litigation between parents and third-parties over a child's custody, the IMGPA statutorily changed those previous standards, particularly the parental preference no longer exists and terminating a guardianship comes down to whether such an action would be in L.M.Y.'s best interests. *See* Iowa Code § 232D.503(2). In other words, the old legal principle – overcoming parental preference – is no longer the standard. *Compare id. with Matter of Guardianship of Stewart*, 369 N.W.2d 820, 825 (Iowa 1985) (holding that stability of maintaining the guardianship did not outweigh the preference for child to be with their parents).

Comparing how L.M.Y. flourished during the years in her grandparents' care with Mother's instability, the court should have maintained the guardianship. The stability and comfort provided by the grandparents' home, while meeting L.M.Y.'s every need, contrasted with upheaval to L.M.Y. by placing her in Mother's care is sufficient basis to maintain the guardianship. Retaining the guardianship will maintain what has worked for nearly all of L.M.Y.'s life. She will reside in the same home, have the same adults caring for her, be near the same friends, finish her homework at the same table, and will sleep in the same bed, all while maintaining a relationship with Mother. Placing L.M.Y. with Mother will change homes, change schools, change friends, and change virtually every foundational pillar in L.M.Y.'s world.

Mother's nearly complete lack of any sacrifice of time, energy, and financial aid for L.M.Y.'s benefit pales in comparison to the grandparents' contribution of the same. Mother chose to spend time with L.M.Y. on weekends when convenient for her, but spending time with L.M.Y. is not parenting L.M.Y. Mother failed in nearly every aspect of actual parenting. She barely paid attention to L.M.Y.'s education. She never attended a single parent-teacher conference. She attended one of L.M.Y.'s many years of medical and dental appointments. She rarely attended L.M.Y.'s extracurricular activities. She contributed virtually nothing toward L.M.Y.'s expenses. Now, after eleven years of the grandparents'

generosity and watching L.M.Y. thrive in their care, Mother seeks to overturn that history of success for one reason – she's L.M.Y.'s mother. Such a change is not L.M.Y.'s best interests and outweighs Mother's interest.

2. This court should deny Mother's request that the grandparents pay her appellate attorney fees.

This court does not have the authority to order the grandparents to pay Mother's appellate attorney fees. 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 guardians or the grandparents as we have here. § 232D.505(1)(a) (emphasis added). Again, "expressio unius est exclusio alterius". *Homan*, 887 N.W.2d 166.

In Iowa, litigants generally pay their own attorney fees. *Van Sloun v. Agans Bros.*, 778 N.W.2d 174, 182 (Iowa 2010) ("The right to recover attorney fees as costs does not exist at common law."). In other words, a party has no legal basis to have the court order the opposing party to pay his or her attorney fees in the absence of a statute or contract allowing such an award. *Williams v. Van Sickel*, 659 N.W.2d 572, 579 (Iowa 2003); *D.M.H. by Hefel v. Thompson*, 577 N.W.2d 643,

648 (Iowa 1998). 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 should pay his or her own attorney fees. *See D.M.H.*, 577 N.W.2d at 647-48.

Even if this court finds that Mother may recover appellate attorney fees from the grandparents, the circumstances do not justify such an award. Unlike *C.G.*, the trial court here did *not* find "overwhelming evidence" that Mother was "good" and capable of parenting L.M.Y. In fact, the trial court noted Mother's attitude toward the grandparents by how Mother "has approached her relationship with the [grandparents] first with gratitude. Although hard feelings have developed, she continues to speak highly of the important role they play in [L.M.Y.'s] life." (App. at 40.) The grandparents only acted out of L.M.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.M.Y., having Mother pay her own attorney fees is justified.

Conclusion

This court should reverse the district court and reinstate the guardianship. This court should deny Mother's request for appellate attorney fees.

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:

[X] this brief has been prepared in a proportionally spaced typeface using Garamond in 14 point font and contains 2,340 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