IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-1034

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

G.Y. AND K.Y.,
Guardianship-Appellants

vs.

S.W., Mother-Appellee

APPEAL FROM THE IOWA DISTRICT COURT FOR STORY COUNTY,

DISTRICT COURT NO. GCPR028779,
THE HONORABLE JUDGE STEVEN A. OWEN

BRIEF OF AMICUS CURIAE OF THE IOWA GUARDIANSHIP AND CONSERVATORSHIP ASSOCIATION

F. D. Chip Baltimore, II, AT0000649
Iowa Guardianship and Conservatorship Association
Law Office of Kirke C. Quinn
727 Story Street, Suite 701
Boone, IA 50036
[t] 515.432.1490
[f] 515.432.5508
baltimore.chip@kcqlaw.com.

Attorney for Amicus Curiae

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IOWA GUARDIANSHIP AND CONSERVATORSHIP ASSOCIATION'S IDENTITYAND INTEREST IN THE CASE

This case arises under the Iowa Minor Guardianship Proceedings Act (IMGPA) enacted on May 1, 2019, with an effective date of January 1, 2020. 2019 Iowa Acts ch.56 (H.F. 591). This brief is submitted on behalf of the Iowa Guardianship and Conservatorship Association (IGCA). The IGCA has "a unique perspective" and "information" that "will assist the court in assessing the ramifications of any decision rendered in the case," which Iowa R. App. P. 6.906(5)(3) specifies is a basis for allowing an amicus brief.

The mission of the IGCA includes: (1) promoting the implementation of the recommendations of Iowa Guardianship and Conservatorship Reform Task Force (Task Force) and the 2019 comprehensive guardianship and conservatorship reform legislation, including the IMGPA, and (2) advocating for needed care and protection of adults and minors under guardianship and conservatorship and advocating for the interests of guardians and conservators responsible for their care and protection. See IGCA website at https://www.iowagca.org.

The IMGPA incorporated and reflected the recommendations of the Iowa Guardianship and Conservatorship Task Force established by the Supreme Court. See Iowa Guardianship and Conservatorship Reform Task Force, Reforming Iowa's Guardianship and Conservatorship System, Final

Report (August 2017) [hereinafter, Task Force Report]. The Task Force was chaired by Justice Zager and was comprised of seventy-two members representing the major stakeholders in the Iowa guardianship and conservatorship system. See Bruce Zager, et al., *Reforming Iowa's Guardianship and Conservatorship System: An Introduction,* DRAKE L. REV. DISCOURSE, 101, 106-107 (March 2018).

Josephine Gittler, President of the IGCA Board of Directors, is the Wiley B. Rutledge Professor of Law at the University of Iowa College of Law and was the Task Force coordinator and reporter. Other IGCA Board members were Task Force members. Some Board members have been or are guardians and conservators, and some have served as attorneys representing guardians and conservators and representing persons under guardianship and conservatorship.

STATEMENT OF COMPLIANCE WITH IOWA R. APP. P. 6.906(4)

In accordance with Iowa R. App. P. 6.906(4)(d), IGCA affirms that no party's counsel authored its amicus curiae brief in whole or in part and that no party or party's counsel contributed money to fund the preparation or submission of the brief. The IGCA has not been and will not be compensated for submitting this amicus curiae brief, and the IGCA will compensate only its counsel, F. D. Chip Baltimore, II, for his services.

ARGUMENTS

I. ARGUMENTS REGARDING APPLICATION OF RULES OF STATUTORY CONSTRUCTION TO THE IOWA MINOR GUARDIANSHIP PROCEEDINGS ACT (IMGPA)

A. The language of the IMGPA demonstrates that the legislative intent was to create two different categories of minor guardianships, each with differing purposes and requirements.

In Albaugh v. The Reserve, 930 N.W.2d 676 (Iowa 2019), this Court summarized the rules of statutory construction that should be applied in this case.

> Under these rules, "[t]he primary purpose of statutory construction is to determine legislative intent, gleaned from the words used by the legislature" (citation omitted). To ascertain legislative intent, we examine "the language used, the purpose of the statute, the policies and remedies implicated, and the consequences resulting from different interpretations" (citation omitted).

Id. at 683. Applying these rules to the IMGPA, the legislative intent clearly was to create two different categories of minor guardianships, each with differing purposes and requirements.

One category of minor guardianships, which the IMGPA created, is the voluntary guardianship with parental consent. Iowa Code section 232D.203(1) (2021) 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.

In addition to the above requirements, this section of the IMGPA requires the parent and the guardian to enter into and submit an agreement to the court concerning their respective responsibilities and the expected duration of the guardianship, if known. Iowa Code section 203D.203(3) (2021).

The IMGPAA also created a second category of minor guardianships, is the involuntary guardianship without parental consent. Iowa Code section 232D.204 (2021) provides:

> 1. The court may appoint a guardian for a minor without the consent of the parent or parents having legal custody of the minor if the court finds by clear and convincing evidence all of the following:
> a. There is a person serving as a *de facto* guardian of the minor.
> b. There has been a demonstrated lack of consistent parental participation in the life of the minor by the parent. In determining whether a parent has demonstrated a lack of consistent

> participation in the minor's life, the court may consider all of the following:
> (1) The intent of the parent in placing the custody, care, and supervision of the minor with the person petitioning as a *de facto* guardian and the facts and circumstances regarding such placement.
> (2) The amount of communication and visitation of the parent with the minor during the alleged *de facto* guardianship.
> (3) Any refusal of the parent to comply with conditions for retaining custody of the minor set forth in any previous court orders.
> 2. The court may appoint a guardian for a minor without the consent of the parent or parents having legal custody of the minor if the court finds by clear and convincing evidence all of the following:
> a. No parent having legal custody of the minor is willing or able to exercise the power the court will grant to the guardian if the court appoints a guardian.
> b. Appointment of a guardian for the minor is in the best interest of the minor.

This section adopts a key recommendation of the Task Force to permit involuntary guardianships without parental consent, but only under narrowly defined circumstances that satisfy federal and state constitutional requirements.[1] Task Force Report at 42-45.

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[1] The Task Force recommendations presented two options. One option was to authorize both voluntary guardianships with parental consent and involuntary guardianships without parental consent. Task Force Report at 42-45. The other option was to authorize the voluntary but not involuntary guardianships. Id. The Task Force noted: "A survey of statutes of 50 states and the District of Columbia disclosed that a majority of these statutes provide a guardian for a minor may be appointed without parental consent. In addition the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act provides that the court may appoint a guardian for a minor if the 'court finds the appointment is in the minor's best interest and … there

In some cases, such guardianships may be an appropriate less drastic alternative to a child in need of assistance (CINA) adjudication to ensure that a child receives needed care and protection. See Iowa Code sections 232.36, 232.87 & 232.96 (2021). See also Josephine Gittler, et al., *Reforming Iowa's Guardianship and Conservatorship System: Minor Guardianships*, DRAKE L. REV. DISCOURSE 101, 111-114 (June 2018), available at https://lawreviewdrake.files.wordpress.com/2018/06/reforming-iowas-guardianship-and-conservatorship-system-minor-guardianships.pdf. In some other cases, such guardianships also may be warranted when the parent is unwilling or unable to furnish needed care and protection to a child but the parental behavior does not demonstrate the degree of parental unfitness required for a CINA adjudication. Id.

B. In a judicial determination of whether to terminate a guardianship established with parental consent, the applicable provisions of the IMGPA, taken together, are Iowa Code sections 232D.503(2), 232D.203 and 232D.204.

Prior to the enactment of the IMGPA, in cases involving termination of minor guardianships (as well as other types of cases), Iowa Code section 633.559 (2019) created a rebuttable presumption that "the parents of a minor

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is clear and convincing evidence that all parents of the minor are unwilling or unable to exercise the powers the court is granting the guardian' " (footnotes omitted). Id. at 45-45.

child, or either of them, if qualified and suitable, shall be preferred over all others for appointment of a guardian." See, e.g., In re Guardianship of Knell, 537 N.W.2d 778, 781 (Iowa 1995); In re Guardianship of Roach, 778 N.W.2d 212, 214 (Iowa Ct. App. 2009). However, the IMGPA, expressly repealed this statutory provision. 2019 Iowa Acts ch. 56, section 43.

At issue in this case is a minor guardianship to which the parent originally consented but now seeks to terminate. Under the IMGPA, Iowa Code section 232D.503(2) (2021) is initially applicable to the termination of such a guardianship. It provides:

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

However, section 232D.503(2), pertaining to termination of a guardianship established with parental consent, must be construed in conjunction with the aforementioned section 232D.203 (guardianship with parental consent) and the aforementioned section 232D.204 (guardianship without parental consent). As this Court has stated: "We…look at the entire chapter when the legislature enacted the statute, so we may give the statute its proper meaning in context." Sanon v. City of Pella, 865 N.W.2d 506, 511

(Iowa 2015). See Albaugh v. The Reserve, 930 N.W.2d 676, 683 (Iowa 2019); Des Moines Flying Serv. v Ariel Services, 880 N.W.2d 212 (Iowa 2016).

Section 232D.503(2) first requires the court to make a determination of "whether the basis for the guardianship set forth in section 232D.203 is not currently satisfied." Since parental consent is a prerequisite for appointment of a guardian under section 232D.203(1), this determination will depend on whether the parent has in fact withdrawn consent to the guardianship.[2]

If the court finds that "the basis for the guardianship set forth in section 232D.203 is not currently satisfied" because parental consent has been withdrawn, section 232D.503(2) then requires the court to terminate the guardianship unless the court finds termination "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."

[2] It also may depend on the terms of agreement of the parent and guardian as to the duration of the guardianship filed with the court pursuant section to 232D.203(3). In this case, however, the court had no such agreement to consider because the guardianship was initiated under Code provisions in effect prior to the enactment of the IMGPA that did not require the filing of an agreement.

But if the court makes this finding and does not terminate the guardianship, the court converts what had been a voluntary guardianship with parental consent into an involuntary guardianship without parental consent.

Consequently, section 232D.503(2), must be read in conjunction with section 232D.204, and before continuing a guardianship originally established with parental consent but thereafter withdrawn, the court must consider whether a basis for establishing an involuntary minor guardianship without parental consent exists under section 232D.204. This section authorizes an involuntary guardianship only if the court finds by clear and convincing evidence that (1) there is a person serving as a *de facto* guardian and there has been a demonstrated lack of consistent parental participation in the life of the minor, or (2) the parent is unwilling or unable to exercise the powers the court would grant to the guardian and a guardianship is in the best interest of the minor. Iowa Code section 232D.204(1) and (2).

Taken together, sections 232D.503(2) and 232D.204 dictate the conclusion that the legislature intended to permit continuation of a guardianship originally established with parental consent and thereafter withdrawn only if the requirements of both section 232D.503(2) and 232D.204 are satisfied by clear and convincing evidence that:

(1) termination "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" under section 232D.503(2); AND

(2) the limited grounds for establishing an involuntary guardianship exist under section 232D.204.

II. ARGUMENTS REGARDING CONSTITUTIONALITY OF IOWA MINOR GUARDIANSHIP PROCEEDINGS ACT (IMGPA)

A. Error was not preserved regarding constitutional arguments of mother S.W., and this is not an appropriate case for review of these arguments by this Court.

The requirement of error preservation, which is based on principles of fairness, is well established. DeVoss v. State, 648 N.W.2d 56, 60-63 (Iowa 2002) (summarizing the development of error preservation over the years). This Court has stated: "Our general rule of error preservation is that we will not decide an issue presented to us on appeal that was not presented to the district court. In order for the error to be preserved, the issue must be both raised and decided by the district court." In re Estate of Cawiezell v. Coronelli, 958 N.W.2d 842, 847 (Iowa 2021) (citation omitted). The error preservation rule is applicable to constitutional claims and is generally applicable to juvenile court decisions. See Thomas A. Mayes and Anuradha Vaitheswaran,

Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice, 55 DRAKE L. REV. 39, 46, 78 (2006) (citing supporting decisions).

In the application for further review to this court, the mother S.W. for the first time argues that the IMGPA, as applied in this case, is unconstitutional. Appellee's Appl. for Further Review, at 13. The IGCA concurs with the guardians G.Y. and K.Y. that the mother failed to preserve error with respect to her constitutional arguments. Appellant's Resistance to Appellee's Appl. for Further Review, 17-18.

Consideration of the constitutionality of the IMGPA requires presentation and analysis of facts and issues that were not raised and decided by the juvenile court and the court of appeals. Before addressing important issues regarding the IMGPA's constitutionality, this Court should have the benefit of a fully developed record from an appropriate case in which these issues have been raised by the litigants and decided by the district court and the court of appeals. This is not such an appropriate case.

B. IMGPA provisions regarding termination of a minor guardianship comply with due process requirements of the U.S. Constitution and Iowa Constitution

If the Court finds that error was preserved and this is an appropriate case for review of constitutional issues, the Court should hold that the provisions of the IMGPA pertaining to termination of a minor guardianship,

properly construed as set forth above, comply with the substantive and due process requirements of the Fourteenth Amendment of the United States Constitution and Article I of the Iowa Constitution.

1. Presumption of Constitutionality

When a statute is challenged on constitutional grounds, this Court has stated:

> Because statutes are cloaked with a strong presumption of constitutionality, a party challenging a statute as unconstitutional carries a heavy burden of rebutting this presumption. *In re Morrow*, 616 N.W.2d 544, 547 (Iowa 2000). In this regard, the challenger must negate every reasonable basis upon which the statute could be upheld as constitutional. *Id.* The challenger must also show beyond a reasonable doubt that a statute violates the constitution. *Johnston v. Veterans' Plaza Auth.*, 535 N.W.2d 131, 132 (Iowa 1995). If a statute is susceptible to more than one construction, one of which is constitutional and the other not, we are obliged to adopt the construction which will uphold it. *Santi v. Santi*, 633 N.W.2d 312, 316 (Iowa 2001).

In re Adoption of S.J.D., 641 N.W.2d 794, 797 (Iowa 2002).

2. United States Supreme Court Decisions

The United States Supreme Court has long recognized that parents have a fundamental liberty interest in the care, custody, and control of their children under the Due Process Clause of the Fourteenth Amendment, but that this interest is limited and must be balanced against the interest of the state in the protection of children and ensuring their welfare. Thus, in Prince v. Massachusetts, 321 U.S. 158, 166 (1944), the United States Supreme Court

stated that "the custody, care and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." However, the Supreme Court went on to state: "But the family itself is not beyond regulation in the public interest . . . [and that a]cting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and *in many other ways*." Id. (emphasis added) (citations omitted).

A parent's constitutionally protected liberty interest has a procedural as well as substantive due process aspect. In Santosky v. Kramer, 455 U.S. 745 (1982), the Supreme Court considered the standard of proof required in a proceeding brought by the state to terminate parental rights completely. The Court weighed the parental interest at stake, the state interest in protecting the child, and the risk of erroneous fact finding if a preponderance of the evidence standard, rather than a clear and convincing evidence standard, was used. Id. at 758-768. The Court held that the state must present clear and convincing evidence of the grounds for termination in order to protect parental rights. Id. at 768-769.

In Troxel v. Granville, 530 U.S. 57, 60 (2007), the Supreme Court assessed the constitutionality of a broad state statute that allowed "any person"

to petition the court for visitation rights with a child "at any time" and authorized the court to grant the petition over parental objection if it was in the "child's best interest." Id. at 60. The Supreme Court held that the statute was unconstitutional *as applied to the facts of the case*. Id. at 67 (O'Connor, J., plurality opinion). Id. at 76 (Souter, J., concurring). Although all of the justices but one acknowledged that the state statute burdened a fundamental right, a majority of the justices did not apply the strict scrutiny standard in assessing the constitutionality of the statute and did not clearly enunciate the general standard to be applied in cases involving parental rights. See David Meyer, *Constitutional Pragmatism For A Changing American Family*, 32 RUTGERS L. REV. 711, 714-722 (2001) (describing positions taken with respect to the standard to be applied in plurality, concurring and dissenting opinions).

3. Iowa Supreme Court Decisions

In Santi v. Santi, 633 N.W.2d 312, (Iowa 2001), this Court held a grandparent visitation statute facially unconstitutional under Article I of the Iowa Constitution. Id. at 321. This Court's decision, unlike the Troxel decision, expressly stated that "the infringement on parental liberty interests implicated by the statute must be 'narrowly tailored to serve a compelling state interest." Id. at 318 (citation omitted). In subsequent cases involving

parental rights, this Court continued to apply this standard. See, e.g., Marriage of Howard, 661 N.W.2d 183, 188 (Iowa 2003); Lamberts v. Lillig, 670 N.W.2d 129, 132 (Iowa 2003). See also In re Guardianship of S.K.M., No. 16-1537, 2017 WL5185427 at 6 * (Iowa Ct. App. Nov. 8, 2017) (termination of minor guardianship).

4. Constitutionality of IMGPA

The proper statutory construction of the IMGPA is consistent with the substantive and due process requirements of the Fourteenth Amendment of the United States Constitution and Article I of the Iowa Constitution.

As it has been pointed out under this Court's rules of statutory construction, in a judicial determination of whether a guardianship initiated with parental consent should be terminated, three provisions of the IMGPA are applicable and should be taken together. They are Iowa Code sections 232D.503(2), 232D.203(1) and 232D.204 (2021).

As it also has been pointed out, Iowa Code section 232D.503(2) (2021), permits a guardianship established with parental consent to be continued after parental consent is withdrawn if the court finds that termination would be harmful to the minor and the minor's interest outweighs the parent's interest. But when a guardianship with parental consent is continued despite withdrawal of such consent, it becomes an involuntary guardianship.

Therefore, the court must look to the requirements in Iowa Code section 232D.204 (2021) for the establishment of an involuntary guardianship without parental consent in determining whether the guardianship should be continued rather than terminated.

It must be emphasized that section 232D.204 requires *clear and convincing evidence* of the following conditions for a guardianship without parental consent: (1) the minor has a *de facto* guardian, and there has been a demonstrated lack of consistent parental participation in the life of the minor by the parent; or (2) no parent having legal custody of the minor is willing or able to exercise the powers of the guardian; and a guardianship is in the best interest of the minor.

The existence of these conditions, proven by clear and convincing evidence, demonstrate that a parent is unable or unwilling to exercise their parental responsibilities to care for and protect a child. Clear and convincing evidence of these conditions can, but does not necessarily, rise to the level of parental unfitness required for adjudication of a minor as a child in need of assistance (CINA), in order to effectuate the intent of the legislature to provide a less drastic alternative to a CINA adjudication.

Taken together, Iowa Code sections 232D.503(2), 232D.203(1) and 232D.204(1) & (2) conform to the substantive and procedural due process

requirements enunciated in the case law. See Ann L. Estin, *Minor Guardianship without Parental Consent: Constitutional Questions*, *in* Institute on Guardianship and Conservatorship, *House File 591, Opening and Administration of Minor Guardianships, CLE Conference*, Session Two, Appx. A, at 37-39 (Nov. 15, 2019, rev. Dec. 9, 2019), http://www.iowagca.org.dream.website/wp-content/uploads/2020/10/CLE-Materials-November-15.pdf. In accordance with Santosky and Santi, these provisions reflect the compelling interest of the state in maintaining a minor guardianship, even after parental consent is withdrawn, in narrowly defined circumstances where termination would result in harm to the child, where the interests of the child outweigh the interest of the child's parent and where the proof of the requisite circumstances is established by clear and convincing evidence.

CONCLUSION

The IMGPA manifests a clear recognition on the part of the Iowa General Assembly both of the importance of ensuring needed protection of children and of the importance of respect for parental rights and due process, when parental rights are restricted. In cases involving the proposed termination of a voluntary guardianship to which the parent no longer consents, if the guardianship is not terminated, it effectively becomes an

involuntary guardianship. Using the applicable rules of statutory construction, the applicable provisions of the IMGPA, when read together, provide the appropriate basis for a judicial determination of whether the guardianship may be continued in accordance with substantive and procedural due process requirements.

Respectfully submitted:

/s/ F.D. Chip Baltimore, II
F. D. Chip Baltimore, II, AT0000649
Law Office of Kirke C. Quinn
727 Story Street, Suite 701
Boone, IA 50036
[t] 515.432.1490
[f] 515.432.5508
baltimore.chip@kcqlaw.com.

Attorney for Amicus Curiae, Iowa Guardianship and Conservatorship Association

CERTIFICATE OF SERVICE

I, F.D. Chip Baltimore, II, hereby certify that the Amicus Brief was electronically filed on the 29th day of September, 2021, and was electronically served upon the parties and Appellee's counsel via electronic mail/EDMS.

/s/ F.D. Chip Baltimore, II

CERTIFICATE OF COMPLIANCE

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