

COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

FREEDOM CHETENI,

Plaintiff-Appellant,

vs.

JULIE ANN DELOHOUSAYE,

No. 30,041

Respondent-Appellee,

and

BRIAN DELAHOUSAYE and
PEGGY DELAHOUSAYE,

Petitioners-Appellees,

IN THE MATTER OF THE GUARDIANSHIP
OF PATRICK D., a child.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

SEP 10 2010

John M. Murphy

Appeal from the Third Judicial District Court, Dona Ana County, New Mexico

The Honorable Michael T. Murphy, Judge

PETITIONERS-APPELLEES' ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
SUMMARY OF PROCEEDINGS	1
ARGUMENT	6
I. THE DISTRICT COURT’S ORDER APPOINTING GRANDPARENTS AS KINSHIP GUARDIANS IS IN THE BEST INTERESTS OF CHILD AND SHOULD BE AFFIRMED	6
A. District court’s finding that best interests of Child is in the custody of grandparents may not be disturbed on appeal.....	6
B. The requirements of kinship guardianship were met and found by the district court.....	8
II. DISTRICT COURT HAD SUFFICIENT INFORMATION TO ENTER ITS ORDER ON KINSHIP GUARDIANSHIP AND THE DISTRICT COURT’S ORDER WAS NOT PREMATURE.....	17
A. Father had notice of a final hearing and made no objection to proceeding to a hearing on the merits.....	17
B. Father and district court were prepared to proceed to a final hearing.....	19
III. REQUIRING FATHER TO DISCLOSE HIS IMMIGRATION RECORDS WAS WITHIN THE DISCRETION OF THE DISTRICT COURT AND RELAVENT TO ONGOING CUSTODY MATTERS.....	20
CONCLUSION	23

References to the recorded hearings on the CD are to the date of the hearing and time of day as recorded on the CD and provided by For The Record software. (e.g., CD 3, 10-27-08, 3:01:18, indicates questioning or testimony on October 27, 2008 at 3:01 p.m. and 18 seconds as indicated on the CD)

TABLE OF AUTHORITIES

NEW MEXICO CASES

<u>Barela v. Barela</u> , 91 N.M. 686, 579 P.2d 1253 (1978).....	22
<u>Clayton v. Trotter</u> , 110 N.M. 369, 796 P.2d 262 (Ct. App. 1990).....	22
<u>CYFD v. Senaida C.</u> , 2008-NMCA-007, 143 N.M. 335.....	21
<u>Debbie L. v. Galadriel R. (In the matter of the guardianship of Victoria R.)</u> , 2009-NMCA-007, ¶6, 145 N.M. 500.....	passim
<u>Gutierrez v. Connick</u> , 2004-NMCA-017, 135 N.M. 272.....	21
<u>Navajo Academy, Inc. v. Navajo United Methodist Mission School, Inc.</u> , 109 N.M. 324, 785 P.2d 235(1990).....	9
<u>Ridenour v. Ridenour</u> , 120 N.M. 352, 901 P.2d 770 (Ct. App. 1995).....	7
<u>Ridgway v. Ridgway</u> , 94 N.M. 345, 610 P.2d 749 (1980).....	6, 7
<u>Roth v. Bookert (In the matter of the adoption of J.J.B.)</u> , 119 N.M. 638, 894 P.2d 994 (1995).....	7, 10
<u>Selmeczki v. New Mexico Dept. of Corrections</u> , 2006-NMCA-024, 139 N.M. 122.....	18
<u>State v. Cleve</u> , 1999-NMSC-017, 127 N.M. 240	14
<u>State v. Elliott</u> , 89 N.M. 756, 557 P.2d 1105 (1977).....	14
<u>Vest v. New Mexico Human Services Dept. (In the matter of the adoption of Francisco A.)</u> , 116 N.M. 708, 866 P.2d 1175 (Ct. App. 1993)	6, 9, 10
<u>Woolwine v. Furr's, Inc.</u> , 106 N.M. 492, 745 P.2d 717 (Ct. App. 1987).....	18

STATUTES

NMSA 1978, Section 40-10B-1 (2001).....	9
NMSA 1978, Section 40-10B-2 (2001).....	9
NMSA 1978, Section 40-10B-2(A) (2001).....	9, 10, 11
NMSA 1978, Section 40-10B-2(B) (2001).....	11
NMSA 1978, Section 40-10B-2(C) (2001).....	11
NMSA 1978, Section 40-10B-3(A) (2001).....	9
NMSA 1978, Section 40-10B-3(C) (2001).....	9
NMSA 1978, Section 40-10B-8 (2001).....	13
NMSA 1978, Section 40-10B-8(A) (2001).....	13, 16
NMSA 1978, Section 40-10B-8(B) (2001).....	13
NMSA 1978, Section 40-10B-8(B)(1) (2001).....	13, 14, 15
NMSA 1978, Section 40-10B-12 (2001).....	11, 12
NMSA 1978, Section 40-10B-12(A) (2001).....	10
NMSA 1978, Section 40-10B-12(B) (2001).....	10, 11
NMSA 1978, Section 40-10B-13 (2001).....	12
NMSA 1978, Section 40-10B-13(B) (2001).....	12
NMSA 1978, Section 40-10B-14 (2001).....	11

SUMMARY OF PROCEEDINGS

Appellees, Brian and Peggy Delahoussaye (hereafter “Grandparents”), provide the following summary in addition to the Summary of Proceedings set forth by Appellant, Freedom Cheteni (hereafter “Father”) in his Brief in Chief.

An initial hearing was held in this case on October 27, 2008 on Julie Delahoussaye’s (hereafter “Mother”) Emergency Motion for Ex Parte Custody or For an Emergency Hearing Regarding Custody. [RP 71][BIC 2] The court’s order from that hearing provided that Grandparents would have sole legal and physical custody of the minor child, Patrick (hereafter “Child”), in the interim while Father and Mother’s custody case was pending. [RP 72] Grandparents had authority to make all legal custody decisions for child. Id. The court provided Mother and Father with a timesharing arrangement. Id.

The court commented that in determining custody, it would rely heavily on a custody evaluation and the situation of the parties. The court pointed out that Mother did not work and Father was in the United States on a visa and at that time, had no permanent right to stay in the country. There was “a lot of stuff” in the air. [CD 3, 10-27-08, 3:17:21-3:17:49]

During the hearing, the district court addressed Mother and Father and discussed centering on the best interests of Child. [CD 3, 10-27-08, 3:01:18-3:03:25]

The court stated it was interested in the best interests of Child and it could not say that loud or often enough. [CD 3, 10-27-08, 3:18:46-3:18:53]

On March 5, 2009, the district court held a hearing on Father's motion for judicial review of the interim custody order. [BIC 4-5] The court commented that everyone needed to figure out what is in Child's best interests and discussed the problems created for kids going through custody disputes. [CD 3, 3-5-09, 5:07:14-5:08:35] The court heard nothing during the hearing to indicate its prior decision to trust Grandparents to put stability in this dispute was anything but the correct decision. [CD 3, 3-5-09, 5:08:55-5:09:09] The court ordered Grandparents to retain temporary sole legal and primary physical custody. [RP 224] Grandparents were joined as parties to the case at Father's request. [RP 225] The court also granted Father's request for overnight visits in addition to other visitation. [RP 224]

During a discussion with the court regarding discovery, Mother's attorney requested access to Father's immigration records. [BIC 5] The court responded Father's immigration status was relevant to custody. The court told Father to cooperate with discovery requests and that he would be sorry if he didn't and happier if he did. [CD 3, 3-5-09, 5:15:40-5:15:00] The court felt Father's immigration status was relevant to Father's request for custody. [BIC 5-6]

The next hearing in the case occurred on April 30, 2009 on the court's Order to Show Cause. [RP 256] Father was not present as he was in a detention facility in El Paso, Texas pending deportation since April 15, 2009. [BIC 6-7] During the hearing, Mother's attorney told the court she was trying to get information on Father's immigration status. The court stated it wanted Mother to have the information and that issue was more primary at that point in time than child support. [CD 3, 4-30-09, 1:41:28-1:41:44] At a subsequent hearing on May 28, 2009, the court again stated that Father's immigration information was very important. [BIC 7]

During the district court's August 31, 2009 hearing on pending motions, the court found that Child was safe, well protected, and had not been subject to abuse or neglect while in Grandparents' custody. Considering the circumstances, Child continued to be in reasonable custody with Grandparents. [CD 3, 8-31-09, 2:18:37-2:18:55] At that time, Child had been in the legal and physical custody of Grandparents since October 2008. [RP 71-72]

The district court issued two notices for a hearing to occur on October 19, 2009. The first notice, filed September 23, 2009, noticed the parties for a hearing on "custody and relocation". [RP 350] The second notice, filed October 1, 2009, noticed the parties for a hearing on "all motions and orders to show cause". [RP 375]

The court made clear at the beginning of the October 19, 2009 hearing, it intended to fully resolve the case that day. [BIC 10]

Father was prepared to call witnesses at the October 19, 2009 hearing. He presented testimony from his immigration attorney, Rebecca Robledo, as to his status in the country. [CD 3, 10-19-09, 1:39:25-1:58:10] Father was also prepared to call a witness to testify Father was able to care for Child and had a network of support. [CD 3, 10-19-09, 1:58:31-1:59:09] The witness was not available until 3:30 p.m.; however, the Court allowed Father to offer a tender as to the witness' testimony. Id. The court later gave Father the opportunity to call his witness but told Father it would accept his previous tender. Father decided it was not necessary to call the witness. [CD 3, 10-19-09, 3:34:58-3:35:13]

The court questioned Father about the best interests of Child. During the discussion with Father, the court stated it was concerned about Father's immigration status. The court, as well as the other parties, then questioned Father about his ability to support Child as he was not working. [CD 3, 10-19-09, 2:03:55-2:16:24] In questioning Mother, the court recognized that Child was totally dependent on Grandparents for support since Child's birth. [CD 3, 10-19-09, 2:26:19-2:26:49]

In announcing the district court's decision, the court stated that the touchstone to the court is Child's best interests. [CD 3, 10-19-09, 3:35:25-3:35:35]

The court did not believe Father was a bad person, but he was remarkably uninformed about what was in the best interests of Child. [CD 3, 10-19-09, 3:38:06-3:38:17]

Although the court granted Grandparents kinship guardianship, it provided timesharing for Father. In addition to telephonic visits three days a week, the court allowed father supervised visits at Families and Youth, Incorporated, five days a week for four hours a day when Father was in Las Cruces. The court further stated that when social workers believed more flexibility should be allowed such as unsupervised visits, it would be done. [CD 3, 10-19-09, 3:39:45-3:40:50] The court told Father that he could move for a judicial review of timesharing when Father's immigration situation resolved. [BIC 13] The court ordered Grandparents to keep Father informed of Child's activities, school, and events in his life. The court did not anticipate either party disappearing from Child's life and stated that fathers are just as important as mothers. [CD 3, 10-19-09, 3:41:50-3:42:36]

In requiring Father to sign a release of his immigration records, the court reasoned that it wanted someone other than Father to tell the court Father's immigration status. It was a form of verification. [CD 3, 10-19-09, 3:52:32-3:52:45] The court found that Father was not credible. [CD 3, 10-19-09, 3:49:30-3:49:35][BIC]

ARGUMENT

I. THE DISTRICT COURT'S ORDER APPOINTING GRANDPARENTS AS KINSHIP GUARDIANS IS IN THE BEST INTERESTS OF CHILD AND SHOULD BE AFFIRMED.

A. District court's finding that best interests of Child is in the custody of grandparents may not be disturbed on appeal.

The district court determined at the initial hearing on October 27, 2008 that neither parent was able to care for Child and it was in Child's best interests to be in the custody of Grandparents. Supra p. 1. The court made it clear that the best interests of Child was the center of this case and Child's best interests was the court's main concern. Supra pp. 1-2. In subsequent hearings through the final hearing on October 19, 2009, the district court remained consistent in its determination that Child's best interests was paramount. Supra pp. 1,2,4. Also, the district court continually found that Child's best interests were in the legal and physical custody of Grandparents. Supra pp. 1-5. In determining custody, a child's welfare and best interests are the paramount consideration for the court. Vest v. New Mexico Human Services Dept. (In the matter of the adoption of Francisco A.), 116 N.M. 708, 713, 866 P.2d 1175 (Ct. App. 1993). The welfare of the child is of primary importance and the trial court has wide discretion in awarding custody. Ridgway v. Ridgway, 94 N.M. 345, 347, 610 P.2d 749 (1980).

It is also well established that the state has compelling interest in the welfare of its children. Ridenour v. Ridenour, 120 N.M. 352, 355, 901 P.2d 770 (Ct. App. 1995). When parents' rights to raise their children are balanced against the best interests and rights of children, parents' rights are secondary. Id. The presumption that when a family breaks up, custody should go to the natural parent is never conclusive. Roth v. Bookert (In the matter of the adoption of J.J.B.), 119 N.M. 638, 652, 894 P.2d 994 (1995). The Supreme Court stated:

Custody based upon the biological parent-child relationship may be at odds with the best interests of the child. When that happens, the best interests of the child must prevail. Id.

It is also well established that the trial court is best suited to find the delicate balance of the child's best interests in a natural parent-child relationship measured against custody in other persons. Id. at 654. The decision of the trial judge who sees the parties, observes their demeanor, and hears the testimony will not be overturned unless there is a manifest abuse of discretion. Ridgway, 94 N.M. at 347. A determination of the child's best interests when balancing the interest of a natural parent-child relationship against custody and other persons cannot be based upon the written appellate record. Roth, 119 N.M. at 654.

In his appeal, Father does not make any challenge to the sufficiency of the evidence supporting the district court's finding that the best interests of Child is in

the sole legal and physical custody of Grandparents. For that reason, Father is bound by the facts as found by the trial court. Debbie L. v. Galadriel R. (In the matter of the guardianship of Victoria R.), 2009-NMCA-007, ¶6, 145 N.M. 500, 502. It is not the appellate court's function to reweigh the evidence. Absent a proper challenge to the sufficiency of the evidence, appellant is bound by the facts found by the district court. Id.

This case begins and ends with the best interests of Child. From the beginning, it has been in Child's best interests to be in the legal and physical custody of Grandparents. The findings by the district court, first on October 27, 2008, that Mother and Father were not able to provide the necessary care and support for child are not challenged by Father. The district court's findings remained unchanged over the next year and through the final hearing on October 19, 2009. The district court was updated as to the status of Child over the course of the year through five separate hearings. See Supra pp. 1-5.

The district court's finding that Child's best interests is in the sole legal and physical custody of Grandparents is well grounded, and not challenged by Father.

B. The requirements of kinship guardianship were met and found by the district court.

It is the state's policy that when neither parent is able to provide appropriate

care, guidance, and supervision to a child, a child should be raised by family members. NMSA 1978, Section 40-10B-2(A) (2001). This policy is found within the Kinship Guardianship Act (hereafter “KGA”). NMSA 1978, Section 40-10B-1 to Section 40-10B-15 (2001). Grandparents meet the definition of a qualified person seeking appointment as kinship guardians. Grandparents qualify as kinship caregivers as Child resided with them and they provided Child with care, maintenance, and supervision consistent with the duties and responsibilities of a parent of Child. See NMSA 1978, Section 40-10B-3(A) and (C). Father does not dispute Grandparents meet the definition of a kinship caregiver.

The policy and purpose of the KGA as announced in Section 40-10B-2 is consistent with the concepts of custody and a child’s best interests. The paramount consideration for the court in custody cases is the child’s welfare and best interests. Vest, 116 N.M. at 713. In dealing with children in custody cases, the district court exercises its equitable powers. Id. “The touchstone of equity is that it is flexible; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all parties.” Id.; citing Navajo Academy, Inc. vs. Navajo United Methodist Mission School, Inc., 109 N.M. 324, 329, 785 P.2d 235 (1990).

New Mexico courts recognize the importance of a district court maintaining

flexibility in fashioning decrees in the child's best interests. Vest, 116 N.M. at 714. Because parental rights are secondary to the best interests and welfare of a child, flexibility allows the district court to consider temporary as well as permanent custody arrangements. Roth 119 N.M. at 654. The district court should consider granting visitation rights to any of the parties. Equity and flexibility allow the court to devise a custody arrangement that, while granting custody to a non-parent, does not permanently sever the child from his or her natural parents. Id. at 654-655. A child is not to be awarded like a trophy to whichever party wins the litigation. A child's best interests may be served by applying equitable principles. Id. at 654.

The KGA follows this policy of equity and flexibility by recognizing there are times when the natural parents are unable or unwilling to provide appropriate care, guidance or supervision to their child. Section 40-10B-2(A). While it is preferred that children be raised by their natural parents, in cases where parents are unable or unwilling to provide support, the Court should look to family members or kinship caregivers to raise the child. Id. Further, the KGA recognizes that appointment of a kinship guardianship may not be permanent. Under the KGA, any person, including the child, may move for revocation of a guardianship created pursuant to the KGA. NMSA 1978, Section 40-10B-12(A) (2001). If the district court finds by a preponderance of the evidence that a change in circumstances has

been proved, and that revocation is in the best interests of the child, the court shall revoke the guardianship. Section 40-10B-12(B). The KGA provides the district court continuing jurisdiction in the matter. NMSA 1978, Section 40-10B-14 (2001).

In Child's case, the district court used its equitable powers and followed the policy and purpose of the KGA. The court found neither parent was able to provide appropriate care, guidance, and supervision for Child. [RP 473] Therefore, Child would be in the legal and physical custody of Grandparents. Id. These findings follow the policy of the KGA announced in Section 40-10B-2(A). The court found Child resided with Grandparents for a period of more than 90 days, Grandparents have been providing for the care of Child since Child's birth, and neither parent was capable of providing a financially or emotionally stable home. [RP 473] These findings meet the intent for use of the KGA set forth in Section 40-10B-2(B). Further, Grandparents pursued a guardianship under the KGA to effect a legal relationship between themselves and Child who was placed in their sole legal custody and care. See Section 40-10B-2(C).

The KGA was not used or invoked by Grandparents to terminate either Mother or Father's parental rights. See Debbie L. 145 N.M. at 502 (nothing in KGA suggests that KGA may be invoked to terminate a parent's rights). The district court did not do so. As discussed, the kinship guardianship is revocable under

Section 40-10B-12. Id. The district court recognized this principle by ordering a judicial review in 24 months if nothing is brought before the court sooner. [RP 476] The district court ordered that Mother and Father retain their parental rights and duties as authorized by NMSA 1978, Section 40-10B-13 (2001). Debbie L. 145 N.M. at 502-503. The district court allowed timesharing with Mother and Father. [RP 474-475] Because Mother lives in Las Cruces, Grandparents were authorized to make the decisions regarding visitation between Mother and Child. Section 40-10B-13(B); [RP 475] Due to Father's circumstances, the district court tailored specific timesharing arrangements for Father but allowed for flexibility. Supra p. 5; [RP 474-475] The district court also ordered Mother and Father to pay child support, a parental duty and obligation, to Grandparents. [RP 475]

Finally, the district court acknowledged its continuing jurisdiction. Debbie L., 145 N.M. at 503. The court told Father that his timesharing would be increased to allow for unsupervised visits if deemed appropriate by social workers. Supra p. 5. The court also informed Father he could move for a judicial review of timesharing once his immigration situation resolved. Id. The district court made it clear that Father was to remain a part of Child's life by ordering Grandparents to keep Father informed of Child's activities, school, and events. Id. The court did not anticipate that either Mother or Father would disappear from Child's life. Id. A guardianship

under the KGA is not intended to, “...completely and irrevocably sever the relationship between a parent and the child, nor did it intend for a KGA guardianship to be a one-size-fits-all remedy.” Debbie L., 145 N.M. at 503.

The elements of proof for an appointment of a kinship guardianship are found in NMSA 1978, Section 40-10B-8 (2001). Subsection A allows the district court to make the appointment if it finds: 1) a qualified person seeks appointment; 2) venue is proper; 3) required notices have been given; 4) requirements of subsection B have been proved; and 5) the best interests of the minor child will be served by the requested appointment. Section 40-10B-8(A). The only challenge Father makes to these findings by the district court is to number 4, the requirements of subsection B have been proved.

Under the KGA, a guardianship may be appointed if any one of three conditions is met under Section 40-10B-8(B). The first condition allows appointment of a kinship guardianship if, “*a* parent of the child is living and has consented in writing to the appointment of a guardian and the consent has not been withdrawn.” Section 40-10B-8(B)(1)(emphasis added). In his appeal, Father does not challenge the findings of the court that Mother validly consented to the appointment of Grandparents as guardians, and her consent was never withdrawn. Father’s challenge is that Mother could not effectively consent over Father’s

objection. [BIC 24-25] Father's argument is that for subsection B(1) to apply, he must also consent to the guardianship. Id.

The legislature specifically uses the language "a parent" in Section 40-10B-8(B)(1). This language is unambiguous. The legislature could have simply used the language "the parents of the child" rather than "a parent" in Section 40-10B-8(B)(1) if it intended both parents consent to the appointment of a guardian. In interpreting a statute, the court ascertains and gives effect to the intent of the legislature. State v. Cleve, 1999-NMSC-017, ¶ 8, 127 N.M. 240, 243. In ascertaining the intent of the legislature, the court looks first to the plain language of the statute. Id. Statutes are to be given effect as written and where they are free from ambiguity, there is no room for statutory construction. State v. Elliott, 89 N.M. 756, 757, 557 P.2d 1105 (1977). The unambiguous language in Section 40-10B-8(B)(1) must be read and given effect as it is written by the legislature.

In Debbie L. v. Galadriel R., the mother and father of a child leave the child in the care of petitioners. Petitioners assume the day to day care of the child. A parent-child bond is established with petitioners. Mother later decides she wants to resume care of the child and asks that child be returned to her. Petitioners refuse to return the child. Petitioners begin legal proceedings seeking recognition of their relationship with the child. The district court applies the KGA and awards

petitioners all legal rights and duties of a parent with the exception of the right to consent to the child's adoption. The court provides the mother with substantial visitation. Mother appealed. Debbie L., 145 N.M. at 501.

In Debbie L., the appellate court analyzes the KGA and upholds the district court's ruling, holding that extraordinary circumstances exist within the meaning of the KGA. Id. at 508. The court of appeals then sets forth an alternative ground to support petitioners as KGA guardians. The father consented to the kinship guardianship. Id. at 509. In Debbie L., as in the present case, the district court found that one parent consented to the guardianship pursuant to Section 40-10B-8(B)(1). Id. at 510. Therefore, the proceeding was not a pure dispute between natural parents and third parties. One parent agreed that placing the child with a third party was in the child's best interests. Id. Father's consent gave the appellate court grounds to find the appointment of petitioners as guardians appropriate. Id. at 509-510.

As in Debbie L., the district court's unchallenged finding that Mother consented to the appointment of a guardian and her consent was not withdrawn, is sufficient grounds to meet the requirements of Section 40-10B-8(B)(1). Father argues that the requirements of subsection B(1) provide safeguards from misuse of the KGA, and serve as a check on circumstances in which a kinship guardianship

may be used. [BIC 24] In analyzing the use and purpose of the KGA, the ultimate check or safeguard is the requirement the best interests of the child will be served by the appointment. Section 40-10B-8(A). “Where two legal parents disagree over where the best interests of their child lay, neither parent has an absolute, unilateral right to decide where the child’s best interests lay.” Debbie L., 145 N.M. at 510. Allowing Father the unilateral right to prevent a kinship guardianship as he argues in his brief, gives Father, not the court, the ultimate say in Child’s best interests.

Father’s argument ignores the fact that the district court found at the final hearing that both Mother and Father were unable to provide adequate care, maintenance, and supervision for Child. [RP 473] This finding is not challenged by Father. If Father can unilaterally prevent a kinship guardianship, then the district court must try to determine custody between two unfit parents. There is not any court that will transfer custody of a child to a parent who is found to be unwilling or unable to care for their child. Debbie L., 145 N.M. at 504 (footnote 3). In asking the court of appeals to reverse the district court in this case, it is not clear who Father suggests take custody of Child in light of the undisputed findings that both Father and Mother are unable to care for Child.

Father complains that he never consented to placement of Child with Grandparents [BIC 23] However, he never disputes the district court’s decision to

place Child with Grandparents was supported by substantial evidence. [BIC 23] Placement with Grandparents initially began on October 27, 2008, and continued until the final hearing on October 19, 2009. Supra pp. 1,3. Father does not challenge or dispute the district court's decision that Grandparents retain custody during that period was supported by substantial evidence and in the best interests of Child.

Child has been in Grandparents care since his birth. [RP 473] A kinship guardianship gives effect to Grandparents' legal relationship with Child. Through the court's order, Father was provided the meaningful opportunity to reestablish a parent-child relationship with Child. At some point, he may eventually reassume the role of Child's caregiver. Father does not have the right to terminate, at his whim, the emotionally and financially stable relationship that now exists between Grandparents and Child due to Father's inability to care for Child. Debbie L., 145 N.M. at 509.

II. DISTRICT COURT HAD SUFFICIENT INFORMATION TO ENTER ITS ORDER ON KINSHIP GUARDIANSHIP AND THE DISTRICT COURT'S ORDER WAS NOT PREMATURE.

A. Father had notice of a final hearing and made no objection to proceeding to a hearing on the merits.

The district court issued two notices for a final hearing on October 19, 2009.

The first notice issued September 23, 2009, stated that the nature of the hearing was “custody and relocation”. [RP 350] This notice provided parties notice that custody of Child was to be heard on October 19, 2009. The other notice provided by the court stated the nature of the hearing was for “all motions and orders to show cause”. [RP 375]

Father did not make any objection to proceeding to a final hearing on October 19, 2009. By failing to object at the hearing, Father did not preserve this issue for appeal. Father admits he made no argument against proceeding to a final hearing on October 19, 2009. [BIC 29] Father points out that Mother’s counsel told the district court she was not prepared for a hearing on all issues that day. [BIC 10]

Counsel’s comment that she was not prepared to proceed to a final hearing does not preserve the issue for Father. The appellate court generally does not review a matter not passed upon by the trial court. Selmeczki v. New Mexico Dept. of Corrections, 2006-NMCA-024, ¶23, 139 N.M. 122, 129. In Selmeczki, the appellate court stated that appellant may not preserve an argument raised by an opponent. Id. at 129-130; citing Woolwine vs. Furrs, Inc., 106 N.M. 492, 496, 745 P.2d 717 (Ct. App. 1987). The appellate court declined to hear the issue not preserved. Id. at ¶24. Likewise, Father failed to preserve any argument that he did not receive adequate notice of the October 19, 2009 hearing or that he was not

prepared to proceed.

B. Father and district court were prepared to proceed to a final hearing.

The record demonstrates Father was prepared to proceed to a final hearing on custody on October 19, 2009. His failure to object is evidence he was prepared to go forward. In addition, Father was prepared to present witnesses on his behalf regarding custody. Father called his immigration attorney to discuss his status in the United States. Supra p. 4. Father was also prepared to present a witness to testify about Father's ability to care for Child and his network of support. Id. Other evidence Father was prepared to proceed to a final hearing includes the fact that on August 14, 2009, Father filed a motion for summary judgment seeking to dismiss Grandparents' petition for kinship guardianship and then followed up with a brief in support of his motion on October 13, 2009. [RP 318, 428] In addition, Father filed a motion to dismiss Grandparents' petition for appointment as kinship guardians on October 13, 2009. [RP 416] Father's motions and brief contain extensive factual allegations and legal research. From his pleadings, it is evident Father was well prepared to proceed to a final hearing. The record from the October 19, 2009 hearing demonstrates Father had a full and fair opportunity to call his witnesses, to provide testimony, and to be heard. He never made any objection to the contrary.

The district court made clear that it was prepared to proceed to a final

hearing. The court issued a notice of hearing on custody. [RP 350] As of the October 19, 2009 hearing, Mother and Father's case had been pending almost one year since October 27, 2008. Supra p. 1. Prior to the October 19, 2009 hearing, there were four separate hearings in the case. Supra pp. 1-3. At the beginning of the October 19, 2009 hearing, the district court announced it was proceeding on all issues and would fully resolve the case that day. [BIC 10] The court further stated that it had "heard it all at least once". [BIC 11]

Even though Father argues the district court's order was premature, he makes no argument or challenge that the evidence supported the district court's finding that the best interests of Child was in the custody of Grandparents.

III. REQUIRING FATHER TO DISCLOSE HIS IMMIGRATION RECORDS WAS WITHIN THE DISCRETION OF THE DISTRICT COURT AND RELEVANT TO ONGOING CUSTODY MATTERS.

Father is a citizen of Zimbabwe. [BIC 3] He was initially in the United States on a student visa. Id. The district court stated at the March 5, 2009 hearing that Father's immigration status was relevant to custody. Supra p. 2. During the April 30, 2009 hearing, the court remarked that Father's immigration status was more primary than child support. Supra p. 3. At a hearing on May 28, 2009, the district court stated Father's immigration information was very important. Id. Father understood the importance of his immigration status as he called his

immigration attorney as a witness at the final hearing on October 19, 2009. [BIC 11]

As of the October 19, 2009 hearing, Father's future immigration status in the United States was undetermined. Id.

In determining custody, the court was interested and concerned about Father's immigration status over the course of this case. At the final hearing, the court told Father he could ask for a judicial review once his immigration situation resolved. Supra p. 5. As part of the court's custody order, it required Father to sign a release for Mother's attorney to obtain Father's immigration records. [BIC 14]

A district court has broad but not unfettered discretion in awarding visitation. Gutierrez v. Connick, 2004-NMCA-017, ¶19, 135 N.M. 272, 277. The court's requirement that Father sign the release was part of its visitation order as the court required the release as a condition for Father to see Child. [BIC 14] A district court has broad discretion and great flexibility to fashion custody arrangements in the best interests of children. CYFD v. Senaida C., 2008-NMCA-007, ¶19, 143 N.M. 335, 338. All conflicts are resolved and inferences indulged in favor of the district court's decision. Id. The standard on appeal is an abuse of the district court's discretion and an abuse of discretion will only be found when the district court's ruling is clearly against logic and effect of the facts and circumstances. Id.

Because Father's immigration status in the United States is undetermined, it

is logical, considering the facts and circumstances of this case, for the court to order him to sign a release of his records. Such a condition is within the court's broad discretion and is logical considering the court's repeated statements about the importance of Father's immigration status. Cf. Barela vs. Barela, 91 N.M. 686, 688, 579 P.2d 1253 (1978) (if a parent does not support his child when legally required to do so, that parent's rights to associate with the child can be terminated by the court). Common sense dictates the importance of knowing Father's immigration status in the United States in determining how to establish current timesharing and custody and how to establish it in the future, depending on Father's status.

Making the district court's ruling more reasonable, is the fact the district court found Father was not credible. Supra p. 5. The finding of Father's credibility is determined by the trial court only and the appellate court does not make any determination of the credibility of witnesses. Clayton v. Trotter, 110 N.M. 369, 371, 796 P.2d 262 (Ct. App. 1990). The district court wanted some verification of Father's immigration status. Supra p. 5. The fact the district court wanted someone other than Father, who is not credible, to verify Father's immigration status is logical and within the court's broad discretion.

CONCLUSION

The district court's order granting Grandparents a kinship guardianship is in the best interests of Child. The court's order is consistent with the policy and purpose of the KGA. The guardianship gives effect to the legal relationship between Grandparents and Child whom they have been caring for since his birth. The evidence and the court's findings meet all the requirements of Section 40-10B-8. The court's order requires Grandparents to keep Father informed and involved in Child's life. Further, the court leaves the door open on timesharing between Father and Child to be expanded and potentially, for Father to be a caregiver and custodian for Child.

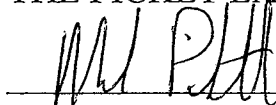
If custody were to be removed from Grandparents, the court and Child would be placed in a very undesirable position. The options for the court would be to grant custody either to Mother or Father, two parents the court found to be unfit at this time. The other option would be to find another fit caregiver for Child. None of these options make sense or are in the best interests of Child when Grandparents are available and willing to provide emotional and financial support to Child.

The court's order granting Grandparents a kinship guardianship should be affirmed. Further, the court's requirement that Father sign a release of his immigration records is within the court's sound discretion and should also be

affirmed.

RESPECTFULLY SUBMITTED,

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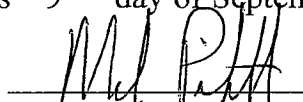
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing instrument to Edward Ricco, RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A., P.O. Box 1888, Albuquerque, New Mexico 87103 and Marci E. Beyer, Esq., P.O. Box 2857, Las Cruces, New Mexico 88004-2857 this 9th day of September, 2010.


MARK L. PICKETT