IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

FREEDOM CHETENI,

Petitioner-Appellant,

COPY

vs. No. 30,041

JULIE ANN DELAHOUSSAYE,

Respondent-Appellee, and

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
JUL 14 2010

BRIAN DELAHOUSSAYE and
PEGGY DELAHOUSSAYE,

Petitioners-Appellees,

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

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

The Honorable Michael T. Murphy, Judge

BRIEF IN CHIEF

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Table of Authorities iii

Summary of Proceedings 1

Nature of the Case 1

Summary of Facts and Proceedings 1

Argument 16

I. THE DISTRICT COURT ERRED IN APPOINTING CHILD'S GRANDPARENTS AS KINSHIP GUARDIANS IN THE MIDST OF THIS CUSTODY DISPUTE. THE COURT'S ORDER GRANTING KINSHIP GUARDIANSHIP SHOULD BE SET ASIDE. 16

A. The Kinship Guardianship Act Has No Application in Child Custody Disputes Between Parents. 16

B. Even if the Kinship Guardianship Act Were Applicable to This Case, the District Court Entered Its Guardianship Order Prematurely and with Insufficient Information. 29

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN CONDITIONING FATHER'S RIGHT OF VISITATION WITH CHILD ON FATHER'S CONSENT TO COMPLETE DISCLOSURE OF HIS IMMIGRATION RECORDS. 33

Conclusion 39

Statement Regarding Oral Argument 40

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Alfieri v. Alfieri,
105 N.M. 373, 733 P.2d 4 (Ct. App. 1987) 35

Barela v. Barela,
91 N.M. 686, 579 P.2d 1253 (1978) 37

Cheesecake Factory, Inc. v. Baines,
1998-NMCA-120, 125 N.M. 622, 964 P.2d 183 34

Cook v. Brownlee,
54 N.M. 227, 220 P.2d 378 (1950) 20

Debbie L. v. Galadriel R. (In re Guardianship of Victoria R.),
2009-NMCA-007, 145 N.M. 500, 201 P.3d 169 (filed 2008),
cert. denied, 2008-NMCERT-012, 145 N.M. 571, 203 P.3d 102 . . . . 20, 22

Grant v. Cumiford,
2005-NMCA-058, 137 N.M. 485, 112 P.3d 1142 29

Greene v. French,
97 N.M. 493, 641 P.2d 524 (Ct. App. 1982) 28, 40

Helen G. v. Mark J.H. (In re Adoption Petition of Bobby Antonio R.),
2008-NMSC-002, 143 N.M. 246, 175 P.3d 914 (filed 2007) 22

Jeantete v. Jeantete,
111 N.M. 417, 806 P.2d 66 (Ct. App. 1990) 33

Lopez v. Lopez,
97 N.M. 332, 639 P.2d 1186 (1981) 39

Lozano v. GTE Lenkurt, Inc.,
1996-NMCA-074, 122 N.M. 103, 920 P.2d 1057 . . . . 32, 33

Mills v. New Mexico State Board of Psychologist Examiners,
1997-NMSC-028, 123 N.M. 421, 941 P.2d 502 31

Padilla v. Montano,
116 N.M. 398, 862 P.2d 1257 (Ct. App. 1993) 29

Paragon Foundation, Inc. v. New Mexico Livestock Board,
2006-NMCA-004, 138 N.M. 761, 126 P.3d 577 33

Perkins v. Department of Human Services,
106 N.M. 651, 748 P.2d 24 (Ct. App. 1987) 29

Pra v. Gherardini (Ex parte Pra),
34 N.M. 587, 286 P. 828 (1930) 20

Roth v. Bookert (In re Adoption of J.J.B.),
119 N.M. 638, 894 P.2d 994 (1995) 20

In re Ruben D.,
2001-NMCA-006, 130 N.M. 110, 18 P.3d 1063 17

Segal v. Goodman,
115 N.M. 349, 851 P.2d 471 (1993) 29

Selmeczki v. New Mexico Department of Corrections,
2006-NMCA-024, 139 N.M. 122, 129 P.3d 158 30

Shorty v. Scott,
87 N.M. 490, 535 P.2d 1341 (1975) 20, 27

Sims v. Sims,
1996-NMSC-078, 122 N.M. 618, 930 P.2d 153 33

Sitterly v. Matthews,
2000-NMCA-037, 129 N.M. 134, 2 P.3d 871 17

State ex rel. Children, Youth & Families Department v. Brandy S.,
2007-NMCA-135, 142 N.M. 705, 168 P.3d 1129 17

State ex rel. Children, Youth & Families Department v. Lorena R.
(In re Ruth Anne E.), 1999-NMCA-035, 126 N.M. 670, 974 P.2d 164 .. 31

State ex rel. Children, Youth & Families Dep't v. Pamela R.D.G.
(In re Pamela A.G.), 2006-NMSC-019, 139 N.M. 459, 134 P.3d 746 ... 17

State ex rel. Children, Youth & Families Department v. A.H.,
1997-NMCA-118, 124 N.M. 244, 947 P.2d 1064 37

State v. Doe,
99 N.M. 456, 659 P.2d 908 (Ct. App. 1983) 29

State v. Torres,
1999-NMSC-010, 127 N.M. 20, 976 P.2d 20 .... 33, 38

State v. Whitaker,
110 N.M. 486, 797 P.2d 275 (Ct. App. 1990) 25

Thatcher v. Arnall (In re Guardianship of Arnall),
94 N.M. 306, 610 P.2d 193 (1980) 30

Thomas-Lott v. Earles (In re Guardianship of Ashleigh R.),
2002-NMCA-103, 132 N.M. 772, 55 P.3d 984 .... passim

Williams v. Rio Rancho Public Schools,
2008-NMCA-150, 145 N.M. 214, 195 P.3d 879 35

CASES FROM OTHER JURISDICTIONS

Biamby v. Biamby,
494 N.Y.S.2d 741 (N.Y. App. Div. 1985) 35

Boswell v. Boswell,
721 A.2d 662 (Md. 1998) 37, 38

Camacho v. Camacho,
218 Cal. Rptr. 810 (Cal. Ct. App. 1985) 38

In re Cameron C.,
723 N.Y.S.2d 796 (N.Y. App. Div. 2001) 35, 37

Duling v. Gristede's Operating Corp.,
266 F.R.D. 66 (S.D.N.Y. 2010) 36

Farmer v. Farmer,
735 N.E.2d 285 (Ind. Ct. App. 2000) 35

Hastings v. Rigsbee,
875 So. 2d 772 (Fla. Dist. Ct. App. 2004) 37

Kent v. Burdick,
591 So. 2d 994 (Fla. Dist. Ct. App. 1991) 38, 39

Lehr v. Robertson,
463 U.S. 248 (1983) 22

Maxwell v. LeBlanc,
434 So. 2d 375 (La. 1983) 35

McCain v. Bradford (In re Guardianship of S.M.),
172 P.3d 244 (Okla. Civ. App. 2007) 28

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66 Cal. Rptr. 417 (Cal. Ct. App. 1968) 35

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415 P.2d 571 (Ariz. Ct. App. 1966) 35

STATUTES, REGULATIONS, AND RULES

NMSA 1978, § 12-2A-5(A) (1997) 25, 26

NMSA 1978, § 32A-4-31 (2005) 18

NMSA 1978, § 40-10B-1 to -15 (2001) .... passim

NMSA 1978, § 40-10B-2(A) (2001) 26

NMSA 1978, § 40-10B-2(B) (2001) 20, 26

NMSA 1978, § 40-10B-2(C)(1) (2001) 20, 26

NMSA 1978, § 40-10B-3(A) (2001) 20

NMSA 1978, § 40-10B-3(C) (2001) 20

NMSA 1978, § 40-10B-8(B) (2001) 21, 24, 25

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NMSA 1978, § 40-10B-8(B)(3) (2001) 26

NMSA 1978, § 40-10B-8(C) (2001) 22

NMSA 1978, § 40-10B-8(E) (2001) 35

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NMSA 1978, § 45-5-204(A) (1995) 18

8 C.F.R. § 103.21 36

Form 4-988 NMRA 25

Rule 11-706 NMRA .... passim

Rule 12-201(A) NMRA 16 n.1

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6 Marq. Elder's Advisor 149 (2004) 19

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19 Quinnipiac Probate L.J. 87 (2005) 18, 19, 22

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Summary of Proceedings

Nature of the Case

Although this matter was initiated as a parentage action to determine child support and custody between the parents of the child in question, who is now nearly five years old, the issues on appeal arise following transformation of the action into one under the Kinship Guardianship Act, NMSA 1978, § 40-10B-1 to -15 (2001) (hereinafter "KGA"). The district court granted a petition by the child's maternal grandparents, who were joined in the proceeding, for appointment as the child's kinship guardians. The child's father appeals the grant of kinship guardianship and related issues.

Statement of Facts and Proceedings

Appellant Freedom Cheteni ("Father") initiated this proceeding in October 2008 by filing in the district court against Appellee Julie Ann Delahoussaye ("Mother") a pro se petition to establish paternity, determine custody and timesharing, and assess child support with regard to the couple's then three-year-old child, Patrick ("Child"). (R.P. 41.) Paternity was not in dispute (R.P. 42); Father's goal in filing the petition was to obtain sole legal and physical custody of Child (R.P. 43). Father at the time had physical custody of Child which he obtained approximately two weeks earlier as a result of filing a domestic violence

proceeding which ultimately was dismissed. (R.P. 42; Tr. (10/27/08) 1:16:30-1:16:40; see R.P. 60-65.) The same day that Father's paternity petition was filed, Mother filed a response to the petition (R.P. 66) and an emergency motion to obtain custody of Child (R.P. 51). Mother sought immediate return of Child or an emergency hearing on custody and visitation. (R.P. 57.) Ultimately, she sought sole legal and primary physical custody of Child. (R.P. 67.)

The district court held a hearing on Mother's emergency custody motion on October 27, 2008. It heard testimony from Child's maternal grandparents, Brian and Peggy Delahoussaye (respectively, "Grandfather" and "Grandmother"; collectively, "Grandparents") as well as from Mother and Father regarding the present situation and the circumstances leading up to it. Father was represented by counsel at this hearing but shortly afterwards resumed his pro se status. (R.P. 70, 125, 220.)

The evidence at the custody hearing showed that Mother and Father developed an intimate relationship as college students in Colorado. Mother became pregnant and returned to Albuquerque to live with Grandparents, which she continued to do after Child was born in September 2005. Father came to live with them. After Grandparents moved to Las Cruces, Grandparents lived in one unit of a four-plex and Father, Mother, and Child lived in an adjoining unit until

the relationship between Mother and Father ended in October 2008 and Mother asked him to leave. Mother at that time was 24 years old and did not work full-time. Father, a citizen of Zimbabwe in the United States on a student visa, attended New Mexico State University in Las Cruces. Grandparents moved to another residence in Las Cruces in the summer of 2008 but continued to spend substantial time with Mother and Child and often had family meals with them. (Tr. (10/27/08) 1:30:00-1:33:00, 1:53:20-1:53:30, 2:54:20, 2:59:20-2:59:28.)

Grandparents testified that they and Mother were Child's primary caretakers and that Grandparents financially supported Mother and Child as well as Father while he lived with them. Grandfather is a physician who operated a clinic in Las Cruces. Grandmother worked flexible, part-time hours performing administrative work at the clinic. When asked why he was willing to provide support and not require Mother to find full-time work, Grandfather stated that it was his belief and Mother's that it was in the best interest of both Mother and Child for Mother to be a full-time parent. (Tr. (10/27/08) 1:53:30-1:54:20, 1:56:25-1:57:00, 2:36:45-2:37:00

Grandparents, Mother, and Father presented contradictory testimony regarding the fitness of either parent to have primary custody of Child. Mother testified about a rollover automobile accident that she claimed was caused by

Father's driving at excessive speed after arguing with her. Father testified to his view that Mother posed a danger to Child and that he believed it to be in Child's best interest that he have primary custody. (Tr. (10/27/08) 2:25:40-2:26:30, 2:49:05-2:49:07; see generally Tr. (10/27/08).)

The court remarked that allegations relating to Child's safety had been made by both parties and that it would order a Rule 11-706 NMRA ("Rule 706") expert evaluation. It awarded custody to Grandparents on an interim basis, emphasizing that the arrangement was temporary until the custody evaluation was performed. The court stated that it would be relying "fairly heavily" on the custodial evaluation in determining the ultimate outcome. (Tr. (10/27/08) 3:04:15-3:05:10, 3:08:50-3:09:00, 3:17:20-3:17:35.)

The court entered a written order awarding sole legal and physical custody of Child to Grandparents on an interim basis. (R.P. 71.) The court allowed Grandparents to determine the conditions of visitation by Mother. (R.P. 72 ¶ 5.) The court appointed a Rule 706 expert to make recommendations regarding custody and visitation. (Id. ¶ 9.)

Several months later, Father filed a motion (R.P. 87) and later a pro se amended motion (R.P. 127; see also R.P. 153 (supporting affidavit)) for judicial review of the interim custody order (then once amended, see R.P. 93). Father also

requested that Grandparents be made parties to the ongoing proceedings. (See R.P. 139.)

The amended motion was heard on March 5, 2009. At the hearing, the parties presented widely divergent testimony relating to the optimal custodial arrangements for Child. (See generally Tr. (3/5/09).) Grandmother testified that Mother was then living with Grandparents and was seeing Child all the time. (Tr. (3/5/09) 4:46:25-4:46:40.) The court stated that it was looking forward to receiving the Rule 706 expert report. (Tr. (3/5/09) 5:00:45.) The court ordered that sole legal and primary physical custody should remain with Grandparents on a temporary basis. Grandparents were ordered joined to the action as parties. (R.P. 223-26.)

Near the end of the hearing, counsel for Mother indicated that she intended to file a motion to compel discovery responses from Father. (Tr. (3/5/09) 5:12:50.) A dialog among counsel, the court, and Father followed concerning discovery issues raised by Mother. Counsel requested that Father be required to sign a Freedom of Information Act ("FOIA") request that counsel had furnished to him, authorizing release of Father's immigration records to counsel. The court admonished Father to cooperate with Mother's discovery requests or he would "be sorry." The court remarked that Father's immigration status was relevant to

whether Father would be given custody. In response to the Court's inquiry, Father stated that he remained lawfully in the country under his student visa although he was not then a student at NMSU and that he was in the process of adjusting his status and applying to become a permanent resident. (Tr. (3/5/09) 5:14:35-5:19:45.)

The court's written order following the hearing included language directing Father to execute a FOIA request for release of his immigration records to Mother's counsel. (R.P. 227.) Copies of the documents Father was ordered to execute were appended to the order. (R.P. 230-32.) The order was later amended. (See R.P. 236-46.) Father subsequently objected to the order and amended order. (R.P. 384.) He stated that he had made information regarding his current immigration status available to Mother's counsel, but he questioned counsel's recourse to his immigration file to investigate his "truthfulness." (R.P. 388 ¶ 32.)

Following the March 5, 2009, hearing, Mother filed a series of motions for order to show cause and discovery motions. These included a motion for order to show cause, filed on March 20, 2009, raising Father's failure to execute releases for disclosure of his immigration file. (R.P. 233.)

On April 15, 2009, Father was apprehended by immigration agents and confined in a detention facility in El Paso pending deportation, on the ground that

his student visa had expired and he was subject to immediate removal from the country. (See R.P. 331.)

On May 28, 2009, the court held a hearing on Mother's motions. Father, then in detention, did not appear. Counsel for Mother complained that she still had not received all the immigration information she had requested from Father. The court remarked that the information was "very important." (Tr. (5/28/09) 1:29:30 to 1:29:49.) The court entered an order finding that Father had not signed the release of his immigration records as required and ordering immigration officials to furnish Father's immigration records to the court. (R.P. 297-99; see also Tr. (5/28/09) 1:31:33-1:31:45.)

On July 15, 2009, with Father still in detention, Grandparents (now represented by separate counsel) filed a petition for guardianship and custody of Child pursuant to the Kinship Guardianship Act, NMSA 1978, §§ 40-10B-1 to -15 (2001). The petition alleged that Mother and Child currently resided with Grandparents, that Grandparents assisted Mother with care of Child, and that Child had resided with Grandparents for more than 90 days immediately preceding the petition date. It also alleged that Mother consented to the appointment of Grandparents as guardians and that Father was in immigration detention. The petition asked that Grandparents be awarded guardianship of Child as well as

shared legal and physical custody of Child with Mother. (R.P. 302-06.) One week later, Mother filed a pleading styled as a motion to determine custody but essentially concurring in Grandparents' request to be appointed kinship guardians with shared physical custody of Child. (R.P. 309-11.)

On August 14, 2009, Father filed a pleading styled as a motion for summary judgment on Grandparents' guardianship petition. (R.P. 318-34.) In it, Father contended that it was in Child's best interest to be placed in Father's sole custody. Father stated that he was to be released from immigration custody when certain paperwork was completed, that there was no need for a guardianship, and that the Rule 706 expert's pending recommendations regarding Child's best interest should be followed. Father contended that awarding guardianship to Grandparents would violate his fundamental liberty interest as a parent of Child.

On August 31, 2009, the court held a hearing on pending motions. Father, still in detention, appeared telephonically. The court ruled that it would defer action on the custody issue and Grandparents' guardianship petition because Father was not free to participate in the proceedings and because it would make a difference, depending on the resolution of Father's immigration status, whether Father was going to remain in the United States. (Tr. (8/31/09) 1:51:45-1:52:30.)

At the court's request, Grandmother testified to report on Child's status.

Grandmother also advised the court that Mother was working and had started school at NMSU. Child had been living with Grandparents since October 2008. Mother was still living with Grandparents who continued to support her and Child. Mother was with Child "every day for many, many hours" doing the "typical mother" things – feeding, bathing, and playing with Child and taking Child to preschool. (Tr. (8/31/09) 1:55:55-2:00:20.) Grandmother stated that except for the approximately nine-month period ending in October 1998 when Mother and Father lived in a four-plex unit adjacent to Grandparents, Mother and Child lived continuously with Grandparents from the time of Child's birth. (Tr. (8/31/09) 2:03:42-2:04:05.)

Father was released from immigration detention in September 2009. On September 15, 2009, Father filed a motion (R.P. 346) seeking an emergency custody hearing on the ground that Mother and Grandparents had barred him from all contact with Child, that Father was moving to California in a few days to attend school, and that Father had arranged to take Child with him. The motion stated that Father's immigration case was being transferred to California, where a final determination of his permanent resident application was to be made.

In October 2009 Father filed a number of pleadings, the principal ones being (1) a motion to dismiss Grandparents' petition for appointment of a kinship

guardian (R.P. 416), (2) a memorandum brief in support of Father's previous motion for summary judgment on the guardianship petition (R.P. 428), and (3) a response to Mother's motion to determine custody (R.P. 443). Father challenged whether the statutory requirements for appointment of a kinship guardian had been met. (R.P. 417-18 ¶¶ 7-10.) Father asserted that, since he had been released from custody, there was no longer a reason why he was unable to care for Child and that Father was best suited to raise Child. (R.P. 418 ¶ 12, 419 ¶ 17; R.P. 431 ¶ 14.) Father asserted that the court should await the Rule 706 expert's recommendations and follow them. (R.P. 718 ¶ 14.) Father alleged that his constitutional rights as a fit biological parent would be violated by awarding guardianship to Grandparents. (R.P. 431 ¶ 17.) Father contended that the kinship guardianship process was being used by Mother and Grandparents to prevent Father from gaining custody of Child. (R.P. 434 ¶ 29.)

On October 19, 2009, the district court convened a hearing that had been noticed to address all pending motions and orders to show cause. (R.P. 375.) At the start of the hearing, the court announced its intention to determine all issues and fully resolve the case that day. (Tr. (10/19/09) 1:27:40-1:27:49, 1:36:24-1:36:29.) The court inquired what evidence was to be presented. Mother's counsel protested that she was not prepared for a hearing on all issues that day.

The court advised her that the court had "heard it all at least once" and that counsel was indeed prepared and should wait to see what was going to happen. (Tr. (10/19/09) 1:38:20-1:38:50.)

Father called his immigration attorney as a witness appearing telephonically. The attorney testified that Father had been released from detention on bond. Father's student visa had been reinstated in September 2009 in connection with his enrollment at a college in California in a cooperative program with Stanford University. Father was legally in the United States. Father's immigration case was in transition to a non-detainee docket and when the transition was complete the immigration attorney intended to move to terminate the removal proceedings on the ground that Father's visa was again in force. That process, she said, could take months. She testified that, additionally, Father had an asylum application pending. (Tr. (10/19/09) 1:40:15-1:53:45.)

The attorney stated that Father presently was not authorized to work but would be applying for a work permit and could work under a student visa if he was granted hardship status, which would be applied for as soon as the removal process was terminated. Hardship status is routinely granted, she said, if a non-resident is subject to a court order requiring the payment of child support. (Tr. (10/19/09) 1:53:45-1:56:05.)

The court engaged in a dialog with counsel for Mother and Grandparents discussing the reasons for granting a kinship guardianship. Counsel for Grandparents explained that Mother and Child had been living with Grandparents and that Mother, while a capable parent, needed their emotional and financial support to help her care for Child. Counsel for Mother also stated that Mother needed the emotional support of her parents in dealing with Father. The court then announced that on that projected testimony the petition for kinship guardianship was denied and that the court would take testimony on whether the order granting temporary legal and physical custody to Grandparents should be made permanent until circumstances changed. (Tr. (10/19/09) 1:59:22-2:03:25.) Mother and Father presented disputed testimony regarding the ability of each to serve as a custodial parent for Child. (See generally Tr. (10/19/09).)

The court then withdrew its oral ruling denying the kinship guardianship petition and asked Grandparents' counsel to present evidence. (Tr. (10/19/09) 2:44:36-2:45:00.) Grandparents testified. (See generally Tr. (10/19/09).) Child and Mother continued to reside with Grandparents. (Tr. 10/19/09) 2:46:30-2:46:41.) Grandmother testified that she was willing to support Mother after her pregnancy so Mother would have an opportunity to bond with Child, complete her education, and get on her feet. (Tr. (10/19/09) 2:59:18-3:00:11.) Grandfather also

testified as to why in his view it would be in Child's best interest if a kinship guardianship were awarded. (See generally Tr. (10/19/09).)

The court ruled that it would grant the petition for kinship guardianship. The court expressed the view that neither of Child's parents appeared particularly competent at the present time, though the court expressed an expectation that the situation would change over time. The court characterized Father as remarkably uninformed about what was best for Child. The court expressed a lack of confidence in Mother's present ability to care responsibly for Child. (Tr. (10/19/09) 3:35:16-3:39:14.)

The court granted Father supervised visitation, though it recognized that Father lived in California and could not easily exercise visitation. The court ordered telephone visitation between Child and Father three days per week. Mother was allowed visitation to whatever extent Grandparents permitted. (Tr. (10/19/09) 3:39:28-3:42:44.)

The court advised Father that he could move for judicial review of the timesharing arrangements when Father's immigration situation was resolved. Otherwise, the court ruled that it would review the kinship guardianship as a matter of course in 24 months. (Tr. (10/19/09) 3:43:45-3:45:01.)

Following these oral rulings, Mother's counsel stated that the March 20,

2009, motion for order to show cause, based on Father's failure to sign a FOIA request for release of his immigration information to counsel, remained pending. The court asked why that still mattered. Counsel stated that she wanted to find Father's dishonest statements. The court responded that it assumed Father's statements to be dishonest because Father was not credible. The court then said that Father was to sign a release form as a condition of access to Child. Mother's counsel had a FOIA release on hand which Father signed in open court. (See S.R.P. 587-89.) The court stated that it was requiring Father to sign the release, even though discovery was over, because the court wanted someone besides Father to be able to provide information regarding Father's immigration status, as a matter of "verification." "You don't have to sign it," the court stated to Father, "but then you don't get to see your kid." (Tr. (10/19/09) 3:48:50-3:52:48.)

Two days after the October 19, 2009, hearing, Father filed a motion to revoke the appointment of Grandparents as kinship guardians (R.P. 463), arguing in part that the case was not ready for final adjudication and requesting that the court set a hearing on the merits "when this case is ripe" (R.P. 465).

The court entered a written order on November 4, 2009, granting Grandparents' petition for kinship guardianship, appointing them as kinship guardians, and granting them sole legal and physical custody of Child. The order

included findings addressing the requirements for appointment of a kinship guardian under the Kinship Guardianship Act and incorporated other oral rulings from the October 19 hearing. The court's findings do not fully track the statutory requirements. (R.P. 472.) See infra Point I(A). The order was amended on December 4, 2009, to correct the language regarding telephone visitation. (R.P. 544.)

After the court announced its ruling at the October 19, 2009, hearing, but before the court entered its November 4 order, Father on November 2, 2009, filed a notice of appeal from, inter alia, the order that was to be entered granting a kinship guardianship. (R.P. 468.)

On November 4, 2009, the court also entered an order on the March 20, 2009, motion for order to show cause. (R.P. 480.) That order, which formalized the court's October 19, 2009, oral ruling, contained a finding that Father's immigration records are relevant to ongoing custody and visitation matters and that Mother was entitled to all documents regarding Father's immigration records. Father was ordered to execute any documents necessary to allow Mother to have access to all of Father's immigration records. Execution of those documents was made a condition of Father's continuing visitation with Child. (Id.)

On November 13, 2009, Father filed a notice of appeal from the November

4 order requiring Father to authorize the release of his immigration records to Mother as a condition of visitation. (R.P. 492.) As noted, on December 4, 2009, the court entered a corrected version of the November 4, 2009, order on the petition for kinship guardianship (R.P. 544).[1]

In November 2009, Father revoked the consent to disclosure of his immigration records that he signed in open court pursuant to the district court's oral ruling. (See S.R.P. 557.) Mother subsequently filed a "notice" stating that Father's visitation rights "are terminated." (S.R.P. 554, 556.)

Argument

I. THE DISTRICT COURT ERRED IN APPOINTING CHILD'S GRANDPARENTS AS KINSHIP GUARDIANS IN THE MIDST OF THIS CUSTODY DISPUTE. THE COURT'S ORDER GRANTING KINSHIP GUARDIANSHIP SHOULD BE SET ASIDE.

A. The Kinship Guardianship Act Has No Application in Child Custody Disputes Between Parents.

Standard of Review:

The proper interpretation of a statute presents an issue of law that is

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[1]Father's notices of appeal filed on November 2 and November 13, 2009, perfected timely appeals from the order and amended order of kinship guardianship, see Rule 12-201(A) NMRA (unnumbered final paragraph), and from the order conditioning visitation on Father's consent to disclosure of his immigration records, see Rule 12-201(A)(2) NMRA.

reviewed de novo. In re Ruben D., 2001-NMCA-006, ¶ 7, 130 N.M. 110, 18 P.3d 1063. A district court's application of the law to the facts is reviewed de novo. Sitterly v. Matthews, 2000-NMCA-037, ¶ 22, 129 N.M. 134, 2 P.3d 871.

Preservation of Issue:

Father argued to the district court that the statutory requirements for establishing a kinship guardianship were not met in this case, though the particulars of Father's argument differ from those presented here. Supra p. 10. However, this issue implicates Father's fundamental liberty interest in the care and custody of Child. See State ex rel. Children, Youth & Families Dep't v. Pamela R.D. G. (In re Pamela A.G.), 2006-NMSC-019, ¶ 11, 139 N.M. 459, 134 P.3d 746 ("The interest of parents in the care, custody, and control of their children is a fundamental liberty interest."); State ex rel. Children, Youth & Families Dep't v. Brandy S., 2007-NMCA-135, ¶ 22, 142 N.M. 705, 168 P.3d 1129 ("A parent's fundamental liberty interest in the care, custody, and management of their children is well established." (internal quotation marks & citation omitted)). It also involves a question of general public interest concerning the interpretation and application of the Kinship Guardianship Act. See Rule 12-216(B)(1), (2) NMRA (exceptions to preservation requirement).

Analysis:

When it was enacted in 2001, the Kinship Guardianship Act expanded the statutory authority of courts to appoint a non-parent as a guardian for a child. The present case tests the limits of that authority and the manner in which it should be exercised.

A court may appoint a guardian for a child pursuant to the Probate Code in certain circumstances. See NMSA 1978, § 45-5-204(A) (1995) ("The court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order."); Thomas-Lott v. Earles (In re Guardianship of Ashleigh R.), 2002-NMCA-103, 132 N.M. 772, 55 P.3d 984 (guardian cannot be appointed under Probate Code over objection of parent with custodial rights). A court also may appoint a guardian for a child who has been adjudged abused or neglected if the circumstances warrant. See NMSA 1978, § 32A-4-31 (2005).

The KGA adds the concept of a guardianship arising out of kinship. Presumably the statute stems from, and clearly it reflects, the "growing reality" of "[k]inship or relative care . . . across the United States." Erin Duques, Note, Support for Relative Caregivers: A Look at the Financial Disincentives to Pursuing Guardianship Through the Probate Courts, 19 Quinnipiac Prob. L.J. 87,

89 (2005).

"'[K]inship care' generally refers to situations in which a relative other than a parent lives with and becomes the primary caregiver of a child, typically because the child's parent is unable or unwilling to care for the child." Jeffrey C. Goelitz, Note, Answering the Call to Support Elderly Kinship Caregivers, 15 Elder L.J. 233, 235 (2007) (footnote omitted). Such arrangements are hardly novel; "[h]istorically, extended families have stepped in to care for younger members when their parents are unable to do so." Anna Leonard, Note, Grandparent Kinship Caregivers, 6 Marq. Elder's Advisor 149, 151 (2004) (footnote omitted). They are, however, increasingly common and are "among the most important child welfare trends" of recent years. Rebecca Hegar & Maria Scannapieco, From Family Duty to Family Policy: The Evolution of Kinship Care, 74 Child Welfare 200, 201 (1995). Of significance to New Mexico, kinship care arrangements tend to be culturally preferred among Hispanic and Native American families. Id. at 206. Most instances of kinship care are entirely informal arrangements. Goelitz at 243. Legal guardianship fortifies and validates such arrangements because, "without it, the caretaker lacks the the legal right to make important health or education decisions for the child." Duques at 91.

In enacting the KGA, the New Mexico Legislature sought to enable "a legal

relationship between a child and a kinship caregiver when the child is not residing with either parent." Id. § 40-10B-2(C)(1) (2001). A kinship caregiver is a caregiver with whom the child resides who acts as a parent to the child and who is "a relative of the child, a godparent, a member of the child's tribe or clan or an adult with whom the child has a significant bond." Id. § 40-10B-3(C) (2001); see also id. § 40-10B-3(A) (2001).

The KGA focuses on a particular scenario, recurrent in New Mexico case law, in which a child is placed voluntarily with a non-parent caregiver and the caregiver's rights with respect to the child require clarification. See, e.g., Roth v. Bookert (In re Adoption of J.J.B.), 119 N.M. 638, 894 P.2d 994 (1995); Shorty v. Scott, 87 N.M. 490, 535 P.2d 1341 (1975); Cook v. Brownlee, 54 N.M. 227, 220 P.2d 378 (1950); Pra v. Gherardini (Ex parte Pra), 34 N.M. 587, 286 P. 828 (1930); Debbie L. v. Galadriel R. (In re Guardianship of Victoria R.), 2009-NMCA-007, 145 N.M. 500, 201 P.3d 169 (filed 2008), cert. denied, 2008-NMCERT-012, 145 N.M. 571, 203 P.3d 102; Ashleigh R., 2002-NMCA-103. In this respect the legislature is explicit: the KGA "is intended to address those cases where a parent has left a child or children in the care of another for ninety consecutive days and that arrangement leaves the child or children without appropriate care, guidance or supervision." NMSA 1978, § 40-10B-2(B) (2001).

What distinguishes a kinship guardianship from a guardianship in a case of abuse or neglect, then, is the fact that "[k]inship guardianship does not authorize the court to remove the child from the parents' home." N.M. Judicial Educ. Ctr. Child Welfare Handbook ch. 30A.1, http://jec.unm.edu/resources/benchbooks/child_law/ch_30a.htm (last visited July 12, 2010). In the case of a kinship guardianship, the transfer of physical custody is effectuated by the parents themselves.

Under the KGA, a qualified person may be appointed to be a kinship guardian only if:

> (1) 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;
>
> (2) a parent of the child is living but all parental rights in regard to the child have been terminated or suspended by prior court order; or
>
> (3) the child has resided with the petitioner without the parent for a period of ninety days or more immediately preceding the date the petition is filed and a parent having legal custody of the child is currently unwilling or unable to provide adequate care, maintenance and supervision for the child or there are extraordinary circumstances; and
>
> (4) no guardian of the child is currently appointed pursuant to a provision of the Uniform Probate Code.

NMSA 1978, § 40-10B-8(B) (2001). In addition, the appointment must be shown to serve the best interests of the child. Id. § 40-10B-8(A) (2001). Proof must be

by clear and convincing evidence (except in cases involving Indian children, where federal law imposes a higher standard). Id. § 40-10B-8(C) (2001).

A guardian appointed pursuant to the KGA "has the legal rights and duties of a parent except the right to consent to adoption of the child and except for parental rights and duties that the court orders retained by a parent." Id. § 40-10B-13(A) (2001). Therefore, while it is true that appointment of a kinship guardian may be beneficial to a child who lacks adequate parental care, see, e.g., Duques at 90-91, it is also the case that a kinship guardianship "represents very serious consequences for the parent," Victoria R., 2009-NMCA-007, ¶ 28. Although Father and Mother are not married, Father has acknowledged paternity, sought custody of Child, and vigorously advocated for Child's best interests. Father's parental rights are thus fully deserving of legal protection. Lehr v. Robertson , 463 U.S. 248, 261 (1983) (interest of unwed father, who has accepted responsibilities of parenthood, in personal contact with child "acquires substantial protection under the Due Process Clause"); Helen G. v. Mark J.H. (In re Adoption Petition of Bobby Antonio R.), 2008-NMSC-002, ¶ 48, 143 N.M. 246, 175 P.3d 914 (filed 2007) (indicating that filing paternity action is one act that unwed father could undertake to establish relationship with child as foundation for protection of parental rights).

In the case now before the Court, the KGA has not been used for the purpose intended by the legislature – to give legal recognition to the de facto parental status of third-party caregivers to whom parents have voluntarily entrusted the care of their child. Instead, the KGA was injected by Grandparents into what began as a custody dispute between Mother and Father, and it has been used by Mother, in alliance with Grandparents, as an offensive weapon in that custody battle.

Father had physical custody of Child when these proceedings commenced. Supra p. 1. Father never consented to place Child with Grandparents as substitute caregivers. That arrangement was compelled by the district court as an interim measure after the initial custody hearing. Supra p. 4. Nor did Mother ever actually surrender custody of Child to her parents in any real sense. From the time of Child's birth through the award of kinship guardianship, Mother has lived in a family environment that included herself, her parents, and Child and has enjoyed full access to Child. Supra pp. 5, 7, 9, 12.

By their own testimony, Grandparents' agenda has been to enable Mother to remain dependent on them while acting as a full-time parent during Child's early years and while completing her education. Supra pp. 3, 12. And as matters have played out, it is clear that Mother has for all practical purposes attained, through

the device of a kinship guardianship, the ability to live with and actively parent Child to the full extent she desires. Supra pp. 5, 7, 9, 12. The KGA aspects of this case have been invoked only to give Mother the upper hand in maintaining custody of Child in her family home to the exclusion of Father.

The KGA, however, includes safeguards that should prevent it from being misused in this way. Specifically, the statutory requirements of Section 40-10B-8(B) serve as a check on the circumstances in which a kinship guardianship may be appropriate. It is significant, therefore, that the district court's order appointing Grandparents as kinship guardians does not include findings sufficient to satisfy all the statutory requirements. On the record in this case, the district court could not find the requirements to be met.

The district court's order relies on subparagraphs (1) and (3) of Section 40-10B-8(B), supra p. 21, in establishing a kinship guardianship. (See R.P. 473 ¶¶ 4-5.) Subparagraph (1) permits appointment of a kinship guardian 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." NMSA 1978, § 40-10B-8(B)(1). The district court found that Mother "is living and has consented to the appointment of [Grandparents] as guardians." (R.P. 473.) But the court did not find and could not find that Father had consented to the appointment.

Mother's consent alone is insufficient to establish a guardianship based on Section 40-10B-8(B)(1), because Father is very much in the picture and did not consent. Mother could not effectively consent to a kinship guardianship over Father's objection. See 2 Sandra Morgan Little, Child Custody & Visitation § 10.03[2], at 10-21 (2009) (ordinarily, parents have equal rights regarding their child). Subsection (1) must be construed to require that, where both parents are living, both must consent to creation of a guardianship under that provision. See NMSA 1978, § 12-2A-5(A) (1997) (rules of construction; statutory language in the singular includes the plural). For the state to infringe Father's parental rights, supra p. 22, on the sole basis of Mother's consent would be constitutionally suspect. See State v. Whitaker, 110 N.M. 486, 493, 797 P.2d 275, 282 (Ct. App. 1990) (statute should be construed where possible to avoid raising questions of constitutionality). Moreover, the form of order adopted by the Supreme Court for appointment of a kinship guardian by consent makes clear that where both parents are living and retain their parental rights, both must consent to the appointment. Form 4-988 NMRA.

Subparagraph (3) of Section 40-10B-8(B) permits appointment of a kinship guardian only after

> the child has resided with the petitioner without the parent for a period of ninety days or more immediately preceding the date the petition is filed and a parent having legal custody of the child is currently unwilling or unable to provide adequate care, maintenance and supervision for the child or there are extraordinary circumstances.

NMSA 1978, § 40-10B-8(B)(3) (2001). The court did not and could not find that Child had resided with Grandparents "without the parent" for 90 days prior to the petition because, as noted above, the record indicates that Mother continually resided with Grandparents and Child, both before and after the petition was filed. Subparagraph (3) should be construed to require that, for a guardian to be appointed for a child with two living parents, the child must have been living with the prospective guardian without either parent for the prescribed period prior to the petition. See NMSA 1978, § 12-2A-5(A) (1997) (statutory language in the singular includes the plural). As discussed above, that is the factual scenario around which the KGA was designed. See NMSA 1978, § 40-10B-2(A), (B) & (C)(1) (policy of state that child should be raised by family or kinship caregivers "[w]hen neither parent is able or willing to provide appropriate care"; KGA "is intended to address those cases where a parent has left a child or children in the care of another for ninety consecutive days"; one purpose of Act is to "establish procedures to effect a legal relationship between a child and a kinship caregiver when the child is not residing with either parent").

The district court also did not and could not find that a parent "having legal custody of the child" was unable to provide adequate care, because early in the case the court granted interim custody to Grandparents. Supra p. 5. This statutory requirement emphasizes that the KGA is intended as a means to transfer legal custody of the child to guardians to whom the parents already have conveyed physical custody. As noted, that is not what occurred in the present case. And because the district court already had made a temporary custody ruling and was empowered to determine custody in the course of Father's paternity action, invocation of the KGA was unnecessary.

Finally, the district court understandably did not find that the facts met the high standard of "extraordinary circumstances." See Ashleigh R., 2002-NMCA-103, ¶ 25 ("A finding of extraordinary circumstances must be based on proof of a substantial likelihood of serious physical or psychological harm or serious detriment to the child." (internal quotation marks & citation omitted)). The point was not even argued by Grandparents. (R.P. 302-04; Tr. (10/19/09 1:59:21-2:02:10.)

The district court's failure to make findings that satisfy in full the statutory requirements for appointment of a kinship guardian requires reversal of the order of appointment. See Shorty, 87 N.M. at 494, 535 P.2d at 1345 (court made no

findings regarding fitness of parties competing for custody); Ashleigh R., 2002-NMCA-103, ¶ 1 (court "could not deny Mother custody without an express finding that she was unfit or that other extraordinary circumstances existed"); cf. Greene v. French, 97 N.M. 493, 494, 641 P.2d 524, 525 (Ct. App. 1982) (guardianship decree that did not meet statutory requirements created no more than "quasi-guardianship"); see also McCain v. Bradford (In re Guardianship of S.M.), 172 P.3d 244, 247 (Okla. Civ. App. 2007) (""[T]he challenged order fails to state the statutory elements that must be proved . . . to warrant the imposition of the kinship guardianship. Consequently, we hold the order is fatally deficient.").

Moreover, this is not a defect that can be remedied by the making of additional findings on remand. The necessary findings cannot be made on the record in this case. The facts instead demonstrate that this case lies outside the intended scope of the KGA. It cannot be that the legislature intended the KGA to apply to circumstances in which one parent, who continues to function as such, and the prospective guardians, living together with the child, ally to divest the parental rights of the other parent who is actively seeking custody of the child. The statute was not meant to help Mother become a more successful single parent while limiting Father's contact with Child to restrictive conditions of visitation. The statutory language is to the contrary. The KGA should be construed to

accomplish its express purpose, Padilla v. Montano, 116 N.M. 398, 403, 862 P.2d 1257, 1262 (Ct. App. 1993), and its scope should be delineated accordingly. The order of appointment therefore should be set aside and this case should be remanded to the district court to proceed as it began – as a custody dispute between Father and Mother.

B. Even if the Kinship Guardianship Act Were Applicable to This Case, the District Court Entered Its Guardianship Order Prematurely and with Insufficient Information.

Standard of Review:

The district court's manner of conducting the proceedings is reviewed for abuse of discretion. See, e.g., State v. Doe, 99 N.M. 456, 659 P.2d 908 (Ct. App. 1983). An abuse of discretion occurs if the court acts unreasonably, see Segal v. Goodman, 115 N.M. 349, 356-57, 851 P.2d 471, 478-79 (1993), or if the court "has not proceeded in the manner required by law," Perkins v. Dep't of Human Servs., 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987).

Preservation of Issue:

Father did not argue at the October 19, 2009, hearing that the district court's unexpected announcement that it would issue a final decision on the merits that day prevented him from adequately preparing, but Mother did. See supra p. 10. Cf. Grant v. Cumiford, 2005-NMCA-058, ¶ 37, 137 N.M. 485, 112 P.3d 1142

(although appellant parent did not argue in trial court against guardian ad litem's motion to limit public access to hearing on custody and child support issues, television station responded and opposed motion; issue would be considered preserved in parent's appeal because it "was clearly before the district court, as argued by the television station"); but see Selmeczki v. N.M. Dep't of Corrections, 2006-NMCA-024, ¶ 23, 139 N.M. 122, 129 P.3d 158 (where the only argument below on issue was presented by opposing party, issue was not preserved for appellate review; appellant "may not preserve an argument raised by his opponent"). Father promptly moved to revoke the guardianship on the ground that the court had acted prematurely. Supra p. 14. Father argued to the trial court that on several occasions that it should not rule on the guardianship petition until the Rule 706 expert's report was available. Supra pp. 8, 10. Additionally, this issue implicates Father's fundamental liberty interest in the care and custody of Child. See supra p. 17; cf. Thatcher v. Arnall (In re Guardianship of Arnall), 94 N.M. 306, 308, 610 P.2d 193, 195 (1980).

Analysis:

Even if the district court was correct in proceeding under the KGA in the circumstances of this case, the court committed procedural errors requiring reversal and remand for further proceedings before the court can properly consider

whether an order of kinship guardianship is justified.

First, the court failed to give adequate notice to the parties that the appointment of kinship guardians was to be considered in the October 19, 2009, hearing at which the appointment was made. Father's interest in maintaining his full parental rights with respect to Child was entitled to due process protection. Supra p. 22.

"[D]ue process requires notice and an opportunity to be heard prior to a deprivation of a protected liberty or property interest." Mills v. N.M. State Bd. Psychologist Exam'rs, 1997-NMSC-028, ¶ 14, 123 N.M. 421, 941 P.2d 502. To satisfy due process, notice must be "reasonably calculated to inform the person concerning the subject and issues involved in the proceeding." State ex rel. Children, Youth & Families Dep't v. Lorena R. (In re Ruth Anne E.), 1999-NMCA-035, ¶ 26, 126 N.M. 670, 974 P.2d 164 (internal quotation marks & citation omitted).

The October 19 hearing was not noticed as a hearing on the merits of Grandparents' petition for kinship guardianship. (R.P. 375.) Indeed, a request for a merits hearing was pending. (R.P. 378.) The parties clearly were surprised by the court's announcement at the hearing on October 19 that it intended to resolve the entire matter then and there. Supra p. 10. Father, a pro se litigant, should not

have been further disadvantaged by being deprived of fair notice that the time was at hand for him to prepare and present fully his opposition to Grandparents' petition for kinship guardianship.

Additionally, the district court seemingly felt by the October 19 hearing that it had spent enough time on the matter. Supra pp. 10-11. But the court's abrupt change in direction part way through the hearing, supra p. 12, suggests that the court's thinking on the issue remained very much in flux.

At that point the court had not yet received the Rule 706 expert report that it had commissioned and expressed a desire to have available in aid of its decision. Supra pp. 4, 5.[2] Additionally, Father's immigration, employment, residential, and educational status was in transition in connection with Father's release from custody and enrollment in school in California. Supra pp. 9, 11.[3] While the district court's concern with reaching closure is understandable, the court erred by ruling before becoming fully informed on the important issue before it. Cf. Lozano v. GTE Lenkurt, Inc., 1996-NMCA-074, ¶¶ 20-25, 122 N.M. 103, 920

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[2]The report, it appears, was submitted to the district court and made available to the parties in December 2009, around the time this appeal was taken (see S.R.P. 562 ¶ 18, 565-66 ¶ 38), but it has not been filed and does not appear in the appellate record.

[3]Father's application for a work permit apparently was approved in January 2010, after this appeal was initiated. (See S.R.P. 566 ¶ 39.)

P.2d 1057 (accounting was necessary to determine whether attorneys claiming fee award had misappropriated funds; trial court, apparently concerned with need to move on to other matters, abused its discretion in ruling on fee award without obtaining accounting).

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN CONDITIONING FATHER'S RIGHT OF VISITATION WITH CHILD ON FATHER'S CONSENT TO COMPLETE DISCLOSURE OF HIS IMMIGRATION RECORDS.

Standard of Review:

A district court's ruling denying or modifying an award of visitation is reviewed for abuse of discretion. Jeantete v. Jeantete, 111 N.M. 417, 419, 806 P.2d 66, 68 (Ct. App. 1990). An abuse of discretion occurs "when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case," Sims v. Sims, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153, or when the ruling "does not follow from a logical application of [the pertinent] factors," State v. Torres, 1999-NMSC-010, ¶ 10, 127 N.M. 20, 976 P.2d 20. See also Paragon Found., Inc. v. N.M. Livestock Bd., 2006-NMCA-004, ¶ 31, 138 N.M. 761, 126 P.3d 577 (district court's discovery orders are reviewed for abuse of discretion).

Preservation of Issue:

Father did not sign the FOIA request/release documents prepared by Mother's counsel until he did so in open court under compulsion of the district court's October 19, 2009, bench ruling. Supra p. 14. Cf. Cheesecake Factory, Inc. v. Baines, 1998-NMCA-120, ¶ 3, 125 N.M. 622, 964 P.2d 183 (where no supersedeas bond filed, payment of judgment by appellant does not waive right to appeal; "Involuntary payment of a judgment does not foreclose the payor's right to appeal, and payment to avoid execution on a judgment is involuntary."). Earlier, Father had argued to the district court that only his current immigration status information was relevant and that Mother had no proper reason to access his entire immigration file. Supra p. 6.

Analysis:

The district court's order conditioning Father's visitation with Child on Father's agreement to allow Mother access to his entire immigration file is unlawful.[4]

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[4]In November 2009, Father revoked the consent to disclosure of his immigration records that he granted under pressure of the district court's coercive ruling and Mother filed a "notice" stating that Father's visitation rights "are terminated." Supra p. 16. Grandparents apparently then barred Father from visitation (see S.R.P. 561-63), but on information and belief Father has more recently been allowed some telephonic and in-person visitation, though not to the extent he has desired and not without continuing conflict. As matters stand, the

Father has a substantial, legally cognizable interest in maintaining contact with Child through visitation. The right of a noncustodial parent to visit with his or her child "ensues from parenthood," Messer v. Messer, 66 Cal. Rptr. 417, 419 (Cal. Ct. App. 1968). Visitation by a noncustodial parent is a natural right, Maxwell v. LeBlanc, 434 So.2d 375, 376 (La. 1983), that is "more precious than any property right," Biamby v. Biamby, 494 N.Y.S.2d 741, 742 (N.Y. App. Div. 1985), and a "sacred and precious privilege," Farmer v. Farmer, 735 N.E.2d 285, 289 (Ind. Ct. App. 2000), which should only be denied "under extraordinary circumstances," Reardon v. Reardon, 415 P.2d 571, 573 (Ariz. Ct. App. 1966) (internal quotation marks & citation omitted), where there are "compelling reasons for doing so," In re Cameron C., 723 N.Y.S.2d 796, 797 (N.Y. App. Div. 2001). From the child's perspective, visitation may make "a wholesome, if not vital, contribution to the child's emotional well-being." Alfieri v. Alfieri, 105 N.M. 373, 379, 733 P.2d 4, 10 (Ct. App. 1987). The KGA itself recognizes the importance of visitation. NMSA 1978, § 40-10B-8(E) (2001) (authorizing

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district court's visitation order is fully enforceable and remains an ongoing threat to Father's exercise of his visitation rights. See Williams v. Rio Rancho Pub. Schs., 2008-NMCA-150, ¶ 16, 145 N.M. 214, 195 P.3d 879 (discussing court's ability to review cases that, even if they have become moot, "present issues of substantial public interest or which are capable of repetition yet evade review" (internal quotation marks & citation omitted)).

visitation between parent and child during period of kinship guardianship to maintain or rebuild parent-child relationship).

Father also has a legally cognizable privacy interest in his immigration file. An alien's immigration file, or "A-file" in government parlance, "contains all the individual's official record material such as: naturalization certificates; various forms and attachments (e.g., photographs); applications and petitions for benefits under the immigration and nationality laws; reports of investigations; statements; reports; correspondence; and memoranda on each individual for whom DHS has created a record under the Immigration and Nationality Act." U.S. Citizenship and Immigration Servs., System Notice for Alien File/Central Index System, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=fca9c253d8f3f010VgnVCM1000000ecd190aRCRD&vgnextchannel=c54f0ccc1793f010VgnVCM1000000ecd190aRCRD (last visited July 12, 2010). Access to the file by third parties may be obtained only if the subject of the file provides a signed authorization to release the file. See id.; see also 8 C.F.R. § 103.21 (providing for access to immigration records by person seeking records about him- or herself); cf. Duling v. Gristede's Operating Corp., 266 F.R.D. 66 (S.D.N.Y. 2010) (recognizing that immigration records "often implicate privacy concerns").

The district court's order requires Father to sacrifice his privacy interest in order to maintain his – and Child's – interest in visitation. The trade-off cannot be justified. Conditions imposed on visitation are permissible when they contribute to the child's best interests. See, e.g., State ex rel. Children, Youth & Families Dept. v. A.H., 1997-NMCA-118, ¶ 13, 124 N.M. 244, 947 P.2d 1064 (directing children's court to revise children's treatment plan "to require that Father participate in the treatment plan as a provision of his visitation rights. . . . Father's participation in the treatment plan would allow for Father's visitation with the child and allow the Department to monitor Father's interaction with the children."); cf. Barela v. Barela, 91 N.M. 686, 688, 579 P.2d 1253, 1255 (1978) (indicating that visitation may be conditioned on payment of child support). Conditions that are not necessary to promote the child's welfare, however, constitute an abuse of discretion. See, e.g., In re Cameron C., 723 N.Y.S.2d at 797 (father ordered to admit to allegations of exposing child to pornography and to apologize); Boswell v. Boswell, 721 A.2d 662 (Md. 1998) (visitation conditioned on absence of father's nonmarital partner); see also Hastings v. Rigsbee, 875 So. 2d 772 (Fla. Dist. Ct. App. 2004) (mother required either to authorize release of her psychological testing records or to undergo new psychological evaluation and release results). "Not only must access to the

children be reasonable, but any limitations placed on visitation must also be reasonable." Boswell, 721 A.2d at 670.

The district court did not find that it was in Child's best interests to require Father to disclose his entire immigration file to Mother in order to be able to "see [his] kid." Supra p. 14. Cf. Camacho v. Camacho, 218 Cal. Rptr. 810, 813 (Cal. Ct. App. 1985) (conditioning visitation on psychotherapy was unwarranted when there was "no finding . . . that visits by [father] would be detrimental" to the child). It is doubtful that such a finding could be made. The court instead seemed to view the issue as a discovery matter although, as it noted, discovery had ended. Supra p. 14.

But even in discovery terms the court's ruling cannot be sustained. The court acceded to Mother's request to conduct a fishing expedition. See supra p. 14. Only Father's current immigration status could properly be considered relevant to custody, and the custody issue already had been determined in Grandparents' favor with the granting of their petition and was not before the court at the time. While visitation remained the subject of the court's continuing supervision, the court's determination that all of Father's immigration records were relevant to visitation, supra p. 15, cannot be rationalized. State v. Torres, 1997-NMSC-010; cf. Kent v. Burdick, 591 So. 2d 994, 996 (Fla. Dist. Ct. App.

1991) ("While according the lower court broad discretion, we cannot overlook the basic proposition that a parent has a natural legal right to enjoy the custody, fellowship and companionship of his offspring."). One cannot escape the conclusion that the court's order was intemperate. In any event, it is erroneous and requires reversal.

"The trial court must keep in mind that it is the well-being of the child rather than the reward or punishment of a parent that ought to guide the trial court in determining visitation. It is incumbent upon the trial court to award as liberal a visitation plan in all custody matters to assure the non-custodial parent an ample opportunity to share in the child's growth and to nurture the parent-child relationships with that parent. Only when the proposed visitation interferes with the child's emotional well-being or significantly disrupts the child's day to day environment, should it be limited." Lopez v. Lopez, 97 N.M. 332, 335, 639 P.2d 1186 (1981) (internal citation omitted). The district court's harsh and unnecessary visitation restrictions violate this principle and should be stricken.

Conclusion

The district court erred in concluding that the Kinship Guardianship Act applies to the present circumstances, in appointing Grandparents as kinship guardians, and in deciding the issues prematurely, without adequate notice, and on

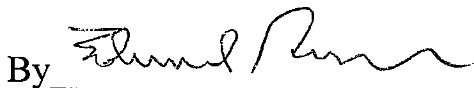
an insufficient record. The status preceding the filing of the petition for kinship guardianship should be restored: interim custody of Child in Grandparents pending resolution of the custody dispute between Father and Mother initiated by Father's original filing. That dispute should be resolved based on the evidence available to the district court on remand, including the Rule 706 expert report and updated information regarding Father's situation. See Greene v. French, 97 N.M. at 495, 641 P.2d at 526 ("[F]indings used to determine present parental rights must be based on current evidence."). The district court's conditioning of Father's visitation rights on his consent to complete disclosure of his immigration records to Mother should be vacated.

Statement Regarding Oral Argument

Appellant requests oral argument. Oral argument may assist the Court in understanding the record and facts, assessing the positions of the parties, and disposing of the merits of this appeal.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By 

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CERTIFICATE OF SERVICE

We certify that a copy of the foregoing pleading was served upon

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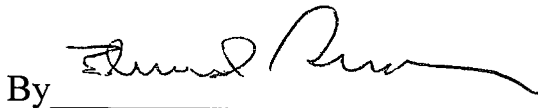
by first-class mail this 14th day of July, 2010.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By 

Edward Ricco