IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

FREEDOM CHETENI,

Petitioner-Appellant,



vs.

No. 30,041

JULIE ANN DELAHOUSSAYE,

Respondent-Appellee, and



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

---

# REPLY BRIEF

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.
Edward Ricco
Jocelyn Drennan
Post Office Box 1888
Albuquerque, NM 87103
Telephone: (505) 765-5900
Fax: (505) 768-7395
*Attorneys for Appellant*

## TABLE OF CONTENTS

Table of Authorities . . . . . ii

Introduction . . . . . 1

Argument . . . . . 2

I. GRANDPARENTS DID NOT ESTABLISH A BASIS FOR RELIEF UNDER THE KINSHIP GUARDIANSHIP ACT. . . . . 2

II. THE DISTRICT COURT RULED ON THE GUARDIANSHIP PETITION WITHOUT ADEQUATE NOTICE OR ADEQUATE INFORMATION. . . . . 7

III. COERCED DISCLOSURE OF FATHER'S ENTIRE IMMIGRATION FILE AS A CONDITION OF VISITATION WAS AN ABUSE OF THE TRIAL COURT'S DISCRETION. . . . . 8

Conclusion . . . . . 9

## TABLE OF AUTHORITIES

### NEW MEXICO CASES

Burris-Awalt v. Knowles (In re Guardianship of Ware),
2010-NMCA-083, ___ N.M. ___, ___ P.3d ___ . . . . . 7, 9

Continental Potash Inc. v. Freeport-McMoran, Inc.,
115 N.M. 690, 858 P.2d 66 (1993) . . . . . 3

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 . . . . . 4

Fitzsimmons v. Fitzsimmons,
104 N.M. 420, 722 P.2d 671 (Ct. App. 1986) . . . . . 5

Greene v. French,
97 N.M. 493, 641 P.2d 524 (Ct. App. 1982) . . . . . 7

In re Guardianship of Sabrina Mae D.,
114 N.M. 133, 835 P.2d 849 (Ct. App. 1992) . . . . . 3

Ridenour v. Ridenour,
120 N.M. 352, 901 P.2d 770 (Ct. App. 1995) . . . . . 3

State ex rel. Helman v. Gallegos,
117 N.M. 346, 871 P.2d 1352 (1994) . . . . . 6

### CASES FROM OTHER JURISDICTIONS

Quilloin v. Walcott, 434 U.S. 246 (1978) . . . . . 6

### STATUTES

NMSA 1978, § 12-2A-5(A) (1997) . . . . . 5

NMSA 1978, § 40-10B-8 (2001) . . . . . 5

NMSA 1978, § 40-10B-8(A) (2001) . . . . . 3

NMSA 1978, § 40-10B-8(B) (2001) . . . . . 4

NMSA 1978, § 40-10B-8(B)(1) (2001) . . . . . 5-6

NMSA 1978, § 40-10B-8(B)(3) (2001) . . . . . 4-5

**RULES**

Rule 12-216(B)(2) NMRA . . . . . 7

## Introduction

Father has not challenged the district court's decision at the initial hearing to place interim custody of Child in Grandparents while the custody dispute between Mother and Father, instituted by Father's paternity action, was adjudicated. That ruling was not unwarranted, considering the situation confronting the district court at the time. (Br. in Chief at 4.) Indeed, Father's request on appeal is that the case be restored to exactly that point in the proceedings, before Grandparents improperly injected the Kinship Guardianship Act ("KGA") into the process and the district court incorrectly awarded guardianship pursuant to that statute. (Id. at 40.)

Similarly, Father recognizes the relevancy of his immigration status to the custody issue before the district court; he does not contend that his immigration status should not be disclosed. (Id. at 6.) He challenges the district court's overbroad requirement that, as a condition of visitation, he must make all the information in his immigration file accessible to Mother.

Mother has made no response to Father's opening brief, remaining characteristically passive and allowing Grandparents to carry the burden of defending the parenting arrangements that Mother and Grandparents have secured through the guardianship award. Grandparents, however, present no argument that

can justify the district court's award of guardianship under the KGA in the circumstances of this case. Nor do Grandparents, who have no personal interest in the issue in any event, offer a basis to uphold the district court's sweeping and invasive disclosure requirement. This Court therefore should reverse the challenged rulings and grant the relief requested by Father.

## Argument

### I. GRANDPARENTS DID NOT ESTABLISH A BASIS FOR RELIEF UNDER THE KINSHIP GUARDIANSHIP ACT.

Grandparents argue, first, that the district court's guardianship ruling was proper because the court had Child's best interests at heart and determined that Child's best interests "were in the legal and physical custody of Grandparents." (Answer Br. at 6.) To the extent Grandparents seek to defend the court's initial decision to place Child in the temporary custody of Grandparents while the custodial dispute between Father and Mother was resolved, Father raises no issue on appeal. But the court went further and awarded kinship guardianship to Grandparents, largely divesting Father of his parental rights. (Br. in Chief at 22.)

In defending that challenged ruling, Grandparents rely on the district court's "wide discretion" in determining the best interests of Child. (Answer Br. at 6.) But the court's discretion, even if directed toward a worthy goal, has to be

exercised lawfully. Continental Potash Inc. v. Freeport-McMoran, Inc., 115 N.M. 690, 697, 858 P.2d 66, 73 (1993) (judicial discretion "is a legal discretion to be exercised in conformity with the law").

It is not enough to say that the district court awarded guardianship under the KGA to further Child's best interests when the court had no basis to proceed under the KGA in the first place. Under the KGA, the court is vested with authority to appoint a kinship guardian "if the court finds that a qualified person seeks appointment, the venue is proper, the required notices have been given, the requirements of Subsection B of this section have been proved and the best interests of the minor will be served by the requested appointment." NMSA 1978, § 40-10B-8(A) (2001); cf. Ridenour v. Ridenour, 120 N.M. 352, 356, 901 P.2d 770, 774 (Ct. App. 1995) (award of visitation rights under grandparent visitation statute is proper "only after grandparents have met one of the threshold [statutory] factors . . . and presented evidence to show . . . that visitation is in the child's best interests"). The court cannot jump to a determination of best interests if the preconditions to the court's exercise of power are lacking. See In re Guardianship of Sabrina Mae D., 114 N.M. 133, 137, 835 P.2d 849, 853 (Ct. App. 1992) (although court appointed grandparents as guardians based on finding of child's best interests, court could not properly find that statutory conditions for

appointment had been met; reversed and remanded). Nor is it enough to point to the court's flexible, equitable power to fashion the terms of a kinship guardianship (Answer Br. at 9-11) if the KGA's threshold requirements are absent that would permit the court to act at all.

Grandparents have not shown the existence of any of the conditions identified in Subsection B of the KGA, NMSA 1978, § 40-10B-8(B) (2001), that would empower the district court to appoint a kinship guardian. (See Br. in Chief at 21.) They cite 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, a case that was decided under the "extraordinary circumstances" ground of section 40-10B-8(B)(3), but they did not seek to prove below, nor did the district court find, the existence of extraordinary circumstances in this case. (Br. in Chief at 27.) They rely instead on an "alternative ground" (Answer Br. at 15) addressed only in a one-judge opinion in Debbie L. which does not reflect the opinion of the Court. 2009-NMCA-007, ¶ 23 (Pickard, J., and Sutin, J., specially concurring).

Notably, Debbie L. at least presents a factual scenario within the intended scope of the KGA: "the mother and father of a child leave the child in the care of" the applicants for appointment as kinship guardians, who "assume the day to day

care of the child." (Answer Br. at 14; see Br. in Chief at 20.) Here, in contrast, Grandparents acknowledge that the district court's finding does not state that Child had resided with Grandparents "without the parent" for a period of 90 days prior to the petition, as required by section 40-10B-8(B)(3). (Answer Br. at 11.) Grandparents' petition does not even allege that this requirement was met. (R.P. 303 ¶¶ 8, 10.) Grandparents do not dispute Father's showing (Br. in Chief at 23-24) that in the present case the KGA was invoked to allow Mother to continue to live with and act as a parent to Child on a full-time basis in order to overcome Father's prayer for custody.

Without findings sufficient to satisfy section 41-10B-8, the district court could not properly order the appointment of kinship guardians. Cf. Fitzsimmons v. Fitzsimmons, 104 N.M. 420, 423, 722 P.2d 671, 674 (Ct. App. 1986) ("While the trial court is accorded great leeway in custodial decisions, the court's ruling must be supported by appropriate findings."). Grandparents argue that a guardianship can be established pursuant to section 41-10B-8(B)(1) based on Mother's consent alone. (Answer Br. at 13-14.) Relying on the argument that the words "a parent" in the KGA unambiguously mean just one parent, but see NMSA 1978, § 12-2A-5(A) (1997) (use of singular in statutory language includes plural), Grandparents do not explain how the statute, if so construed in this case, could

survive a constitutional challenge. (Br. in Chief at 25.) The statute's "beguiling simplicity," State ex rel. Helman v. Gallegos, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994), does not convey a legislative intent to trammel a parent's due process rights. One parent simply cannot, within the requirements of due process, unilaterally effect such a drastic change in the rights of the other parent whose involvement with the child merits legal protection. (Br. in Chief at 22.) See Quilloin v. Walcott, 434 U.S. 246 (1978) (indicating that unwed father who has accepted sufficient responsibility for child has equal right with child's mother to consent, or not, to adoption).

Grandparents argue that requiring the consent of both parents under section 41-10B-8(B)(1) would give Father "the unilateral right to prevent a kinship guardianship." (Answer Br. at 16.) That is not the case. It simply would prevent a kinship guardianship from being established on the basis of consent where necessary consent had not been obtained.

Father's position on appeal does not threaten the district court with a dilemma regarding where to place Child (see id.), in view of the district court's interim ruling placing custody temporarily in Grandparents. Father asks only that the question of custody be addressed by the district court, without the improper overlay of the KGA, on the facts Father will present on remand. Father intends to

establish, in light of the as yet unreviewed Rule 706 expert report and current evidence, see Greene v. French, 97 N.M. 493, 495, 641 P.2d 524, 526 (Ct. App. 1982), that he is a maturing, caring, and protective parent whose life situation has stabilized and who is fully able to provide for Child's welfare. Grandparents acknowledge that Father may show in time that he can "reassume the role of child's caregiver." (Answer Br. at 17.) It is Grandparents who, by claiming a status they do not deserve under the KGA, are blocking Father's chance to do just that and to prove that the interim award of custody to Grandparents should be terminated in a timely and appropriate fashion.

## II. THE DISTRICT COURT RULED ON THE GUARDIANSHIP PETITION WITHOUT ADEQUATE NOTICE OR ADEQUATE INFORMATION.

Grandparents assert that the district court "made it clear that it was prepared to proceed to a final hearing." (Answer Br. at 19-20.) But this occurred "[a]t the beginning of the October 19, 2009, hearing" (id. at 20) at which the court ruled on the guardianship petition, not beforehand. The lack of notice affected Father's fundamental rights. Rule 12-216(B)(2) NMRA. (Br. in Chief at 30.) Entry of the order establishing a kinship guardianship without appropriate notice violated Father's due process rights and "by itself argues in favor of reversal." Burris-Awalt v. Knowles (In re Guardianship of Ware), 2010-NMCA-083, ¶ 19, __ N.M.

___, ___ P.3d ___. Grandparents' contention that Father "was prepared to proceed" on the merits because he had two witnesses ready to testify on the matters that had been noticed – presumably a suggestion of harmless error – is based only on speculation.

Grandparents do not address Father's additional point that the district court abused its discretion by ruling on the guardianship petition without first receiving the Rule 706 report that the court had previously indicated was of importance to its judgment and without allowing reasonable time for Father's post-detention status to stabilize. (Br. in Chief at 32.) At the October 19 hearing the court signaled that it simply had run out of patience. (Id. at 10-11.) Grandparents do not attempt to justify the court's imprudent rush to a decision. (Id. at 32.)

## III. COERCED DISCLOSURE OF FATHER'S ENTIRE IMMIGRATION FILE AS A CONDITION OF VISITATION WAS AN ABUSE OF THE TRIAL COURT'S DISCRETION.

Father has no quarrel with the notion that the district court needed to be informed about Father's immigration status in order to determine issues of guardianship or custody. Whether Father was lawfully in this country or was facing detention or imminent removal plainly could affect how the district court viewed its decisional options. Father himself presented evidence regarding his immigration status at the October 19 hearing. (Br. in Chief at 11.)

Grandparents – apparently on Mother's behalf, although they have no direct interest in the issue – argue only the relevancy of Father's immigration status to the proceedings, a point Father concedes. (Answer Br. at 20-22.) But the district court ordered Father to allow Mother full access to his entire immigration file as a condition on visitation with Child. The fact that Grandparents make no effort to defend the ruling at issue is a further indication (see Br. in Chief at 35-39) that the ruling is indefensible.

## Conclusion

This Court should reverse the district court's order appointing Grandparents as kinship guardians for Child and should grant relief as requested in Father's opening brief. Because prolonging the status quo impacts Father's fundamental rights, Burris-Awalt, 2010-NMCA-083, ¶ 13, the district court should be directed to resolve as expeditiously as is practicable the custody issues properly before it.

Respectfully submitted,

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

By _____

Edward Ricco
Jocelyn Drennan
Post Office Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900
Fax: (505) 768-7395
*ericco@rodey.com*

*Attorneys for Appellant*

## CERTIFICATE OF SERVICE

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

Marci E. Beyer, Esq.
P.O. Box 2845
Las Cruces, NM 88004-2845

Mark L. Pickett, Esq.
P.O. Box 1239
Las Cruces, NM 88004-1239

by first-class mail this 18th day of October, 2010.

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

By _____
Edward Ricco