

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Interest of A.D., child,)	
)	
A.K.,)	Supreme Court No. 20200299
S.K.,)	
)	
Petitioners and Appellees,)	Case No. 08-2020-JV-00077
)	
vs.)	
)	
M.K.,)	
L.D.)	
)	
Respondents and Appellant.)	

BRIEF OF RESPONDENT-APPELLANT L.D.

Appeal from the Order dated August 20, 2020 and Order dated November 4, 2020

In Juvenile Court, Burleigh County, State of North Dakota

The Honorable Lindsey Nieuwsma and the Honorable David Reich

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STATEMENT OF THE ISSUES

¶1 Whether the Judicial Referee erred in finding A.D. was deprived as defined in Section 27-20-02(8) of the North Dakota Century Code.

¶2 Whether the Judicial Referee erred in finding there was clear and convincing evidence that the guardianship was in the best interest of the child in accordance with Section 27-20.1-11 of the North Dakota Century Code.

¶3 Whether the District Court erred in affirming the Judicial Referee's Findings of Fact and Order establishing guardianship.

STATEMENT OF THE CASE

¶4 This is an appeal of the South Central Judicial District's Findings of Fact and Order dated August 20, 2020, and the Order on Review dated November 4, 2020. App. 53, 62. L.D. and M.K. are the biological parents of A.D. born in 2006. App. 7. On or about June 2, 2020, S.K. and A.K. ("S.K. and A.K."), and aunt and uncle of A.D., filed a Petition seeking emergency guardianship of A.D. App. 7. The Petition alleges that through L.D.'s lack of contact and failure to provide support for A.D., L.D. has deprived A.D. by abandonment. App. 7. A trial was held on August 4, 2020. App. 18. On August 20, 2020, the Court entered Findings of Fact and an Order establishing guardianship for A.D. and appointing S.K. and A.K. as guardians. App. 53. On August 27, 2020, L.D. requested a review of the Findings of Fact and Order dated August 20, 2020. App. 61. On November 4, 2020, an Order was issued affirming the Findings of Fact and Order establishing guardianship. App. 62. L.D. appeals the Findings of Fact and Order dated August 20, 2020, and the Order on Review dated November 4, 2020. App. 65.

STATEMENT OF FACTS

¶5 A.D. is the child to M.K. and L.D. App. 18; Tr. p. 19, lns. 8-11; p. 27, lns. 9-11; Aug. 4,

2020. A.D. was born in 2006. App. 7. A Petition for Guardianship was filed on June 2, 2020, alleging abandonment and deprivation. App. 7.

¶6 A.D. lived with her mother, M.K., in Michigan and then moved to Arizona in 2008. App. 18; Tr. p. 20; Ins. 14-24; p. 75, Ins. 2-5; Aug. 4, 2020. In Arizona, A.D. lived with M.K., her siblings, and Mark Jacobs, M.K.'s significant other. App. 18; Tr. p. 75-76, Ins. 21-1; Aug. 4, 2020.

¶7 However, for the past four years, A.D. has lived in North Dakota with her grandmother, who is M.K.'s mother, and S.K. and A.K.. App. 18; Tr. p. 25, Ins. 21-25; Aug. 4, 2020. Initially, when A.D. moved to North Dakota, she would speak with her mother daily. App. 18; Tr. p. 82, Ins. 15-17; Aug. 4, 2020. However, as A.D. became more involved in school and after school programs, communication with M.K. became less frequent. App. 18; Tr. p. 82-83, Ins. 18-2; Aug. 4, 2020. M.K. intended for A.D. to move back to Arizona, however M.K. indicated that M.K.'s mother prevented this from happening. App. 18; Tr. p. 83, Ins. 18-22; Aug. 4, 2020. A.D. has not had any communication with her mother, M.K. in about two years, has not resided with M.K. for about four years, and to the best of A.D.'s knowledge M.K. did not provide any financial assistance for A.D., and M.K. was never asked for money from the grandmother. App. 18; Tr. p. 19-20, Ins. 15-8; p. 84, Ins. 6-8; Aug. 4, 2020.

¶8 L.D. saw A.D. in Michigan until M.K. and A.D. moved to Arizona. App. 18; Tr. p. 93, Ins. 19-21; Aug. 4, 2020. M.K. testified that L.D. never abused A.D. App. 18; Tr. p. 93, Ins. 24-25; Aug. 4, 2020. L.D. also went to Arizona to see A.D. when A.D. was five. App. 18; Tr. p. 93, Ins. 10-18; Aug. 4, 2020. Since L.D. visited A.D. when she was five, in Arizona, M.K. never made L.D. aware as to the whereabouts of A.D. App. 18; Tr. p. 94, Ins. 1-7; Aug. 4, 2020. M.K. moved around in Arizona, and purposefully kept A.D. from L.K. App. 18; Tr. p. 94-95, Ins. 14-2; Aug. 4, 2020. A.D. has not received letters from L.D., has not seen L.D. since living in Michigan, and

A.D. did not know where L.D. lived or to the best of A.D.'s knowledge ever received financial help from L.D. App. 18; Tr. p. 27-28, lns. 18-8; Aug. 4, 2020. To date, A.D. did not receive any direct communication in regard to seeing L.D. App. 18; Tr. p. 28-29, lns. 15-2; Aug. 4, 2020. However, near the end of 2019, L.D. did call A.D.'s grandmother while A.D. was living with her grandmother, and asked if he could talk to A.D. App. 18; Tr. p. 30, lns. 1-19; Aug. 4, 2020. L.D. was not able to speak to A.D. during that phone call. App. 18; Tr. p. 30, lns. 8-17; Aug. 4, 2020.

¶9 A.D. does not want to live with L.D. because A.D. alleges that L.D. has been very abusive and she does not want to go back to that situation. App. 18; Tr. p. 29, lns. 5-11; Aug. 4, 2020. A.D. has heard that L.D. is on oxygen and A.D. believes that she will have to take care of L.D. App. 18; Tr. p. 29, lns. 5-11; Aug. 4, 2020. At some point since A.D. moved to North Dakota, she attended counselling and told the counsellor that L.D. sexually abused her. App. 18; Tr. p. 36, lns. 17-23; Aug. 4, 2020.

¶10 Since A.D. moved to North Dakota approximately four years prior during the summer of 2016, when she was ten years old. App. 18; Tr. p. 31-32, lns. 24-13; p. 39, lns. 5-9; p. 40, lns. 10-17; Aug. 4, 2020. At the end of summer M.K. agreed for A.D. to stay during the school year. App. 18; Tr. p. 44, lns. 3-8; Aug. 4, 2020. Since moving to North Dakota, A.D. has been involved in volleyball, basketball, a book club, a writing club, band, the church, and yearbook. App. 18; Tr. p. 31-32, lns. 24-13; Aug. 4, 2020. A.D. desires to stay residing in North Dakota. App. 18; Tr. p. 32-33, lns. 20-5; Aug. 4, 2020.

¶11 A.D.'s grandmother died on May 31, 2020, and A.D. has since been living with her aunt and uncle, S.K. and A.K.. App. 18; Tr. p. 32, lns. 21-25; Tr. p. 33, lns. 6-8; p. 57, lns. 9-19; Aug. 4, 2020. S.K. and A.K. knew A.D. while A.D. was living with her grandmother and would regularly get together on holidays, and visit A.D. App. 18; Tr. p. 57-58, lns. 20-6; Aug. 4, 2020.

S.K. and A.K. own a home in Dickinson, North Dakota, and have four children. App. 18; Tr. p. 35, lns. 1-14; Aug. 4, 2020. S.K. and A.K. have four other children, who get along with A.D., spend time together, and play board games. App. 18; Tr. p. 33-34, lns. 17-5; Aug. 4, 2020. A.D. shares a room with one of S.K. and A.K. children. App. 18; Tr. p. 35, lns. 1-14; Aug. 4, 2020.

¶12 S.K. is M.K.'s brother. App. 18; Tr. p. 63-64, lns. 24-1; Aug. 4, 2020. S.K. is the chief information officer at American Bancor, Ltd, and has worked there since August of 2001. App. 18; Tr. p. 58, lns. 18-24; Aug. 4, 2020. A.K., his wife, works part-time at Hope Christina Academy as a secretary. App. 18; Tr. p. 59, lns. 2-4; Aug. 4, 2020. S.K. and A.K. have provided A.D. with food and clothing, and do not have any financial concerns about continuing to provide for their four children and A.D. App. 18; Tr. p. 35, lns. 1-14; p. 59, lns. 9-13; Aug. 4, 2020. S.K. believes that if he obtains permanent guardianship he can add A.D. to his health insurance. App. 18; Tr. p. 61, lns. 11-23; Aug. 4, 2020. S.K. and A.K. are involved in their church ministry, the Hope Christian Academy, and the little league baseball program. App. 18; Tr. p. 59, lns. 17-24; Aug. 4, 2020. Since S.K. and A.K. have had A.D. they have involved A.D. in church youth group, open gym, volleyball, a volleyball camp, and have had children who would be in her class at Hope Christian Academy over for dinner. App. 18; Tr. p. 62, lns. 14-24; Aug. 4, 2020.

¶13 S.K. does not personally know L.D. and is not aware if L.D. had any role in A.D.'s life. App. 18; Tr. p. 60, lns. 6-10; Aug. 4, 2020. However, after A.D.'s grandmother passed away, the topic of A.D. living with L.D. was posed to A.D., S.K. noticed A.D. appeared nervous and appeared to have anxiety, and stated she would purposefully run away or act up so there would be other options available to her. App. 18; Tr. p. 60-61, lns. 17-8; Aug. 4, 2020. Since A.D. has lived with S.K. and A.K., L.D. has not had any contact with A.D., has not provided financially for A.D., nor has inquired on how A.D. is doing. App. 18; Tr. p. 63, lns. 12-19; Aug. 4, 2020. S.K.

requests permanent guardianship. App. 18; Tr. p. 63, lns. 20-23; Aug. 4, 2020.

¶14 A.D. desires the Court to take her opinion into consideration and has concerns living with her mother and father. App. 18; Tr. p. 37, lns. 17-24; Aug. 4, 2020. A.D.'s concerns are centered around abuse based on past experiences. App. 18; Tr. p. 37-38, lns. 25-5; Aug. 4, 2020. A.D. has not heard from her mother or father since the prior hearing in June of 2020. App. 18; Tr. p. 38, lns. 12-16; Aug. 4, 2020. A.D. is happy and desires to stay living with S.K. and A.K.. App. 18; Tr. p. 35, lns. 17-20; Aug. 4, 2020.

¶15 During the pendency of these proceedings, L.D. requested an interim order allowing him to have visitation with A.D. App. 17. An Order was entered on June 19, 2020, allowing L.D. to have parenting time upon proof of enrollment and participate in a therapy program to rebuild the relationship with A.D. App. 17. There was no proof of enrollment and/or participation in a therapy program. App. 53. The Court made the following findings in relation to L.D.

[10] The father has not provided care for or had any contact with A.D. since approximately 2007 or 2008. Although the mother testified that she actively made efforts to hide A.D. from the father due to "what the father did to her [the mother]," the father was aware of A.D.'s whereabouts since at least late 2019. A.D. testified that she overheard both individuals on a telephone conversation in which the father contacted L.K. by telephone near the end of 2019; the father stated that he was aware of the mother's and L.K.'s whereabouts while they lived in Minot, North Dakota and followed them. He requested to speak to A.D., but she refused; the father indicated that he would find another way to contact the child. The father did not make further attempts to contact or gain custody of A.D. after that call until his participation in L.K.'s and these guardianship proceedings.

[11] During the pendency of these proceedings, the father requested an interim order allowing him to have visitation with the child. An order was entered on June 19, 2020 provisionally granting the request to establish parenting time with the child upon proof of enrollment and participation by the father in a therapy program such as AFT-CBT or other program designed to rebuild parent-child relationships, due to the length of time (twelve or thirteen years) since the father's last contact with the child. The father did not provide proof of enrollment and/or participate in a therapy program or demonstrate any effort to work towards parenting time with the child.

[17] Based on the foregoing, the child is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical mental, or emotional health or morals; and the deprivation is not due primarily to the lack of financial means of the parents, guardian, or other custodian.

[18] The mother and father have not provided any physical, emotional, psychological or financial care for the child for the last four years and have not made significant attempts to locate the child or have her placed in their care.

App. 53. The Court also found that both parents have deprived the child by abandonment. App.

53. The Court granted the guardianship on August 20, 2020. App. 53.

¶16 On August 27, 2020, L.D. filed request for review of the judicial referee's findings and order. App. 61. On November 4, 2020, the District Court found there was sufficient factual basis in the record to support the determinations made and the Referee that the child was a deprived child as defined in N.D.C.C. § 27-20-02(8) and that there was clear and convincing evidence to believe that the guardianship appointment is in the best interest of the child, and affirmed the Order issued by the Judicial Referee. App. 62. On November 13, 2020, L.D. filed a notice of appeal. App. 65.

LAW AND ARGUMENT

I. The Standard of Review.

¶17 The North Dakota Supreme Court does not set aside a juvenile court's findings of fact unless clearly erroneous. In re T.T., 2004 ND 138, ¶5, 681 N.W.2d 779. "A finding of fact is clearly erroneous under N.D.R.Civ.P. 52(a) if there is no evidence to support it, if it is clear to the reviewing court that a mistake has been made, or if the finding is induced by an erroneous view of the law." Akerlind v. Buck, 2003 ND 169, ¶7, 671 N.W.2d 256. On appeal, the North Dakota Supreme Court reviews the files, records, and minutes or the transcript of the evidence, and we

give appreciable weight to the findings of the juvenile court. In re B.B., 2010 ND 9, ¶5, 777 N.W.2d 350. When a district court reviews a judicial referee's findings and order, the district court's review is de novo. N.D.Admin. R. 13, Section 11.

II. Whether the Judicial Referee erred in finding there was clear and convincing evidence that the guardianship was in the best interest of the child in accordance with Section 27-20.1-11 of the North Dakota Century Code.

¶18 “The court may appoint a guardian of a child if the court finds by clear and convincing evidence that the appointment is in the child's best interest and . . . [t]he child is a deprived child as defined under section 27-20-02.” N.D.C.C. §27-20.1-11. Pursuant to North Dakota Century Code Section 27-20-02(8) a deprived child is defined as a child who:

- a. Is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health, or morals, and the deprivation is not due primarily to the lack of financial means of the child's parents, guardian, or other custodian;
- b. Has been placed for care or adoption in violation of law;
- c. Has been abandoned by the child's parents, guardian, or other custodian;
- d. Is without proper parental care, control, or education as required by law, or other care and control necessary for the child's well-being because of the physical, mental, emotional, or other illness or disability of the child's parent or parents, and that such lack of care is not due to a willful act of commission or act of omission by the child's parents, and care is requested by a parent;
- e. Is in need of treatment and whose parents, guardian, or other custodian have refused to participate in treatment as ordered by the juvenile court;
- f. Was subject to prenatal exposure to chronic or severe use of alcohol or any controlled substance as defined in chapter 19-03.1 in a manner not lawfully prescribed by a practitioner; g. Is present in an environment subjecting the child to exposure to a controlled substance, chemical substance, or drug paraphernalia as prohibited by section 19-03.1-22.2. h. Is a victim of human trafficking as defined in title 12.1.

¶19 “Parents have a fundamental, natural right to their children which is of constitutional dimension. The right is paramount. A parent's paramount and constitutional right to the custody and companionship of their children is superior to that of any other person.” In re G.L., 2017 ND

406, ¶7, 915 N.W.2d 685, (citing Hoff v. Berg, 1999 ND 115, ¶ 10, 595 N.W.2d 285 (citations omitted)).

Because of these parental rights, guardianship termination cases require the following: When there is a custody dispute between a natural parent and a third party the test is whether or not there are exceptional circumstances which require that in the best interest of the child, the child be placed in the custody of the third party rather than with the biological parent. The court cannot award custody to a third party, rather than the natural parent, under a ‘best interest of the child’ test unless it first determines that ‘exceptional circumstances’ exist to trigger the best-interest analysis. Absent exceptional circumstances the natural parent is entitled to custody of the child even though the third party may be able to offer more amenities.

In re G.L., 2017 ND 406, ¶7, 915 N.W.2d 685 (citing Worden v. Worden, 434 N.W.2d 341, 342 (N.D. 1989) (citations omitted)). "The court cannot award custody to a third party, rather than the natural parent, under a ‘best interest of the child’ test unless it first determines that ‘exceptional circumstances’ exist to trigger the best-interest analysis." Id. (citing Worden, 434 N.W.2d 342, 342). The Court made no finding to exceptional circumstances.

¶20 Since, the Court made no finding to exceptional circumstances, the Court does not need to move to the second prong triggered by exceptional circumstances, which is the best interest factors. The best interest factors are outlined by Section 14-09-06.2 of the North Dakota Century Code. The Court did not address the best interest factors in this case either.

A. Whether the Juvenile Court erred in finding A.D. to be deprived.

¶21 In the present case, L.D. argues that the Court erred in granting the guardianship because L.D. could not have deprived A.D. L.D. argues that he cannot deprive and/or abandon A.D. when he was withheld information to maintain a relationship with A.D. The criteria a district court should look to when considering whether a child has been abandoned:

[W]e look to such factors as the parent’s contact and communication with the child, the parent’s love, care and affection toward the child, and the parent’s intent. Also relevant is the parent’s acceptance of parental obligations, such as ‘to care for, protect, support, educate, give moral guidance to, and provide a home for the child.’

‘A parent’s negligent failure to perform his parental duties is significant to the issue of abandonment.’”

In re J.S.L.F., 2013 ND 31, ¶11, 826 N.W.2d 916 (citing In re Adoption of S.R.F., 2004 ND 150, ¶ 10, 683 N.W.2d 913 (quoting In re Adoption of A.M.M., 529 N.W.2d 864, 866 (N.D.1995))).

¶22 M.K. purposefully kept A.D. from L.K. App. 18; Tr. p. 94-95, lns. 14-2; Aug. 4, 2020. Furthermore, M.K. admits that L.D. has never abused A.D. App. 18; Tr. p. 93, lns. 24-25; Aug. 4, 2020. L.D. argues that it is not possible to deprive and/or abandon A.D. when A.D. was withheld from L.D. Additionally, near the end of 2019, L.D. did call A.D.’s grandmother while A.D. was living with her grandmother, and asked if he could talk to A.D. App. 18; Tr. p. 30, lns. 1-19; Aug. 4, 2020. Again, L.D. was not allowed to speak to A.D. App. 18; Tr. p. 30, lns. 8-17; Aug. 4, 2020. L.D. argues that the Petitioners failed to meet their burden to prove by clear and convincing evidence that L.D. abandoned A.D.

b. Whether the District Court erred in affirming the Judicial Referee’s Findings of Fact and Order establishing guardianship.

¶23 Appellate review of a juvenile court is equivalent to the former procedure of trial de novo; therefore, the appellate court independently reviews the evidence. In re K.S., 500 N.W.2d 603 (N.D. 1993). In the present case, the District Court failed to address the Juvenile Court did not find any exceptional circumstances, and did not make any best interest analysis, as required by In re G.L., 2017 ND 406, ¶7, 915 N.W.2d 685, and Worden v. Worden, 434 N.W.2d 341, 342 (N.D. 1989) (citations omitted)). The District Court erred in affirming the Juvenile Court’s Findings and Order.

CONCLUSION

¶24 The Appellant respectfully requests this Court reverse and remand the Courts’ Orders.

Dated this 16th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Appellant brief contains 13 pages consisting of the cover page through the conclusion and signature block and complies with the page limits outlined in North Dakota Rules of Appellate Procedure Rule 32(a)(8)(A).

Dated this 16th day of March, 2021.

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