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STATE OF NORTH DAKOTA

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-77
	)	
vs.	)	
	)	
M.K.,	)	
L.D.,	)	
	)	
Respondents and Appellant.	)	

~~CORRECTED~~ BRIEF OF PETITIONERS – APPELLEES

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

In Juvenile Court, Burleigh County, State of North Dakota

The Honorable Lindsey Nieuwsma and the Honorable David Reich

/s/ *Patrick W Waters*
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APPELLEES STATEMENT OF FACTS

[¶1] The Appellees do not dispute the recitation of facts by the Appellant.

LAW AND ARGUMENT

I. Standard of Review

[¶2] At the time of the trial in juvenile court in this matter, juvenile court had "…exclusive jurisdiction over proceedings in which a child is alleged to be deprived." In re T.T., 2004 ND 138, ¶5, 681 N.W.2d 779. N.D.C.C. 27-20-02(8)(a-h) defines what constitutes a deprived child for purposes of juvenile deprivation actions.

[¶3] "A juvenile court's finding of deprivation must be supported by clear and convincing evidence…findings of fact in juvenile matters shall not be set aside unless clearly erroneous. A finding of fact is clearly erroneous under N.D.R.Civ.P. Rule 52(a) if there is no evidence to support it, if the reviewing court is left with a definite and firm conviction a mistake has been made, or if the finding is induced by an erroneous view of the law…[the North Dakota Supreme Court] give[s] due regard to the juvenile court's opportunity to judge the credibility of witnesses. If the juvenile court finds a child is deprived, the court may order an appropriate disposition under N.D.C.C. § 27-20-30. N.D.C.C. § 27-20-30(d) specifically provides that one of the options that a juvenile court has where it makes a finding that a child is deprived is that the juvenile court may "[a]ppoint a fit and willing relative or other appropriate individual as the child's legal guardian." Ibid.

[¶4] With respect to a District Court's review of a Judicial Referee's findings and order, the review by the District Court is one of *de novo*. N.D.Admin. Rule 13, Section 11. Section (b) of N.D.Admin. Rule 13, Section 11 states:

> (b) The review by a District Court judge must be a de novo review of the record. The District Court may:
> (1) adopt the referee's findings;
> (2) remand to the referee for additional findings; or
> (3) reject the referee's findings.

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 N.D.C.C. § 27-20.1-11.

[¶5] As stated in ¶2 and 3, *supra*, where a juvenile court finds deprivation exists, the juvenile may enter a disposition which includes the granting of a guardianship to a "…fit and willing relative or other appropriate individual…"

[¶6] At trial, the juvenile court found that A.D. is deprived by L.D. and M.K. through their abandonment of A.D. as well as through, [M.K.]'s and [L.D.]'s [failure to] provide [to A.D.] 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. The mother has not established or maintained consistent contact with the child for the last two years, and the father has not established or maintained consistent contact with the child for the last twelve years. Both parents have deprived the child by abandonment. Additionally, while the child was living in the home with the mother, she recalled an incident of severe domestic violence between her mother and her father and witnessed multiple incidences of domestic violence between the mother and Mark Jacobs. At the time of trial, the mother and Mr. Jacobs were still residing together and share a young child. [A.D.] expressed a preference to be placed under a guardianship with the Petitioners rather than placement in the custody of either parent, or the Court has given substantial weight to that preference." Additionally, the juvenile court listed numerous other reasons for its findings of fact which led to its determination that A.D. was deprived under N.D.C.C. § 27-20.1-11. Appellant's App. 54-55. Further, the juvenile court found "…[A.D.] to be a mature, reasonable, and very well-spoken child…the Court finds her testimony to be credible with respect to the "what happened" rather than the "when it happened…The Court also finds that A.D.'s testimony did not appear to be rehearsed or coached

or based on undesirable or improper influences. As a result, this Court gives substantial weight to [A.D.]'s expressed preference to be placed under a guardianship with the Petitioners rather than returning to the custody of either parent." Id. at 57.

[¶7] Curiously, the Appellant cites to In re G.L., 2018 ND 176, 915 ND.2d 685. In re G.L. was a case wherein a biological parent sought to **terminate** a **voluntary** guardianship. The matter before this Court is not one of a guardianship termination, but rather the establishment of a guardianship through a contested, involuntary court trial. The Appellant takes great pains to aver that prior to the juvenile court awarding guardianship to the Petitioners, the juvenile court must first have made a finding that "exceptional circumstances" existed at the time of the awarding of the guardianship. Following the logic of the Appellant, because the juvenile court did not find "exceptional circumstances" existed, the juvenile court was prohibited from ordering that a guardianship be awarded to the Petitioners. The Appellant's contentions are nothing more than an attempt to confuse this Court by citing to a case that is fundamentally, factually different than the present case.

[¶8] Again, the present matter arose from a contested court trial during which the juvenile court heard ample testimony, with all parties having adequate opportunity to call witnesses and cross-examine persons testifying. Because the present case is not one in which a biological parent was seeking to terminate a guardianship, the Appellant cannot rely on In re G.L. as the holding in In re G.L. is not applicable to an involuntary guardianship such as was the present case.

[¶9] The Appellant further argues that the juvenile court did not address the best interest factors required under N.D.C.C. § 14-09-06.2, which provides that the court must consider and evaluate those factors when making decisions regarding parental rights and responsibilities.

However, 14-09-06.2 requires that a court must only address those factors which are applicable to a given case. In the juvenile court's findings, it made the following findings which undeniably addressed the best interest factors of A.D. as applied to the Petition for Guardianship of A.D.:

> "The mother [M.K.] has not provided primary care for [A.D.] since approximately June 2016. In June 2016, the mother allowed [A.D.] to travel from their home in Arizona to stay with her maternal grandmother, L.K., in North Dakota for the summer. [A.D.] did not return to the mother's home after the summer and continued to reside with her grandmother from June 2016 to May 31, 2020. L.K. passed away on May 31, 2020. At the time of her death, a petition seeking appointment of L.K. as guardian for [A.D.] was pending. [A.D.] has resided with the Petitioners since early June 2020… The mother did not provide financial support or other assistance to L.K. or the Petitioners to assist with [A.D.]'s care. The mother has not made significant efforts to have the child returned to her care or to enforce her rights to visitation with the child. The mother has three other children, two of which are not in her care or custody… During the time that [A.D.] lived with her mother from her birth in 2006 until 2016, she witnessed multiple instances of domestic violence by Mark Jacobs against her mother. She testified that she recalled "fights every day" between her mother and Mr. Jacobs, saw Mr. Jacobs hit her mother, and recalled that law enforcement was called to her home approximately ten to fifteen times due to fighting between her mother and Mr. Jacobs in the month prior to her leaving for North Dakota."
>
> "The father [L.D.] 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 [A.D.'s grandmother] by telephone near the end of2019; the father stated that

> he was aware of the mother's and A.D.'s and her grandmother'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."
>
> "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 participation in a therapy program or demonstrate any effort to work towards parenting time with the child."
>
> "[A.D.] testified that she did not know her father and did not want to live with him. She testified that she was afraid of her father and recalled an incident where her father committed severe domestic violence against her mother…[A.D] stated that she did not want to return to an environment where there was domestic violence in the home."
>
> Appellant's App. 54-56.

[¶10] The juvenile court's findings of fact, as stated *supra*, address, at the very least, the best interest factors of N.D.C.C. §14-09-06.

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

[¶11] This Court need only to look to the facts brought forward before the juvenile court at the court trial on the guardianship petition and to the juvenile court's findings of fact and disposition to see that the juvenile court had sufficient evidence before it and engaged in the proper

consideration of the best interests of A.D. when it made the decision to award guardianship of A.D. to the Petitioners. While the juvenile court did not specifically list the best interest factors in its dispositional order, it does not follow that the juvenile court failed to consider the best interest factors as the juvenile court specifically made findings which addressed various best interest factors relating to A.D. It is not necessary for the juvenile court to have had to list each factor, nor does it necessarily follow that each one of the best interest factors were applicable to this case in the mind of the juvenile court.

[¶12] Through the juvenile court's finding and disposition, it is readily apparent that the juvenile court did, in fact, consider applicable best interest factors. For instance, through its acknowledgment that neither L.D. nor M.K. had any contact or role in A.D.'s life as of the time of the court trial and for a significant period of time prior to the filing of the guardianship petition, the juvenile court considered factor (a). The juvenile court also considered factor (b) when it noted that A.D. was not in a safe environment during those times when she resided with either M.K. or L.D. It can be implied that the juvenile court took into account factor (f) as neither M.K. nor L.D. have demonstrated much of anything that indicates they live their lives in a moral manner. Evidence received at the court trial consisted of the poor physical health of L.D., which was heard by the juvenile court through testimony and, therefore, was a consideration of the juvenile court, which is factor (g). A.D. resided in North Dakota for a number of years prior to the petition being filed and evidence received and considered by the juvenile court consisted of all of the ties to the community A.D. had, the school connections, and the stability of the home environment A.D. had come to know. Clearly, any change to that stability would have a dramatic, negative effect upon A.D., factor (h) was therefore considered. The juvenile court clearly and specifically found that A.D. met the criterion set forth in factor (i),

and instances of domestic violence between L.D. and M.K. was submitted to the juvenile court through testimony, which properly demonstrates the juvenile court was mindful of factor (j).

[¶13] On the record before this Court, it cannot be said that the juvenile court made findings of fact regarding deprivation which were clearly erroneous. Likewise, this Court could not be left with a definite and firm conviction, on the record before it, that the juvenile court made a mistake in its findings, and this Court should not find that the findings of fact made by the juvenile court which led to the determination that A.D. was deprived by L.D. and M.K. was an erroneous view of the law in that the facts and evidence received by the juvenile court could have reasonably led the juvenile court to believe that such evidence was sufficient to support a finding of deprivation. Because deprivation was found by the juvenile court, the juvenile court acted within its purview when it awarded guardianship of A.D. to the Petitioners.

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

[¶14] Just as the Appellant improperly relied upon the inapplicable case of In re G.L. to support his contention that the Judicial Referee erred in finding deprivation and awarding guardianship of A.D. to the Petitioners, the Appellant doubles-down and attempts to rely on In re G.L. to aver that the District Court erred in affirming the findings of deprivation made by the Judicial Referee and the subsequent awarding of guardianship. In re G.L. does not apply to the decision of the District Court in affirming just as it did not apply to the Judicial Referee's decision, for the very same reasons as discussed throughout this brief. This Court should not be persuaded by Appellant's attempt to improperly use the holdings in In re G.L. in any facet as applied to the present case. Simply put, the District Court did not err in affirming the Judicial Referee's Findings and Order.

CONCLUSION

[¶15] The Appellees respectfully request this Court affirm both the Order issued by the Judicial Referee which awarded guardianship of A.D. to the Petitioners and the Order in which the District Court affirmed the Judicial Referee's Order.

Dated this 14th day of May, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Appellee brief contains 12 pages consisting of the cover page through the conclusion and signature block and complies with the page limits outlined in N.D.R.App.Pro. Rule 32(a)(8)(A).