Children's Law Workshop: Kinship Guardianship

Judge Jane Levy
Second Judicial District Court

Judge Marie Ward
Second Judicial District Court

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Second Judicial District Court

FACULTY BIOGRAPHIES:

JUDGE JANE C. LEVY was appointed in 2016 to the Second Judicial District Court, Division XXV. Prior to her appointment, she was the managing partner at Geer Wissel Levy & Hartwell P.A. Currently, Judge Levy is the chair of the Second Judicial District's Pro Bono Committee, the Chair of the Supreme Court Domestic Relations Rules Committee, a member of the Innovations Team for the New Mexico judiciary, the chair of the Online Dispute Resolution workgroup, and the chair of the Security Risk Committee for the New Mexico judiciary. Judge Levy holds a Masters in Counseling Psychology from Lewis & Clark Graduate School of Education and Counseling, a Juris Doctorate from Lewis & Clark Law School in Portland, Oregon, and a Bachelor's Degree from Beloit College in Beloit, Wisconsin.

JOHN SCHOEPPNER has had the privilege of serving as a Special Master and Mental Health Commissioner for the Second Judicial District Court since 2003. During this time, he has worked for five Chief Judges and five Children's Division Presiding Judges. He regularly hears child welfare cases, delinquency matters, civil commitment and treatment guardian proceedings. He has worked in treatment courts for over a decade and from time to time assisted the Family Court in domestic violence matters. He is active in some administration of justice committees, including: NM Supreme Court Ad Hoc Committee on Rules for Mental Health Proceedings since 2013; National Council of Juvenile and Family Court Judges (NCJFCJ), Juvenile Law Advisory Committee since 2016; and many committees of the Juvenile Detention Alternatives Initiative (JDAI) and the Community Supports Committee of the Bernalillo County Behavioral Health Initiative (BCBHI). He regularly trains Second Year UNM Psychiatric Resident Physicians and other health care professionals on the NM Mental Health Code. He is a member of the NM Hispanic Bar Association (Board of Directors 1994-2000, 2009-11, President 1998 and 1999), and the NM State Bar Children's Law and Health Law Sections. Mr. Schoeppner is a lifetime New Mexico resident and a graduate of UNM (BA, 1985) (JD, 1989).

LEARNING OBJECTIVES:

After this session, participants will be able to:

- Adjudicate a kinship guardianship case from filing through final hearing;
- Avoid timing pitfalls and other common problems that arise during kinship guardianship cases;
- Recognize how the various courts work together to ensure that kinship guardianship cases are heard in the correct venue (be that Children's Court or some other jurisdiction);
- Distinguish how a kinship guardianship case may be handled when there is a pending case in Children's Court; and
- Describe CYFD connection with kinship guardianship cases.

ARTICLE 10B
Kinship Guardianship

40-10B-1. Short title.

This act [40-10B-1 through 40-10B-15 NMSA 1978] may be cited as the "Kinship Guardianship Act".

History: Laws 2001, ch. 167, § 1.

ANNOTATIONS

Cross references. — For forms approved for use in Kinship Guardianship proceedings, *see* Civil Forms 4A-501 to 4A-513 NMRA.

Compiler's notes. — The Kinship Guardianship Act, codified as 40-10B-1 to 40-10B-15 NMSA 1978, was originally drafted and enacted to be Chapter 45, Article 5 NMSA 1978, but it was recompiled to Chapter 40 NMSA 1978, as the latter seems a more appropriate placement.

40-10B-2. Policy; purpose.

A. It is the policy of the state that the interests of children are best served when they are raised by their parents. When neither parent is able or willing to provide appropriate care, guidance and supervision to a child, it is the policy of the state that, whenever possible, a child should be raised by family members or kinship caregivers.

B. The Kinship Guardianship Act 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.

C. The purposes of the Kinship Guardianship Act are to:

(1) establish procedures to effect a legal relationship between a child and a kinship caregiver when the child is not residing with either parent; and

(2) provide a child with a stable and consistent relationship with a kinship caregiver that will enable the child to develop physically, mentally and emotionally to the maximum extent possible when the child's parents are not willing or able to do so.

History: Laws 2001, ch. 167, § 2.

ANNOTATIONS

Intent of Kinship Guardianship Act. — The legislature enacted the Kinship Guardianship Act with the intent to preserve family unity, consistent with the overall purpose of the Children's Code and the Abuse and Neglect Act, 32A-4-1 NMSA 1978 et seq., indicating that the legislature intended the Kinship Guardianship Act to work in harmony with the Abuse and Neglect Act of the Children's Code. *State ex rel. Children, Youth & Families Dep't v. Djamila B.*, 2015-NMSC-003.

Kinship guardian's role in abuse and neglect proceedings. — The Kinship Guardianship Act bestows parental rights on kinship guardians; the legislature intended that kinship guardians participate in all abuse and neglect proceedings until the kinship guardianship is properly revoked in accordance with this Act and the rules of evidence prior to involuntarily dismissing kinship guardians from abuse and neglect proceedings or before appointing a permanent guardian other than the kinship guardian. *State ex rel. Children, Youth & Families Dep't v. Djamila B.*, 2015-NMSC-003.

Where guardian was appointed by a family court as a kinship guardian pursuant to the Kinship Guardianship Act, 40-10B-1 NMSA 1978 et seq., and where Children, Youth and Families Department (CYFD) brought abuse and neglect proceedings in children's court against guardian and children's biological parents pursuant to the Abuse and Neglect Act, 32A-4-1 NMSA 1978 et seq., the kinship guardian, who possesses the same legal rights and responsibilities of a biological parent, must be a party to a termination of parental rights hearing under the Abuse and Neglect Act. *State ex rel. Children, Youth & Families Dep't v. Djamila B.*, 2015-NMSC-003.

40-10B-3. Definitions.

As used in the Kinship Guardianship Act:

A. "caregiver" means an adult, who is not a parent of a child, with whom a child resides and who provides that child with the care, maintenance and supervision consistent with the duties and responsibilities of a parent of the child;

B. "child" means an individual who is a minor;

C. "kinship" means the relationship that exists between a child and 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;

D. "parent" means a biological or adoptive parent of a child whose parental rights have not been terminated; and

E. "relative" means an individual related to a child as a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin or any person denoted by the prefix "grand" or "great", or the spouse or former spouse of the persons specified.

History: Laws 2001, ch. 167, § 3.

ANNOTATIONS

40-10B-4. Jurisdiction and venue.

A. The district court has jurisdiction of proceedings pursuant to the Kinship Guardianship Act.

B. Proceedings pursuant to the Kinship Guardianship Act shall be in the district court of the county of the child's legal residence or the county where the child resides, if different from the county of legal residence.

History: Laws 2001, ch. 167, § 4.

ANNOTATIONS

40-10B-5. Petition; who may file; contents.

A. A petition seeking the appointment of a guardian pursuant to the Kinship Guardianship Act may be filed only by:

(1) a kinship caregiver;

(2) a caregiver, who has reached the age of twenty-one, with whom no kinship with the child exists, who has been nominated to be guardian of the child by the child, and the child has reached the age of fourteen; or

(3) a caregiver designated formally or informally by a parent in writing if the designation indicates on its face that the parent signing understands:

(a) the purpose and effect of the guardianship;

(b) that the parent has the right to be served with the petition and notices of hearings in the action; and

(c) that the parent may appear in court to contest the guardianship.

B. A petition seeking the appointment of a guardian shall be verified by the petitioner and allege the following with respect to the child:

(1) facts that, if proved, will meet the requirements of Subsection B of Section 40-10B-8 NMSA 1978;

(2) the date and place of birth of the child, if known, and if not known, the reason for the lack of knowledge;

(3) the legal residence of the child and the place where the child resides, if different from the legal residence;

(4) the name and address of the petitioner;

(5) the kinship, if any, between the petitioner and the child;

(6) the names and addresses of the parents of the child;

(7) the names and addresses of persons having legal custody of the child;

(8) the existence of any matters pending involving the custody of the child;

(9) a statement that the petitioner agrees to accept the duties and responsibilities of guardianship;

(10) the existence of any matters pending pursuant to the provisions of Chapter 32A, Article 4 NMSA 1978 and, if so, a statement that the children, youth and families department consents to the relief requested in the petition;

(11) whether the child is subject to provisions of the federal Indian Child Welfare Act of 1978 and, if so:

(a) the tribal affiliations of the child's parents; and

(b) the specific actions taken by the petitioner to notify the parents' tribes and the results of the contacts, including the names, addresses, titles and telephone numbers of the persons contacted, and copies of correspondence with the tribe; and

(12) other facts in support of the guardianship sought.

History: Laws 2001, ch. 167, § 5; 2015, ch. 28, § 1.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901 et seq.

The 2015 amendment, effective June 19, 2015, removed the requirement to state marital status of the child in a petition seeking the appointment of a guardian pursuant to the Kinship Guardianship Act and made technical corrections; in Subsection A, Paragraph (2), after the first occurrence of "reached", deleted "his twenty-first birthday" and added "the age of twenty-one", and after the second occurrence of "reached", deleted "his fourteenth birthday" and added "the age of fourteen"; in Subparagraph A(3)(b), after "that", deleted "he" and added "the parent"; in Subparagraph A(3)(c), after "that", deleted "he" and added "the parent"; in Subsection B, Paragraph (1), after "Section", deleted "8 of the Kinship Guardianship Act" and added "40-10B-8 NMSA 1978"; in Subsection B, Paragraph (3), after "where", deleted "he" and added "the child"; and deleted former Paragraph (4) of Subsection B, and redesignated the succeeding paragraphs accordingly.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and application of Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C.A. § 1901 et seq.) upon child custody determinations, 89 A.L.R.5th 195.

40-10B-6. Service of petition; notice; parties.

A. The court shall set a date for hearing on the petition, which date shall be no less than thirty and no more than ninety days from the date of filing the petition.

B. The petition and a notice of the hearing shall be served upon:

(1) the children, youth and families department if there is any pending matter relating to the child pursuant to the provisions of Chapter 32A, Article 4 NMSA 1978;

(2) the child if the child has reached the age of fourteen;

(3) the parents of the child;

(4) a person having custody of the child or visitation rights pursuant to a court order; and

(5) if the child is an Indian child as defined in the federal Indian Child Welfare Act of 1978, the appropriate Indian tribe and any "Indian custodian", together with a notice of pendency of the guardianship proceedings, pursuant to the provisions of the federal Indian Child Welfare Act of 1978.

C. Service of process required by Subsection A of this section shall be made in accordance with the requirements for giving notice of a hearing pursuant to Subsection A of Section 45-1-401 NMSA 1978.

D. The persons required to be served pursuant to Subsection B of this section have a right to file a response as parties to this action. Other persons may intervene pursuant to Rule 1-024 NMRA.

History: Laws 2001, ch. 167, § 6; 2015, ch. 28, § 2.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901 et seq.

For service of process forms, *see* Civil Forms 4-206, 4-209 and 4-209B NMRA.

The 2015 amendment, effective June 19, 2015, amended the process for obtaining a court hearing; in Subsection A, after "A.", deleted "At the time of filing the petition, the petitioner shall obtain an order of the court setting" and added "The court shall set"; and in Subsection B, Paragraph (2), after "if", deleted "he" and added "the child", and after "reached", deleted "his fourteenth birthday" and added "the age of fourteen".

Procedural due process denied. — Where a grandparent filed a petition for guardianship; the matter was resolved when the grandparent and the parents of the child reached a settlement agreement; respondent was a parent of the child; when the other parent breached the settlement agreement, the grandparent, without filing a new petition for guardianship, prepared a guardianship order; the district court signed the guardianship order in an ex parte proceeding; and no notice was given to respondent and no hearing was scheduled or held on the matter, respondent was denied procedural due process. *Burris-Awalt v. Knowles*, 2010-NMCA-083, 148 N.M. 616, 241 P.3d 617.

40-10B-7. Temporary guardianship pending hearing.

A. After the filing of the petition, upon motion of the petitioner or a person required to be served pursuant to Subsection B of Section 6 of the Kinship Guardianship Act, or upon its own motion, the court may appoint a temporary guardian to serve for not more than one hundred eighty days or until the case is decided on the merits, whichever occurs first.

B. A motion for temporary guardianship shall be heard within twenty days of the date the motion is filed. The motion and notice of hearing shall be served on all persons required to be served pursuant to Subsection B of Section 6 of the Kinship Guardianship Act.

C. An order pursuant to Subsection A of this section may be entered ex parte upon good cause shown. If the order is entered ex parte, a copy of the order shall be served on the persons required to be served pursuant to Subsection B of Section 6 of the Kinship Guardianship Act. If a person files an objection to the order, the court immediately shall schedule a hearing to be held within ten days of the date the objection is filed. Notice of the hearing shall be given to the petitioner and all persons required to be served pursuant to Subsection B of Section 6 of the Kinship Guardianship Act.

History: Laws 2001, ch. 167, § 7.

ANNOTATIONS

40-10B-8. Hearing; elements of proof; burden of proof; judgment; child support.

A. Upon hearing, 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, it shall make the appointment. In other cases, the court may dismiss the proceedings or make any other disposition of the matter that will serve the best interests of the minor.

B. A guardian may be appointed pursuant to the Kinship Guardianship Act 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 [Chapter 45 NMSA 1978].

C. The burden of proof shall be by clear and convincing evidence.

D. As part of a judgment entered pursuant to the Kinship Guardianship Act, the court may order a

parent to pay the reasonable costs of support and maintenance of the child that the parent is financially able to pay. The court may use the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 to calculate a reasonable payment.

E. The court may order visitation between a parent and child to maintain or rebuild a parent-child relationship if the visitation is in the best interests of the child.

History: Laws 2001, ch. 167, § 8; 2015, ch. 28, § 3.

ANNOTATIONS

Cross references. — For the federal Indian Child Welfare Act of 1978, *see* 25 U.S.C. § 1901 et seq.

The 2015 amendment, effective June 19, 2015, changed the standard of proof in cases involving an Indian child; in Subsection C, deleted "except that in those cases involving an Indian child as defined in the federal Indian Child Welfare Act of 1978, the burden of proof shall be proof beyond a reasonable doubt".

Both parents must satisfy the conditions for appointment of a guardian. — Section 40-10B-8 NMSA 1978 requires both parents to satisfy at least one of the three conditions of Subsection B, but does not require both parents to satisfy the same condition. *Freedom C. v. Brian D.*, 2012-NMSC-017, 280 P.3d 909, *rev'g* 2011-NMCA-040, 149 N.M. 588, 252 P.3d 812.

Both parents satisfied the conditions for appointment of a guardian. — Where the parents and the child lived with the child's grandparents for three years; one parent was the child of the grandparents; the other parent moved out of the house and ended the relationship with the other parent in 2008; in a custody proceeding filed by the parents, the district court awarded temporary sole legal and physical custody of the child to the grandparents and visitation rights to the parents; in 2009, almost nine months after they had been awarded custody, the grandparents filed a petition for kinship guardianship and custody of the child; one parent consented to the guardianship; the other parent did not consent to the guardianship; and the district court found the parents to be unfit to raise the child and granted the grandparent's petition for kinship guardianship, the district court properly applied 40-10B-8 NMSA 1978 because both parents satisfied the conditions of Subsection B(3) of 40-10B-8 NMSA 1978. *Freedom C. v. Brian D.*, 2012-NMSC-017, 280 P.3d 909, *rev'g* 2011-NMCA-040, 149 N.M. 588, 252 P.3d 812.

Extraordinary circumstances defined. — Extraordinary circumstances for purposes of the Kinship Guardianship Act are circumstances other than the parent's current inability or unwillingness to provide the child with adequate care, maintenance and supervision that justify appointing guardians for a child over the objections of the child's parents. *Debbie L. v. Galadriel R.*, 2009-NMCA-007, 145 N.M. 500, 201 P.3d 169, cert. denied, 2008-NMCERT-012, 145 N.M. 571, 203 P.3d 102.

Extraordinary circumstances. — A showing that the petitioners have assumed the role of the psychological parents of the child who is the subject of a Kinship Guardianship Act proceeding to the extent that the child will suffer a significant degree of psychological and emotional harm if the relationship with the psychological parents is abruptly terminated is sufficient to rebut the presumption that the biological parent is acting in the child's best interests and to establish extraordinary circumstances within the meaning of the Kinship Guardianship Act. *Debbie L. v.*

Galadriel R., 2009-NMCA-007, 145 N.M. 500, 201 P.3d 169, cert. denied, 2008-NMCERT-012, 145 N.M. 571, 203 P.3d 102.

Extraordinary circumstances were not proven. — Where, in a divorce action, although respondent and respondent's ex-spouse were both found to be fit, custody of respondent's children was awarded to the ex-spouse; the ex-spouse and children lived in New Mexico for eleven years; respondent lived in Texas where the children visited respondent during summers and holidays; when the ex-spouse developed cancer, the children stayed with petitioners for brief periods while the ex-spouse receive medical treatments; when the ex-spouse died, petitioners sought to be appointed as kinship guardians over the children; petitioners were friends of the ex-spouse, but had no biological relationship to the children; the children wanted to stay with petitioners because they had strong ties with the community, wanted to finish school in the community, and were eligible for college scholarships in New Mexico; and there was no evidence that the move to Texas with respondent would cause serious psychological harm or other serious detriment to the children, the evidence did not establish that there were extraordinary circumstances to rebut the presumption that the welfare and best interests of the children would best be served in the custody of respondent. *Stanley J. v. Cliff J.*, 2014-NMCA-029.

40-10B-9. Guardian ad litem; appointment.

A. In a proceeding to appoint a guardian pursuant to the Kinship Guardianship Act, the court may appoint a guardian ad litem for the child upon the motion of a party or solely in the court's discretion. The court shall appoint a guardian ad litem if a parent of the child is participating in the proceeding and objects to the appointment requested.

B. In a proceeding in which a parent of the child has petitioned for the revocation of a guardianship established pursuant to the Kinship Guardianship Act and the guardian objects to the revocation, the court shall appoint a guardian ad litem.

C. The court may order all or some of the parties to a proceeding to pay a reasonable fee of a guardian ad litem. If all of the parties are indigent, the court may award a reasonable fee to the guardian ad litem to be paid out of funds of the court.

History: Laws 2001, ch. 167, § 9.

ANNOTATIONS

40-10B-10. Guardian ad litem; powers and duties.

A guardian ad litem appointed by the court in a proceeding pursuant to the Kinship Guardianship Act shall:

A. in connection with a petition for guardianship, make a diligent investigation of the circumstances surrounding the petition, including visiting the child in the home, interviewing the person proposed as guardian and interviewing the parents of the child if available;

B. in connection with a petition or motion for revocation of a guardianship, recommend an appropriate transition plan in the event the guardianship is revoked; and

C. at a hearing held in connection with proceedings described in Subsection A or B of this section, report to the court concerning the best interests of the child and the child's position on the requested relief.

History: Laws 2001, ch. 167, § 10.

ANNOTATIONS

40-10B-11. Nomination objection by child.

In a proceeding for appointment of a guardian pursuant to the Kinship Guardianship Act:

A. the court shall appoint a person nominated by a child who has reached his fourteenth birthday unless the court finds the nomination contrary to the best interests of the child; and

B. the court shall not appoint a person as guardian if a child who has reached his fourteenth birthday files a written objection in the proceeding before the person accepts appointment as guardian.

History: Laws 2001, ch. 167, § 11.

ANNOTATIONS

40-10B-12. Revocation of guardianship.

A. Any person, including a child who has reached his fourteenth birthday, may move for revocation of a guardianship created pursuant to the Kinship Guardianship Act. The person requesting revocation shall attach to the motion a transition plan proposed to facilitate the reintegration of the child into the home of a parent or a new guardian. A transition plan shall take into consideration the child's age, development and any bond with the guardian.

B. If the court finds that a preponderance of the evidence proves a change in circumstances and the revocation is in the best interests of the child, it shall grant the motion and:

(1) adopt a transition plan proposed by a party or the guardian ad litem;

(2) propose and adopt its own transition plan; or

(3) order the parties to develop a transition plan by consensus if they will agree to do so.

History: Laws 2001, ch. 167, § 12.

ANNOTATIONS

Right of third party to file motion to revoke guardianship. — Where the petitioner, who was the child's aunt by marriage, filed a petition for custody of the child; the child lived with the child's grandmother; the child's mother consented to a kinship guardianship of the child to the grandmother; the court dismissed the petition on the basis of standing; during proceedings on petitioner's motion for reconsideration, petitioner expressed an intention to file a motion under 40-10B-12 NMSA 1978 of the Kinship Guardianship Act; and the court disallowed petitioner from filing the motion and warned petitioner that the court would consider the motion contemptuous of the court's prior order of dismissal, the court's prohibition was erroneous, because 40-10B-12 NMSA 1978 permits any person to file a motion to revoke a kinship guardianship. *Vescio v. Wolf*, 2009-NMCA-129, 147 N.M. 374, 223 P.3d 371.

40-10B-13. Rights and duties of guardian.

A. A guardian appointed for a child pursuant to the Kinship Guardianship Act 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.

B. Unless otherwise ordered by the court, a guardian appointed pursuant to the Kinship Guardianship Act has authority to make all decisions regarding visitation between a parent and the child.

C. A certified copy of the court order appointing a guardian pursuant to the Kinship Guardianship Act shall be satisfactory proof of the authority of the guardian, and letters of guardianship need not be issued.

History: Laws 2001, ch. 167, § 13.

ANNOTATIONS

Kinship guardians possess the rights of biological parents. — A kinship guardian appointed under the Kinship Guardianship Act, 40-10B-1 NMSA 1978 et seq., possesses the same legal rights and responsibilities of a biological parent and may not be involuntarily dismissed as a party from a termination of parental rights case under the Abuse and Neglect Act, 32A-4-1 NMSA 1978 et seq., without first revoking the kinship guardianship according to the procedures specified in the Kinship Guardianship Act and the rules of evidence, but is not a necessary and indispensable party as defined by Rule 1-019 NMRA. *State ex rel. Children, Youth & Families Dep't v. Djamila B.*, 2015-NMSC-003.

Where guardian was appointed by a family court as a kinship guardian pursuant to the Kinship Guardianship Act, 40-10B-1 NMSA 1978 et seq., and where Children, Youth and Families Department (CYFD) brought abuse and neglect proceedings in children's court against guardian and children's biological parents pursuant to the Abuse and Neglect Act, 32A-4-1 NMSA 1978 et seq., the kinship guardian, who possesses the same legal rights and responsibilities of a biological parent, must be a party to a termination of parental rights hearing under the Abuse and Neglect Act,

but is not a necessary and indispensable party as defined by Rule 1-019 NMRA. *State ex rel. Children, Youth & Families Dep't v. Djamila B.*, 2015-NMSC-003.

Kinship guardian is a necessary and indispensable party. — A kinship guardian under the Kinship Guardianship Act, 40-10B-1 NMSA 1978 et seq., who is named as a respondent in an abuse and neglect proceeding is a necessary and indispensable party in the abuse and neglect case and may not be involuntarily dismissed from the case without first revoking the kinship guardianship according to the procedures specified in the Kinship Guardianship Act. *State ex rel. CYFD v. Djamila B.*, 2014-NMCA-045, cert. granted, 2014-NMCERT-004.

Where the guardian was appointed as kinship guardian for the children pursuant to the Kinship Guardianship Act, 40-10B-1 NMSA 1978 et seq.; the children lived with the guardian; the department filed a neglect and abuse petition under the Abuse and Neglect Act, Chapter 32A, Article 4 NMSA 1978, against the guardian and the children's parents; the district court adopted the department's permanency plan to reunify the children with the guardian; six months later, the district court changed the permanency plan from reunification to adoption and dismissed the guardian from the proceedings; and the guardian's kinship guardianship had not been revoked pursuant to the Kinship Guardianship Act because the permanency plan included a proposed adoption, the guardian was a necessary and indispensable party to the abuse and neglect case so long as the guardian's kinship guardianship remained in effect. *State ex rel. CYFD v. Djamila B.*, 2014-NMCA-045, cert. granted, 2014-NMCERT-004.

40-10B-14. Continuing jurisdiction of the court.

The court appointing a guardian pursuant to the Kinship Guardianship Act retains continuing jurisdiction of the matter.

History: Laws 2001, ch. 167, § 14.

ANNOTATIONS

Courts appointing guardians have concurrent jurisdiction with Children's Courts. — Family courts which appoint kinship guardianships have continuing concurrent jurisdiction with children's courts presiding over abuse and neglect proceedings, and therefore petitions to revoke the rights of a kinship guardian may be filed within abuse and neglect proceedings. *State ex rel. Children, Youth & Families Dep't v. Djamila B.*, 2015-NMSC-003.

Where the children's court judge interpreted continuing jurisdiction to mean exclusive jurisdiction, the children's court judge erred in ruling that the court lacked jurisdiction to revoke the kinship guardianship pursuant to this Act. *State ex rel. Children, Youth & Families Dep't v. Djamila B.*, 2015-NMSC-003.

40-10B-15. Caregiver's authorization affidavit.

A. A caregiver who executes a caregiver's authorization affidavit substantially in the form contained in Subsection J of this section by completing Items 1 through 4 of the form and who

subscribes and swears to it before a notary public, is authorized to:

(1) enroll the named child in early intervention services, child development programs, headstart, preschool or a kindergarten through grade twelve school;

(2) consent to medical care, including school-related medical care, immunizations, sports physical examinations, dental care and mental health care; and

(3) be the authorized contact person for school-related purposes.

B. A caregiver who is a relative of the child, who executes a caregiver's authorization affidavit substantially in the form set forth in Subsection J of this section by completing Items 1 through 7 and who subscribes and swears to the affidavit before a notary public, has the same authority to authorize medical care, dental care and mental health care for the child as a guardian appointed pursuant to the Kinship Guardianship Act.

C. A caregiver's authorization affidavit executed pursuant to this section is not valid for more than one year after the date of its execution.

D. The decision of a caregiver to consent to or refuse medical, dental or mental health care pursuant to a caregiver's authorization affidavit is superseded by a contravening decision of a parent or other person having legal custody of the child if the contravening decision does not jeopardize the life, health or safety of the child.

E. No person who acts in good faith reliance on a caregiver's authorization affidavit to provide medical, dental or mental health care to a child without actual knowledge of facts contrary to those stated in the affidavit is subject to criminal culpability, civil liability or professional disciplinary action if the affidavit complies with the requirements of this section. The foregoing exclusions apply even though a parent having parental rights or person having legal custody of the child has contrary wishes as long as the provider of the care has no actual knowledge of the contrary wishes.

F. A person who relies upon a caregiver's authorization affidavit is under no duty to make further inquiry or investigation.

G. If a child stops living with the caregiver, the caregiver shall give notice of that fact to a school, early intervention services provider, child development program provider, headstart provider, preschool or kindergarten through grade twelve school, medical or dental health care provider, mental health care provider, health insurer or other person who has been given a copy of the caregiver's authorization affidavit.

H. A caregiver's authorization affidavit is invalid unless it contains the warning statement set out in the form contained in Subsection J of this section in not less that ten-point boldface type, or a reasonable equivalent thereof, enclosed in a box with three-point rule lines.

I. As used in this section, "school-related medical care" means medical care that is required by the state or a local government authority as a condition for school enrollment.

J. The caregiver's authorization affidavit shall be in substantially the following form:

"Caregiver's Authorization Affidavit"

Use of this affidavit is authorized by the Kinship Guardianship Act.

Instructions:

A. Completion of Items 1-4 and the signing of the affidavit is sufficient to authorize the caregiver to:

(1) enroll a minor in early intervention services, child development programs, headstart, preschool or a kindergarten through grade twelve school ("school");

(2) consent to medical care, including school-related medical care, immunizations, sports physical examinations, dental care and mental health care; and

(3) be the authorized contact person for school-related purposes.

B. Completion of Items 5-7 is additionally required to authorize any other medical care.

Print clearly:

The minor named below lives in my home and I am 18 years of age or older.

1. Name of minor: _____.

2. Minor's birth date: _____.

3. My name (adult giving authorization): _____.

4. My home address: _____.

5. Check one or both (for example, if one parent was advised and the other cannot be located):

( ) I have advised the parent(s) or other person(s) having legal custody of the minor of my intent to authorize medical care, and have received no objection.

( ) I am unable to contact the parent(s) or other person(s) having legal custody of the minor at this time, to notify them of my intended authorization.

6. My date of birth: _____.

7. My NM driver's license or other identification card number: _____.

WARNING: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment or both.

I declare under penalty of perjury under the laws of the state of New Mexico that the foregoing is true and correct.

Signed: _____

The foregoing affidavit was subscribed, sworn to and acknowledged before me this _____ day of _____, 20_____, by _____.

My commission expires:
_____

_____

Notary Public

Notices:

1. This declaration does not affect the rights of the minor's parents or legal guardian regarding the care, custody and control of the minor and does not mean that the caregiver has legal custody of the minor.

2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.

3. This affidavit is not valid for more than one year after the date on which it is executed.

Additional Information:

TO CAREGIVERS:

1. If the minor stops living with you, you are required to notify any school, early intervention services provider, child development program provider, headstart provider, preschool or kindergarten through grade twelve school, medical or dental health care provider, mental health care provider, health insurer or other person to whom you have given this affidavit.

2. If you do not have the information requested in Item 7, provide another form of identification such as your social security number or medicaid number.

TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

1. No person who acts in good faith reliance upon a caregiver's authorization affidavit to provide medical, dental or mental health care, without actual knowledge of facts contrary to those stated on the affidavit, is subject to criminal liability or to civil liability to any person, or is subject to professional disciplinary action, for such reliance if the applicable portions of the form are completed.

2. This affidavit does not confer dependency for health care coverage purposes.

History: Laws 2001, ch. 167, § 15; 2017, ch. 62, § 1.

ANNOTATIONS

The 2017 amendment, effective June 16, 2017, amended the caregiver’s authorization affidavit

process to include early intervention services, child development programs, headstart, preschool or a kindergarten through grade twelve school, and consent to medical care; in Subsection A, after "is authorized to", added the paragraph designation "(1)", in Paragraph A(1), after "named child in", added "early intervention services, child development programs, headstart, preschool or a kindergarten through grade twelve", and after "school", deleted "and consent to school-related medical care for the child", and added Paragraphs A(2) and A(3); in Subsection B, after "Items 1 through", deleted "8" and added "7"; in Subsection G, after "fact to a school", added "early intervention services provider, child development program provider, headstart provider, preschool or kindergarten through grade twelve school, medical or dental"; in Subsection J, Paragraph A of the "Caregiver's Authorization Affidavit", after "sufficient to authorize", deleted "enrollment of" and added "the caregiver to", and added Subparagraphs (1) through (3); in Paragraph B of the Caregiver's Authorization Affidavit, after "Items", deleted "5-8" and added "5-7", deleted Subparagraph (5) and redesignated the succeeding subparagraphs accordingly; and in the section titled "TO CAREGIVERS", deleted Subparagraph (1) and redesignated the succeeding subparagraphs accordingly; and in Subparagraph (1), after "notify any school", added "early intervention services provider, child development program provider, headstart provider, preschool or kindergarten through grade twelve school, medical or dental", and in Subparagraph (2), after "Item", deleted "8" and added "7".

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-003

Filing Date: December 15, 2014

Docket No. 34,583

**IN THE MATTER OF MAHDJID B.
and ALIAH B., children,**

**STATE OF NEW MEXICO, ex rel.
CHILDREN, YOUTH AND FAMILIES
DEPARTMENT,**

Petitioner-Petitioner,

v.

DJAMILA B.,

Respondent-Respondent,

and

ABDEL M. B.,

Intervenor.

**ORIGINAL PROCEEDING ON CERTIORARI
John J. Romero, District Judge**

New Mexico Children, Youth and Families Department
Charles E. Neelley, Chief Children's Court Attorney
Rebecca J. Liggett, Children's Court Attorney
Santa Fe, NM

for Petitioner

Hinkle, Hensley, Shanor & Martin, L.L.P.
Julie Sakura
Santa Fe, NM

for Respondent

The Law Offices of Nancy L. Simmons, P.C.
Nancy L. Simmons
Albuquerque, NM

for Intervenor

OPINION

CHÁVEZ, Justice.

{1} Respondent Djamila B. (Guardian) was appointed by a family court as kinship guardian to Mahdjid and Aliah (Children). Petitioner Children, Youth and Families Department (CYFD) brought abuse and neglect proceedings in children's court against Guardian and Children's biological parents pursuant to the Abuse and Neglect Act (ANA), NMSA 1978, §§ 32A-4-1 to -34 (1993, as amended through 2009). Prior to seeking adoption for Children, CYFD filed a motion to dismiss Guardian from the abuse and neglect proceedings, arguing that Guardian was not an appropriate party to a termination of parental rights hearing because Guardian is not Children's biological parent. The children's court granted CYFD's motion to dismiss Guardian without revoking the kinship guardianship in accordance with the revocation procedures set forth under the Kinship Guardianship Act (KGA), NMSA 1978, §§ 40-10B-1 to -15 (2001). The Court of Appeals reversed the children's court ruling, holding that Guardian was a necessary and indispensable party to the abuse and neglect proceedings. *State ex rel. Children, Youth & Families Dep't v. Djamila B.* (*In re Mahdjid B.*), 2014-NMCA-045, ¶ 20, 322 P.3d 444. This Court granted certiorari review. *State v. Djamila B.*, 2014-NMCERT-004.

{2} We affirm the Court of Appeals on different grounds. We hold that while kinship guardians are not necessary and indispensable parties to abuse and neglect proceedings, kinship guardians, nonetheless, have a statutory right to a revocation hearing in accordance with the revocation procedures of the KGA prior to being dismissed from abuse and neglect proceedings. Such procedures require an evidentiary hearing and compliance with the Rules of Evidence. There is no need for separate filings and hearings in the original family court that appointed the kinship guardian because the children's court presiding over the abuse and neglect proceeding has jurisdiction over the kinship guardian and the subject matter of the case to make decisions that are ultimately in the best interests of the children.

{3} Children's biological father (Father) intervened in this appeal after this Court granted certiorari. Father argues that his due process rights were violated because he was not given a fair opportunity to voice concerns in the dismissal of Guardian from the abuse and neglect proceedings. Although we briefly discuss Father's claim, we do not decide this issue because it is unnecessary in view of our holding on the primary issue. If CYFD continues to believe that a revocation hearing is warranted, Father will have the opportunity to participate in

Guardian's revocation hearing.

I. BACKGROUND

{4} Guardian, who is Children's paternal aunt, became Children's kinship guardian pursuant to the KGA in May 2007 through a separate proceeding in family court. Children lived with Guardian from that time until June 2010, when Children were placed in CYFD's custody.

{5} In June 2010, CYFD filed an abuse and neglect petition in children's court against Children's mother, Father, and Guardian pursuant to the ANA. On June 30, 2010, the children's court issued a notice of custody hearing set for July 8, 2010. The children's court ordered a treatment plan requiring Guardian to submit to psychological and/or psychiatric evaluations, domestic violence and substance abuse assessments, and random drug testing as directed by CYFD. CYFD's initial assessment plan, which was attached to the children's court order, proposed permanent reunification of Children with Guardian by July 2, 2010. Reunification with Guardian remained the goal of the proceedings in orders following the first judicial review on November 2, 2010, the second judicial review on February 3, 2011,and two permanency hearings on May 10, 2011 and August 9, 2011. On August 9, 2011, the children's court adopted CYFD's proposed reunification plan pursuant to Sections 32A-4-24 and 32A-4-25.1, and Children were scheduled for a trial home visit to transition back to living with Guardian beginning on August 12, 2011 as Guardian continued with her treatment plan.

{6} On February 16, 2012, CYFD filed a motion to dismiss Guardian from the abuse and neglect proceedings. At a permanency hearing on February 28, 2012, CYFD changed its permanency plan for Children from reunification with Guardian to adoption. CYFD's motion to dismiss also announced its intent to pursue termination of the parental rights of Children's biological parents. CYFD argued, in part, that it was "filing a motion for Termination of Parental Rights and [Guardian] does not have parental rights to terminate and will not benefit from following a treatment plan and whether she follows a treatment plan does not affect final permanency for the children." Furthermore, without reference to any external authority that would support the requirement of "[p]er CYFD policy," CYFD asserted that Guardian was not eligible either to adopt Children or to be a foster placement for them. In an order filed on April 17, 2012, the children's court adopted CYFD's proposed changes to the permanency plan. Guardian timely opposed CYFD's motion to dismiss her from the case.

{7} On May 8, 2012, the children's court held an evidentiary hearing on CYFD's motion to dismiss. Prior to commencing the hearing, the children's court addressed preliminary matters with the parties and ruled that "[t]he formal rules of evidence [would] not apply" during the hearing. The children's court explained that the formal rules of evidence do not apply during abuse and neglect proceedings except for adjudicatory or termination of parental rights hearings. The children's court also advised the parties that it would instead "weigh[] and balance[]" all of the evidence presented to "see whether the motion [to dismiss]

should or should not be granted."

{8} After hearing all of the evidence presented during the May 8, 2012 hearing, the children's court granted CYFD's motion to dismiss. The children's court briefly addressed the issue of the ongoing kinship guardianship, but it ultimately ruled that the children's court lacked jurisdiction to revoke a kinship guardianship appointed by a family court. The children's court also ruled that a kinship guardianship is "always a temporary status," and that Guardian was not Children's legal parent. Specifically, the children's court expressed its opinion that the appointment of a kinship guardian does not divest the rights of the biological parents, and thus it cannot vest Guardian with full parental rights. The children's court ultimately ruled that CYFD had custody of Children, and because Guardian was not a legal parent, CYFD had complete discretion regarding Children's placement.

{9} On July 2, 2012, the children's court granted CYFD's motion to dismiss Guardian in an order devoid of findings of fact or conclusions of law. Guardian timely appealed the children's court order dismissing her from the abuse and neglect proceedings. In her docketing statement, Guardian argued, inter alia, that dismissal from the abuse and neglect proceedings was improper until her kinship guardianship rights were revoked pursuant to the KGA.

{10} The Court of Appeals held that "[t]he [children's] court erred in dismissing Guardian from the proceedings while she remained the kinship guardian of Children because she was a necessary and indispensable party to the pending case." *Djamila B.*, 2014-NMCA-045, ¶ 20. The Court of Appeals reversed the children's court order dismissing Guardian and "all subsequent orders entered in the case in proceedings that took place without notice first having been provided to Guardian" and remanded the case "to the district court to reinstate Guardian as a party respondent in the matter and for further proceedings in accordance with law." *Id.*

{11} CYFD appealed to this Court, and we granted certiorari review. 2014-NMCERT-004. Father intervened in this appeal after this Court granted certiorari review.

II. DISCUSSION

A. Kinship guardians shall not be involuntarily dismissed from abuse and neglect proceedings unless the kinship guardianship is first properly revoked in accordance with the revocation procedures of the KGA and the New Mexico Rules of Evidence

{12} CYFD argues that the Court of Appeals erred in concluding that Guardian was a necessary and indispensable party to the abuse and neglect proceedings, and therefore she could not be dismissed from the abuse and neglect proceedings until her kinship guardianship was first properly revoked pursuant to the KGA. Resolving this issue requires a survey of the interrelationship between two groups of statutes, the ANA and the KGA.

"Statutory interpretation is a question of law, which we review de novo." *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 40, 320 P.3d 1.

1. *The Legislature enacted the ANA and the KGA with the intent to preserve family unity*

a. The ANA

{13} The New Mexico Children's Code, NMSA 1978, §§ 32A-1-1 to -24-5 (1993, as amended through 2009), incorporates the ANA and qualifies ANA policy and procedure. The central purpose of the Children's Code is to protect the health and safety of children covered by its provisions while "preserv[ing] the unity of the family whenever possible." Section 32A-1-3(A). To achieve these goals, the ANA "details the procedures and timelines the State must follow when it invokes the jurisdiction of the district court to take physical and/or legal custody of a child whom it alleges to be abandoned, neglected, or abused." *State ex rel. Children, Youth & Families Dep't v. Maria C.* (*In re Rudolfo L.*), 2004-NMCA-083, ¶ 18, 136 N.M. 53, 94 P.3d 796. The ANA procedures serve the express purpose of the Children's Code by "assur[ing] that 'the parties [receive] a fair hearing and their constitutional and other legal rights are recognized and enforced.' " *Id*. ¶ 23 (second alteration in original) (quoting Section 32A-1-3(B)). Accordingly, the ANA guarantees the child's parent, guardian, or custodian notice and participation in proceedings prior to the termination of parental rights. Sections 32A-18 to -20, -22, -25, -25.1.

{14} An abuse and neglect case begins when CYFD files a petition alleging abuse or neglect. *See* § 32A-4-7(D) ("Reasonable efforts shall be made to prevent or eliminate the need for removing the child from the child's home, with the paramount concern being the child's health and safety. In all cases when a child is taken into custody, the child shall be released to the child's parent, guardian or custodian, *unless* [*CYFD*] *files a petition within two days from the date that the child was taken into custody*." (emphasis added)). Upon the filing of a petition, "counsel shall be appointed for the parent, guardian or custodian of the child." Section 32A-4-10(B). Within ten days of filing, the children's court holds a custody hearing to determine whether the child should remain in CYFD custody or whether CYFD should return legal custody to the child's parent, guardian, or custodian pending an adjudicatory hearing. Section 32A-4-18(A), (C). The children's court shall return legal custody to the child's parent, guardian, or custodian unless it finds probable cause for abuse or neglect. Section 32A-4-18(C).

{15} An adjudicatory hearing is held within sixty days from when CYFD serves the abuse and neglect petition. Section 32A-4-19(A). The adjudicatory hearing focuses on whether the child was abused or neglected as defined under the ANA. Sections 32A-4-2, -20(H). The children's court determines whether the child was abused or neglected based on a valid admission from the parties or on clear and convincing evidence. *Id.* If the children's court finds abuse or neglect, the court may address disposition immediately or hold a dispositional hearing within thirty days after the adjudicatory hearing where it hears evidence and

determines the best interests of the child as to the child's custody. Section 32A-4-20(H), -22(A). Additionally, if the children's court finds the child to be abused and/or neglected, "the court shall also order [CYFD] to implement and the child's parent, *guardian* or custodian to cooperate with any treatment plan approved by the court." Section 32A-4-22(C) (emphasis added). Within sixty days of disposition, the children's court holds an initial judicial review hearing to determine the effectiveness of the treatment plan. Section 32A-4-25(A).

{16} Within six months of the initial judicial review of the dispositional order, the children's court holds an initial permanency hearing to determine whether the child should be returned home to the child's parent, guardian, or custodian or remain in CYFD's custody. Section 32A-4-25.1(A), (B).

> At the conclusion of the permanency hearing, the [children's] court shall order one of the following permanency plans for the child:
>
> (1) reunification;
>
> (2) placement for adoption after the parents' rights have been relinquished or terminated or after a motion has been filed to terminate parental rights;
>
> (3) placement with a person who will be the child's permanent guardian;
>
> (4) placement in the legal custody of [CYFD] with the child placed in the home of a fit and willing relative; or
>
> (5) placement in the legal custody of [CYFD] under a planned permanent living arrangement, provided that there is substantial evidence that none of the above plans is appropriate for the child.

Section 32A-4-25.1(B).

{17} "If the court adopts a permanency plan of reunification, the court shall adopt a plan for transitioning the child home and schedule a permanency review hearing within three months" to ensure that the child's parent, guardian, or custodian has made good progress. Section 32A-4-25.1(C). "At the permanency review hearing, all parties and the child's guardian ad litem or attorney shall have the opportunity to present evidence and cross-examine witnesses." Section 32A-4-25.1(E). Notably, the Rules of Evidence do not apply in permanency review hearings. Section 32A-4-25.1(I); *see also* Rule 11-1101(D) NMRA ("These rules—except for those on privilege—do not apply to the following: . . . (3)(f) dispositional hearings in children's court proceedings, and (g) the following abuse and neglect proceedings: (i) issuing an ex parte custody order; (ii) custody hearings; (iii)

permanency hearings; and (iv) judicial review proceedings."). If the child is returned home, the case can either be dismissed or the children's court can order continuing supervision. Section 32A-4-25.1(E)(2)-(3). At the permanency review hearing, if the children's court finds that reunification is still not possible, it will initiate proceedings for a permanent guardianship or termination of parental rights (adoption). *See* § 32A-4-31 (permanent guardianship); § 32A-4-28 (termination of parental rights).

{18} Terminating parents' right to reunite with their child, thereby extinguishing the family unit, is a mechanism of last resort under the ANA. The ANA provides that a children's court shall terminate parental rights only when:

> (1) there has been an abandonment of the child by [the child's] parents;
>
> (2) the child has been a neglected or abused child as defined in the [ANA] and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by [CYFD] or other appropriate agency to assist the parent in adjusting the conditions that render the parent unable to properly care for the child. . . . [; or]
>
> (3) the child has been placed in the care of others, including care by other relatives, either by a court order or otherwise and the following conditions exist . . . .

Section 32A-4-28(B). CYFD or any of the other parties to the proceeding may file a motion to terminate parental rights at any time during abuse and neglect proceedings. Section 32A-4-29(A). However, "[t]he grounds for any attempted termination shall be proved by clear and convincing evidence." Section 32A-4-29(I). Unlike the ANA provisions for initial permanency reviews, adjudicatory hearings, or dispositional hearings prior to termination, the procedures for the termination of parental rights fail to mention guardians.

{19} In summary, the ANA limits the procedures and time frame under which parents or custodians and, by extension, guardians can rehabilitate themselves and reunite with their children in line with the overall purpose of the Children's Code. *Maria C.*, 2004-NMCA-083, ¶¶ 18-22. While the ANA serves to protect children in New Mexico against abuse and neglect, preserving the family relationship between the child and the child's parent, guardian, or custodian remains the ultimate goal of ANA proceedings until the children's court finds that reunification is simply not possible.

b. The KGA

{20} Similar to the overall purpose of the Children's Code, the KGA recognizes New Mexico policy that the "interests of children are best served when they are raised by their

parents." Section 40-10B-2(A). However, when neither parent is able or willing to raise their child, the Legislature enacted the KGA in 2001 to establish procedures whereby "a child should be raised by family members or kinship caregivers." *Id.* The KGA applies to cases where a child has been left by the child's parents "in the care of another for ninety consecutive days [or more] and that arrangement leaves the child . . . without appropriate care, guidance or supervision." Section 40-10B-2(B).

{21} Ultimately, "[t]he KGA establishes procedures and substantive standards for effecting legal relationships between children and adult caretakers who have assumed the day-to-day responsibilities of caring for a child." *Debbie L. v. Galadriel L.* (*In re Guardianship of Victoria R.*), 2009-NMCA-007, ¶ 4, 145 N.M. 500, 201 P.3d 169; *see also* § 40-10B-2(C) ("The purposes of the Kinship Guardianship Act are to: (1) establish procedures to effect a legal relationship between a child and a kinship caregiver when the child is not residing with either parent; and (2) provide a child with a stable and consistent relationship with a kinship caregiver that will enable the child to develop physically, mentally and emotionally to the maximum extent possible when the child's parents are not willing or able to do so."). Kinship guardians possess all of "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." Section 40-10B-13(A); *see also* § 40-10B-3(A) ("As used in the Kinship Guardianship Act[,] . . . 'caregiver' means an adult, who is not a parent of a child, with whom a child resides and who provides that child with the care, maintenance and supervision consistent with the duties and responsibilities of a parent of the child.").

{22} A petition for kinship guardianship may be filed by a "kinship caregiver," Section 40-10B-5(A)(1), a designation that includes three categories of caregivers: (1) an adult relative, godparent, or member of the child's tribe or clan, Section 40-10B-3(A), (C); (2) "an adult with whom the child has a significant bond," *id.*; and (3) a guardian appointed directly by a court under the KGA, Sections 40-10B-7(A), -8(A). "Upon hearing, if the court finds that a qualified person seeks appointment, the venue is proper, the required notices have been given, the requirements . . . of this section have been proved and the best interests of the minor will be served by the requested appointment, it shall make the appointment." Section 40-10B-8(A). A kinship guardian "has authority to make all decisions regarding visitation between a parent and the child" unless otherwise ordered by the court. Section 40-10B-13(B).

{23} A motion to revoke the kinship guardianship may be filed by any person. Section 40-10B-12(A). Because of the rights and interests involved, our Rules of Evidence apply in these kinship guardianship revocation proceedings. *See* Rule 11-101 NMRA (governing the scope of our Rules of Evidence); Rule 11-102 NMRA ("These rules should be construed so as to administer every proceeding fairly . . . and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."); Rule 11-1101 (governing the applicability of our Rules of Evidence and listing the specific exceptions to their applicability; notably, KGA revocation hearings are not a listed exception). To revoke

the kinship guardianship, the moving party has the burden of showing that "a preponderance of the evidence proves a change in circumstances and the revocation is in the best interests of the child." Section 40-10B-12(B). A preponderance of the evidence makes it easier to return a child to his or her biological parents when the child's biological parents are able and willing to care for the child. Through this lower burden of proof, the KGA provides the proper statutory mechanism for preserving the unity of family for New Mexico children without severely disrupting the important role of a parent for the child, regardless of whether that parental role is fulfilled by the child's biological parent or a kinship guardian. *See* § 40-10B-2(A) ("[W]henever possible, a child should be raised by family members or kinship caregivers.").

2. *The Legislature intended that kinship guardians participate in all abuse and neglect proceedings until the kinship guardianship is properly revoked in accordance with the revocation procedures of the KGA*

{24} CYFD argues that the omission of guardians from the statutory provisions of the ANA concerning parental rights termination procedures precludes Guardian's ability to further participate in the abuse and neglect proceedings because Guardian lacks any parental rights to divest. However, the omission of the term "guardian" from the parental rights termination procedures in the ANA does not determine whether Guardian has a statutory right to participate in all abuse and neglect proceedings until her kinship guardianship is properly revoked. The Legislature enacted the Children's Code and the KGA to create mechanisms for elevating guardians to the status of a child's biological parents when the biological parents are unwilling or unable to properly care for the child. These statutory mechanisms support the overall purpose of the Children's Code and the KGA concerning family unity. The KGA bestows parental rights on kinship guardians, which must be properly revoked prior to involuntarily dismissing kinship guardians from abuse and neglect proceedings or before appointing a permanent guardian other than the kinship guardian. *See* §§ 32A-4-25.1(B)(3), -31, -32. We hold that the Legislature intended that kinship guardians participate in all abuse and neglect proceedings until the kinship guardianship is first properly revoked in accordance with the revocation procedures of the KGA and our Rules of Evidence.

{25} "Our principal goal in interpreting statutes is to give effect to the Legislature's intent." *Griego v. Oliver*, 2014-NMSC-003, ¶ 20, 316 P.3d 865. In interpreting statutory language, "[w]e look first to the plain language of the statute." *Freedom C. v. Brian D.* (*In re Guardianship of Patrick D.*), 2012-NMSC-017, ¶ 13, 280 P.3d 909 (alteration in original) (internal quotation marks and citation omitted). However, "we look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied." *Jolley v. Associated Elec. & Gas Ins. Servs. Ltd.*, 2010-NMSC-029, ¶ 8, 148 N.M. 436, 237 P.3d 738 (internal quotation marks and citation omitted). We analyze a "statute's function within a comprehensive legislative scheme." *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939.

{26} The ANA, "as part of the Children's Code, . . . must be read as an entirety and each section interpreted so as to correlate as faultlessly as possible with all other sections." *State ex rel. Children, Youth & Families Dep't v. Benjamin O.* (*In re Lakota C.*), 2007-NMCA-070, ¶ 34, 141 N.M. 692, 160 P.3d 601 (internal quotation marks and citation omitted). "Additionally, the provisions of the Children's Code should be interpreted in such a manner as to effectuate its purposes, which include preservation of family unity when possible." *Id.* (internal quotation marks and citations omitted). " 'In other words, a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter.' " *State ex rel. Children, Youth & Families Dep't v. Maurice H.* (*In re Grace H.*), 2014-NMSC-034, ¶ 34, 335 P.3d 746 (quoting *Rivera*, 2004-NMSC-001, ¶ 13 (internal quotation marks and citation omitted)). "Whenever possible, we must read different legislative enactments as harmonious instead of as contradicting one another." *Smith*, 2004-NMSC-032, ¶ 10 (internal quotation marks and citation omitted).

{27} The harmonious common purpose of the ANA and the KGA is to preserve family unity whenever possible. In line with this purpose, the ANA and the KGA both elevate guardians to a level of responsibility synonymous with that of parents. The KGA, enacted to provide a mechanism for family members to legally step into the shoes of parents when a child's biological parents are unable or unwilling to care for that child, grants kinship guardians the same legal rights and responsibilities that a biological parent would have.

{28} This Court rejects "a formalistic and mechanical statutory construction when the results would be absurd, unreasonable, or contrary to the spirit of the statute." *Smith*, 2004-NMSC-032, ¶ 10. Each provision defining the harms and neglect within the ANA includes the term "guardian" in addition to the terms "parent" and "custodian" as persons who are responsible for those harms. Section 32A-4-2(B)(1)-(5), (E)(1)-(4). Additionally, the term "guardian" appears in numerous other provisions of the ANA. *See, e.g.*, § 32A-4-2 (defining abuse and neglect by parties including guardians); § 32A-4-6(A) (describing conditions under which a child may be taken into custody, including when guardians commit certain acts); § 32A-4-7(A) (listing guardians as persons to whom CYFD may release children in CYFD's custody); § 32A-4-22(C) (requiring guardians to comply with court-ordered treatment plans implemented by CYFD); § 32A-4-25(H)(7) (empowering a court during periodic judicial review hearings to issue an order to show cause or to order a hearing on the merits of a motion to terminate parental rights if a parent or guardian has not followed their treatment plan).

{29} Pursuant to the ANA, a kinship guardian can be accused of abuse and neglect, § 32A-4-6(A), summoned to participate in all abuse and neglect proceedings, §§ 32A-4-10(B), -18(B)-(C), and ordered to follow a court-ordered permanency and treatment plan implemented by CYFD, § 32A-4-22(C). Prior to the termination hearing, CYFD and the children's court treated both Guardian and Children's biological parents alike. Guardian was the only party who made consistent efforts to comply with her court-ordered treatment plan. Most importantly, Guardian was Children's only parental figure for nearly three years

between May 2007 and June 2010. Nonetheless, CYFD improperly maintains a rigid textual interpretation of the ANA precluding Guardian from further participating in the abuse and neglect proceedings. Precluding kinship guardians from participating in abuse and neglect termination of parental rights hearings, while ordering them to comply with CYFD's permanency plans for reunification with children, leads to a result that is either "absurd, unreasonable, or contrary to the spirit of the statute[s]." *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022; *see also Maria C.*, 2004-NMCA-083, ¶ 25 (recognizing that the process for terminating parental rights is a "continuum of proceedings" beginning with the filing of the neglect or abuse petition).

{30} We recognize that the Legislature did not expressly include the term "guardian" within the ANA provisions concerning the termination of parental rights. However, the Legislature's omission is not dispositive of whether kinship guardians have a statutory right to a revocation hearing prior to being involuntarily dismissed from abuse and neglect proceedings. "The legislature is presumed to be aware of existing statutes when it enacts legislation." *State v. Fairbanks*, 2004-NMCA-005, ¶ 9, 134 N.M. 783, 82 P.3d 954. Accordingly, the Legislature is presumed to have been aware of both the ANA and the KGA. Because the Legislature intended that the ANA and the KGA work in harmony, the revocation procedures of the KGA naturally complement the ANA provisions concerning termination of parental rights. By enacting compatible legislation, the Legislature intended that courts presiding over abuse and neglect proceedings first hold a revocation hearing in accordance with KGA revocation procedures and our Rules of Evidence prior to involuntarily dismissing a kinship guardian from abuse and neglect proceedings.

{31} This interpretation allows children's courts to ensure that the ANA is applied in a manner which adheres to the spirit of the Children's Code and the KGA. Although the ANA fails to explicitly include the term "guardian" within its statutory procedures for terminating parental rights, kinship guardians nonetheless possess rights equivalent to the parental rights being terminated by the children's court through abuse and neglect proceedings.

{32} Cases that come under the ANA and the KGA often involve unconventional family structures and unconventional facts. *See In re Guardianship of Patrick D.*, 2012-NMSC-017, ¶¶ 1, 29 (court found both parents unfit to raise child; maternal grandparents granted guardianship); *In re Guardianship of Victoria R.*, 2009-NMCA-007, ¶¶ 2, 12 (affirming the district court's award of guardianship to adult caregivers with whom the child formed a bond where father had limited contact with child, mother had emotional problems, and mother informally left the eighteen-month-old child with the adult caregivers, who raised the child for several years). The ANA and the KGA need to work in harmony to preserve family unity when children have unconventional family structures involving both biological parents and kinship guardians. It would undermine the spirit of both acts to allow a children's court to involuntarily dismiss kinship guardians from abuse and neglect proceedings merely based on a strict interpretation of the ANA focused on the omission of "guardian" from the ANA provisions concerning termination of parental rights. Such a result would be antithetical to the Legislature's intent in enacting both statutes.

{33} Consistent with legislative intent, we hold that kinship guardianships must be revoked in accordance with the revocation procedures of the KGA and our Rules of Evidence before involuntarily dismissing a kinship guardian from abuse and neglect proceedings. The KGA requires the party moving for revocation to prove that "a preponderance of the evidence proves a change in circumstances and the revocation is in the best interests of the child." Section 40-10B-12(B). If the court finds that the burden of proof has been met, the court shall grant the motion to revoke the guardianship and dismiss the kinship guardian from the abuse and neglect proceedings. Section 40-10B-12. The court shall also "(1) adopt a transition plan proposed by a party or the guardian ad litem; (2) propose and adopt its own transition plan; or (3) order the parties to develop a transition plan by consensus if they will agree to do so." Section 40-10B-12(B).

3. *Family courts that appoint kinship guardians have concurrent jurisdiction with the children's court in overseeing a kinship guardianship revocation hearing during abuse and neglect proceedings*

{34} The KGA provides that "[t]he court appointing a guardian pursuant to the [KGA] retains continuing jurisdiction of the matter." Section 40-10B-14. The children's court in this case interpreted continuing jurisdiction to mean exclusive jurisdiction. Accordingly, the children's court ruled that it lacked jurisdiction to revoke the kinship guardianship pursuant to Section 40-10B-14 of the KGA. We disagree. Such an interpretation is contrary to the plain text of the KGA and contrary to the functional purposes of the revocation provisions of both the KGA and abuse and neglect proceedings.

{35} First, although the KGA provides for "continuing" jurisdiction, it does not grant exclusive jurisdiction to district courts that appoint kinship guardianships. *See* § 40-10B-4 ("The district court has jurisdiction of proceedings pursuant to the [KGA]. . . . Proceedings pursuant to the [KGA] shall be in the district court of the county of the child's legal residence or the county where the child resides, if different from the county of legal residence."); *see also* § 40-10B-14 ("The court appointing a guardian pursuant to the [KGA] retains continuing jurisdiction of the matter."). The continuing jurisdiction provision of the KGA differs from our child custody statutes, which explicitly necessitate "*exclusive*, continuing jurisdiction." NMSA 1978, § 40-10A-202 (2001) (emphasis added); *see also Elder v. Park*, 1986-NMCA-034, ¶ 17, 104 N.M. 163, 717 P.2d 1132 (recognizing that the primary purpose of the New Mexico Child Custody Jurisdiction Act, NMSA 1978, §§ 40-10-1 to -24 (1981, as amended through 1989), "is to avoid jurisdictional competition and conflict in making custody awards" and facilitate the "orderly resolution of child custody disputes between parents located in different states" (repealed by 2001 Laws, ch. 114, § 404 and recodified in the Uniform Child-Custody Jurisdiction and Enforcement Act, NMSA 1978, §§ 40-10A-101 to -403 (2001))). A children's court holding a kinship guardianship revocation hearing during abuse and neglect proceedings does not give rise to concerns of competing judicial decrees. In situations such as this case, children's courts have jurisdiction over kinship guardians during abuse and neglect proceedings. The children's court is in a better position than the family court to evaluate the "change in circumstances and [whether]

the revocation is in the best interests of the child." Section 40-10B-12(B).

{36} Second, the Legislature enacted both the KGA and the Children's Code with the purpose of preserving family unity. In revoking a kinship guardianship, both family courts and children's courts have concurrent objectives in trying to preserve notions of family unity while effecting the child's best interests.

{37} Consistent with legislative intent, we hold that family courts which appoint kinship guardianships have continuing concurrent jurisdiction over the kinship guardianship, with children's courts presiding over abuse and neglect proceedings. CYFD may petition to revoke the rights of a kinship guardian within those abuse and neglect proceedings. Our holding bridges the divide between the KGA and the ANA and provides courts with symbiotic authority to make rulings that are ultimately in the child's best interests. After receiving a proper motion to revoke a kinship guardianship during abuse and neglect proceedings, the children's court may conduct a full evidentiary hearing in accordance with our Rules of Evidence and act according to the revocation procedures of the KGA to revoke the kinship guardianship if the burden of proof has been met. Once the kinship guardianship has been properly revoked, the kinship guardian shall be dismissed from further participation in the abuse and neglect proceedings.

4. *Although we hold that kinship guardians have a statutory right to a revocation hearing prior to being dismissed from abuse and neglect proceedings, kinship guardians are not necessary and indispensable parties pursuant to Rule 1-019 NMRA*

{38} The Court of Appeals held that the children's court erred in dismissing Guardian because she was a necessary and indispensable party to the abuse and neglect proceedings until her kinship guardianship was revoked pursuant to the KGA. *Djamila B.*, 2014-NMCA-045, ¶ 20. The Court of Appeals reasoned that the KGA conveyed to Guardian the "legal rights and duties of a parent except the right to consent to adoption" or the "rights and duties that the court orders retained by a parent." *Id.* ¶ 13 (internal quotation marks citation omitted).

> A kinship guardian is therefore entitled to the statutory benefits of the [KGA], including the right that [r]easonable efforts shall be made to preserve and reunify the family, with the paramount concern being the child's health and safety. . . . [T]he kinship guardian has the same right as a parent to be a party in a proceeding to terminate parental rights and to advocate or object to the termination of parental rights based on the best interest of the child until the kinship guardianship is properly terminated.

Id. ¶ 13 (second alteration in original) (internal quotation marks and citation omitted).

{39} The legal concept of a necessary and indispensable party is set forth in Rule

1-019(B). However, Rule 1-019 is a rule of civil procedure that does not govern children's court cases concerning the Children's Code. *See* Rule 10-101(A)(1)(c) NMRA ("[T]he Children's Court Rules [of Procedure] govern procedure in the children's courts of New Mexico in all matters involving children alleged by the state . . . to be abused or neglected as defined in the [ANA] including proceedings to terminate parental rights which are filed pursuant to the [ANA]."). Rule 10-121(B)(2) NMRA provides that a guardian must be a party to the abuse and neglect proceedings. "In proceedings on petitions alleging neglect or abuse or a family in need of court-ordered services, the parties to the action are: . . . (2) a parent, guardian or custodian who has allegedly neglected or abused a child or is in need of court-ordered services." Rule 10-121(B). This rule does not state that the named parties are necessary and indispensable, and instead unambiguously directs that a guardian must be a party to the action.

{40} This Court agrees with the outcome reached by the Court of Appeals on different grounds. Kinship guardians do have a statutory right to a revocation hearing pursuant to the KGA prior to being involuntarily dismissed from abuse and neglect proceedings. However, we hold that kinship guardians are not necessary and indispensable parties to ANA proceedings as defined by Rule 1-019. We clarify the holding of the Court of Appeals on this ground.

B. Father's due process rights were not violated during the hearings on the motion to dismiss Guardian from the abuse and neglect proceedings

{41} Father filed a motion to intervene in this appeal after this Court granted certiorari. In his briefing, Father raised issues of procedural due process, arguing that he was not given a fair opportunity to voice concerns in the dismissal of Guardian from the abuse and neglect proceedings. Specifically, Father asks this Court to hold that "a natural parent's expressed wish for family reunification via the auspices of placement with a relative must be taken into account prior to dismissal of the relative from abuse and neglect proceedings." Father further argues that his fundamental liberty interests based in the Fourteenth Amendment allow him to influence placement decisions for Children. CYFD argues that Father's claim was not properly preserved in the district court and cannot be raised for the first time on appeal. *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked.").

{42} We usually review denial of due process rights de novo. *State ex rel. Children, Youth & Families Dep't v. Pamela R.D.G.* (*In re Pamela A.G.*), 2006-NMSC-019, ¶ 10, 139 N.M. 459, 134 P.3d 746. However, we do not issue a holding on this question because it is unnecessary due to our holding that Guardian is entitled to a revocation hearing prior to dismissal from the abuse and neglect proceedings.

{43} Father had various opportunities to meaningfully participate in the proceedings to dismiss Guardian from the abuse and neglect proceedings. At the February 28, 2012 hearing on permanency that resulted in the children's court's approval of a plan of adoption and that

first considered the motion to dismiss Guardian, Father's counsel and Father were present. Father's attorney was excused from a subsequent hearing on the motion to dismiss on March 27, 2012 to work on other pleadings because Father would remain a party to the abuse and neglect proceedings, regardless of the outcome of the hearing on the motion to dismiss Guardian. Father and his counsel both attended but did not participate in the May 8, 2012 evidentiary hearing on the motion to dismiss Guardian from the abuse and neglect proceedings, and again they stated no position on the motion to dismiss. Finally, Father did not intervene in the Court of Appeals action that preceded this appeal. As a result, CYFD argues that this Court lacks jurisdiction to consider the issue. *See* NMSA 1978, § 34-5-14 (1972) (providing that this Court has jurisdiction over original writs, decisions of the Court of Appeals, and actions certified to this Court by the Court of Appeals).

{44} The circumstances surrounding Father's lack of participation in Guardian's dismissal and this late intervention raise troubling questions. However, all of these questions are irrelevant given our holding that Guardian is entitled to a revocation hearing in accordance with the KGA and our Rules of Evidence prior to being involuntarily dismissed from the abuse and neglect proceedings. Because Father's rights had not been terminated as of the time of this appeal, he will have an opportunity to participate in any proceeding initiated to revoke Guardian's kinship guardianship status if he so chooses.

III. CONCLUSION

{45} We reverse the children's court ruling to dismiss Guardian as contrary to law. We affirm the Court of Appeals on different grounds and hold that while kinship guardians are not necessary and indispensable parties to abuse and neglect proceedings, a kinship guardian is nonetheless entitled to a revocation hearing in accordance with the KGA and our Rules of Evidence prior to dismissal from abuse and neglect proceedings. We remand this case to the children's court to conduct a revocation hearing if CYFD continues to believe that such a hearing is warranted.

{46} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

Certiorari Denied, February 14, 2014, No. 34,474

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMCA-029

Filing Date: November 26, 2013

Docket No. 32,421

STANLEY J. and KELLY J.,

Petitioners-Appellees,

v.

CLIFF L.,

Respondent-Appellant,

and

IN THE MATTER OF THE KINSHIP GUARDIANSHIP OF ADAM L. and ADRIAN L.,

Children.

APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY
Drew Tatum, District Judge

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OPINION

VIGIL, Judge.

{1} Cliff L. (Father) appeals an order granting Petitioners guardianship over his biological children, fourteen-year-old Adrian L. and sixteen-year-old Adam L. (Children), pursuant to the Kinship Guardianship Act (the KGA or the Act), NMSA 1978, §§ 40-10B-1 to -15 (2001). The district court concluded that, although Father was at all times fit, willing, and able to care for Children, extraordinary circumstances justified awarding the guardianship to Petitioners over Father's objection. We disagree and reverse.

I. BACKGROUND

{2} Father and Children's Mother were divorced in November 2002. Although both parents were found to be fit, primary physical custody of Children was awarded to Mother, and visitation to Father. Mother moved Children to Broadview, New Mexico, where they lived for the next eleven years, and Children attended school in Grady, New Mexico during this time. Father continued to live in Pilot Point, Texas, where he has family, and Children visited Father in Texas during the summers and holidays in the years that followed. Children have biological family in both Grady and Pilot Point.

{3} Mother developed cancer in 2006, which she battled for six years. While Mother received treatment for several days at a time over the years, Children stayed with their maternal grandparents; but when their grandmother got ill, they starting staying with Petitioners during the seven- to ten-day treatments. Petitioners have no biological relationship to Children, but they were Mother's friends and residents of Grady.

{4} Mother died on January 25, 2012. Two days later, on Friday, January 27, 2012, Petitioners filed a petition in the district court seeking their appointment as kinship guardians over Children pursuant to the KGA and that Petitioner Stanley J. be appointed temporary guardian of Children until notice could be served upon Father. Children also asked that the temporary guardianship be granted on grounds that Mother's funeral was going to be the next day (Saturday, January 28, 2012), that they had been living with Petitioners since Christmas, that Father was coming to take them to Pilot Point, and they desired to remain enrolled in the Grady schools, and remain surrounded by friends and family. The district court was told that Adam was a junior, on the varsity basketball team, and salutatorian of his class, and that Adrian was in the eighth grade, on the junior high basketball team, and valedictorian of his class. Further, the district court was advised that Children were doing "extremely well in their current environment given the current situation with their mother."

{5} A hearing was held the same day the petition was filed, but Father did not attend because he was not aware of it. At the hearing, Petitioner Stanley J. acknowledged that Father was a fit parent, but Children just wanted the court to hear their wishes to stay in Grady instead of being taken to Pilot Point by Father. The district court found that Children's wishes not to be removed from their home, community, and school to be relocated against their wishes during the difficult time of Mother's passing qualified as extraordinary circumstances under the KGA and appointed Petitioner Stanley J. as temporary kinship guardian.

{6} Father arrived in New Mexico to attend Mother's funeral and believed he would be taking Children back to Texas with him, but instead was served with a summons notifying him that Petitioner Stanley J., whom he had never met, was appointed temporary guardian of his children. He immediately hired an attorney and filed a motion to dismiss on January 30, 2012, demanding that custody of Children be returned to him. The district court orally denied Father's motion in a hearing held on February 2, 2012.

{7} On August 27, 2012, the district court held a final hearing to determine if Petitioners should be appointed as permanent kinship guardians under the KGA. Several witnesses testified at this hearing on behalf of Children, regarding Children's established academic, athletic, and social life in Grady, the bond they had with Petitioners and their family, their desire not to move to Texas, and the potential for a negative impact on their motivation to continue to excel if forced to move. Persuaded that these qualified as extraordinary circumstances, the district court issued an order appointing Petitioners as permanent kinship guardians over Children. Father appeals.

II. DISCUSSION

{8} Father argues that the appointment of Petitioners as guardians of Children must be reversed because the evidence failed to establish "extraordinary circumstances" as required under the KGA. Because Father's argument requires us to interpret the meaning of "extraordinary circumstances" in the KGA, the question presented is one of statutory construction, which we review de novo. *In re Guardianship of Patrick D.*, 2012-NMSC-017, ¶ 13, 280 P.3d 909. Moreover, in applying the legal standard of "extraordinary circumstances" to the facts before us, our standard of review is also de novo. *In re Guardianship of Victoria R.*, 2009-NMCA-007, ¶ 7, 145 N.M. 500, 201 P.3d 169 (Alarid, J.) (stating that the mixed questions of law and fact are subject to de novo review).[1]

[1]We cite to Judge Alarid's opinion in *Victoria R.*, however, the actual opinion of the Court is contained in the "special concurrence" written by Judge Pickard, which was joined in by Judge Sutin. *See Victoria R.*, 2009-NMCA-007, ¶ 23 (stating "[a]s we disagree with portions of Judge Alarid's opinion as well as the expansive and unnecessary rationales relied on to affirm, what is contained in this specially concurring opinion is actually the opinion of this Court").

A. The Kinship Guardianship Act

{9} The KGA provides that "[i]t is the policy of the state that the interests of children are best served when they are raised by their parents." Section 40-10B-2(A). However, "[w]hen neither parent is able or willing to provide appropriate care, guidance and supervision to a child, it is the policy of the state that, whenever possible, a child should be raised by family members or kinship caregivers." *Id.* Because there is no evidence or assertion that Petitioners are family members of Children, we limit our consideration to the concept of a "kinship caregiver" as defined in the Act. Under the Act, "kinship" includes "an adult with whom the child has a significant bond" and a "caregiver" is "an adult, who is not a parent of a child, with whom a child resides and who provides that child with the care, maintenance and supervision consistent with the duties and responsibilities of a parent of the child[.]" Section 40-10B-3(A), (C).

{10} The parties do not dispute that the only applicable provision of the Act, which authorized the district court to appoint Petitioners as kinship guardians is Section 40-10B-8(B)(3). Under this section, a guardian may be appointed "only if" it is proved by clear and convincing evidence that

> 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[2] 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*[.]

Id. (emphasis added); Section 40-10B-8(C) (stating that the burden of proof is by clear and convincing evidence unless the case involves an "Indian child" as defined in the federal Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (2006), in which case the burden of proof is beyond a reasonable doubt). All other requirements of the Act must be complied with, and the appointment must be in the best interests of the child. Section 40-10B-8(A). This case requires us to determine if the facts support a conclusion of law that "extraordinary circumstances" exist to warrant appointment of Petitioners as kinship guardians of Children.

B. The Meaning of Extraordinary Circumstances

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[2]The parties dispute whether the requirement in Section 40-10B-8(B)(3) that "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" is applicable in this case. However, it is not necessary for us to decide whether the ninety-day requirement only applies where there is an unwilling or unable parent as Petitioners argue, or whether it also applies when extraordinary circumstances are relied upon as Father argues, because the parties do not dispute that Father is a willing and able parent, and we conclude that extraordinary circumstances are not present in this case.

{11} The Act does not define what it means by "extraordinary circumstances." However, we are able to ascertain its contours from existing New Mexico case law. We begin with the parental preference doctrine, which has been followed in New Mexico for decades. For example, in *Shorty v. Scott*, 1975-NMSC-030, ¶ 8, 87 N.M. 490, 535 P.2d 1341, our Supreme Court held that the "parental right doctrine" creates a presumption in a custody dispute between a natural parent and a third party that the welfare and best interests will be served in the custody of the natural parent. In such a dispute, the non-parent has the burden of proving the contrary and that the parent is unfit. *Id.* ¶ 10.

{12} The potential for "extraordinary circumstances" overcoming the parental preference doctrine was recognized in *In re Adoption of J.J.B.*, 1995-NMSC-026, ¶ 59, 119 N.M. 638, 894 P.2d 994. This was an adoption case in which the father contested the adoption of his child after the mother had placed the child for adoption without the father's knowledge. *Id.* ¶ 1. After concluding that the adoption was void, the Supreme Court was still left with having to determine what standards would apply in determining who would have custody of the child on remand to the district court. *Id.* ¶ 57. The Supreme Court reiterated the presumptions of the parental preference doctrine, *id.* ¶ 58, and added that "[a] parent's right is not absolute and under *extraordinary circumstances*, custody of a child may be awarded to a nonparent over the objections of a parent." *Id.* ¶ 59 (emphasis added). Therefore, our Supreme Court agreed, " 'special facts and circumstances' might be found that would provide 'an extraordinary reason' for taking a child from its parent." *Id.* (citations omitted). The rationale for the exception is "the anticipation of unique situations that are beyond the usual unfit-parent criteria and are not expressly covered by statute or case law." *Id.*

{13} In *J.J.B.*, the mother placed her infant child for adoption when he was nine months old. *Id.* ¶ 1. At the time of the trial, the child had lived for over one and one-half years with the couple seeking to adopt him, during which time the father was only able to secure limited visitation with the child. *Id.* Our Supreme Court stated that an "extraordinary circumstance" in this situation "might arise if the child's contact with the biological parent has been so minimal that he or she has significantly bonded with the adoptive parents." *Id.* ¶ 61. However, the Court cautioned, "the test for this involuntary disruption of the bond between a parent and child is met only with great difficulty, and for evident reasons of humanity and policy." *Id.* (internal quotation marks and citation omitted). In fact, the Court suggested that the evidence must demonstrate that "'the psychological trauma of removal [of the child from the adoptive parents] is grave enough to threaten destruction of the child'" before an extraordinary circumstance will be found to exist. *Id.* (quoting *Bennett v. Jeffreys*, 356 N.E.2d 277, 284 (N.Y.1976)).

{14} We subsequently reiterated and expanded these principles in *In re Guardianship of Ashleigh R.*, 2002-NMCA-103, 132 N.M. 772, 55 P.3d 984, a case involving the appointment of a grandmother and her husband as guardians of a mother's daughters under the Probate Code. *Id.* ¶ 1. We reiterated that the parental preference doctrine creates a presumption that a child's interests will best be served in the custody of a parent and that in a custody dispute the nonparent has the burden of proving otherwise and that the parent is

unfit. *Id.* ¶ 14. We also reiterated that an otherwise fit parent may be denied custody based on "extraordinary circumstances." *Id.* ¶ 15. We added:

> Even when applying the extraordinary circumstances test, only "grave reasons" approaching, but not necessarily reaching, those required for termination of parental rights should overcome the presumption that children are better raised by their own parents. 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."

Id. ¶ 25 (citations omitted).

{15} We then turned to the facts and applied these principles. Although the mother had left her girls with grandparents for more than two years before the grandparents filed their petition, she maintained contact with them, and the girls were not strangers to her. *Id.* ¶ 30. When the petition was filed, the girls already looked to the grandparents as parental figures, and by the time of the final hearing in district court, the girls had lived with grandparents for more than three years. *Id.* The passage of time notwithstanding, we were not able to conclude that the separation was so long that the mother forfeited her right to the care and custody of her children. *Id.* Addressing any possible psychological harm that might arise from transferring custody to the mother, we emphasized that such harm could not be presumed, but must be proved by the party seeking to deprive the parent of custody on that basis. *Id.* ¶ 31. Moreover, we were careful to distinguish between proof of substantial likelihood of short-term emotional distress or apprehension, which was to be expected. *Id.* We therefore held that because the grandparents had not presented sufficient evidence of psychological damage if the girls were returned to the mother's custody, that the mother's voluntary relinquishment of custody and the girls' subsequent attachment to the grandparents did not constitute "extraordinary circumstances." *Id.* ¶ 32.

{16} *Victoria R.* is the first case in which we considered the applicability of "extraordinary circumstances" in a case under the KGA. 2009-NMCA-007, ¶ 7 (Alarid, J.) (noting that the issue at trial was whether "extraordinary circumstances" within the meaning of the KGA justified the appointment of guardians for the child). The dispute between Judge Alarid and the majority concurring opinion was whether *Ashleigh R.*, as a case decided under the Probate Code, should constitute dispositive authority for deciding the KGA case before it. *Victoria R.*, 2009-NMCA-007, ¶ 21 (Alarid, J.), ¶ 24. Judge Alarid would have recognized and given protection to a "psychological parent" under the KGA, *id.* ¶¶ 13-16 (Alarid, J.), a concept not directly addressed by the majority concurring opinion. Rather, the majority concluded that *Ashleigh R.* applied to the KGA and that *Ashleigh R.* was adequate authority for deciding the case on appeal. *Victoria R.*, 2009-NMCA-007, ¶¶ 29-30. "[T]o the extent that the Legislature used the words 'extraordinary circumstances' in the KGA, we believe it [had] extensive common-law antecedents on which it likely relied[.]" *Id.* ¶ 27.

{17} We agreed with the district court in *Victoria R.* that *Ashleigh R.*'s requirements were

satisfied. *Victoria R.*, 2009-NMCA-007, ¶ 29. The district court findings, supported by the evidence, were that "[the m]other left [the c]hild with [the p]etitioners, leading to full-time care, for three years and told them the placement would be permanent and they could adopt [the c]hild; where [the c]hild was primarily bonded to [the p]etitioners as her parents and would suffer significant depression and thereby a substantial likelihood of serious harm and detriment; and where [the f]ather consented to the guardianship[.]" *Id.* ¶ 29.

{18} *Patrick D.* involved another case under the KGA, 2012-NMSC-017, ¶ 1, and it provides us with additional guidance on what is meant by "extraordinary circumstances" in Section 40-10B-8(B)(3). Considering the policy statement in Section 40-10B-2,[3] together with the purposes of the KGA set forth in Section 40-10B-2(C),[4] our Supreme Court interpreted the KGA "to require courts to protect and facilitate relationships between a child and kinship caregivers when neither of the child's parents are able and/or willing to care for the child." *Patrick D.*, 2012-NMSC-107, ¶ 15. Our Supreme Court further declared that the prerequisites set forth in Section 40-10B-8(B), for awarding a kinship guardian, are consistent with these purposes and policies, and "[w]hen [Section 40-10B-8(B)(3)] is applicable, both parents are deemed to be unable and/or unwilling to care for the child." *Patrick D.*, 2012-NMSC-017, ¶ 16. Addressing the inclusion of "extraordinary circumstances" as a basis for awarding a kinship guardian over a parent's objection in Section 40-10B-8(B)(3), our Supreme Court said, "we read [the extraordinary circumstances basis] as a fail safe to allow courts to ensure that the Act is applied in a manner that adheres to the spirit of the Act" because "cases that come under the Act often involve unconventional

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[3]Section 40-10B-2(A) provides:

> It is the policy of the state that the interests of children are best served when they are raised by their parents. When neither parent is able or willing to provide appropriate care, guidance and supervision to a child, it is the policy of the state that, whenever possible, a child should be raised by family members or kinship caregivers.

[4]Section 40-10B-2(C) provides:

> C. The purposes of the Kinship Guardianship Act are to:
>
> (1) establish procedures to effect a legal relationship between a child and a kinship caregiver when the child is not residing with either parent; and
>
> (2) provide a child with a stable and consistent relationship with a kinship caregiver that will enable the child to develop physically, mentally and emotionally to the maximum extent possible when the child's parents are not willing or able to do so.

family structures and unconventional facts." *Patrick D.*, 2012-NMSC-017, ¶ 29.

C. Extraordinary Circumstances Were Not Proved

{19} In order to overcome the presumption of the parental preference doctrine that the welfare and best interests of Children would best be served in the custody of Father, Petitioners were required to prove by clear and convincing evidence that they should be awarded custody due to extraordinary circumstances. The district court ruled that Petitioners satisfied their burden of proof, concluding:

> In consideration of the age of the minor children, the significant bonds between the minor children and the community, the eleven years living in the area, the significant bond between the minor children and the Petitioners, the lack of proactive effort of Respondent to foster and maintain relationships with the minor children, the academic and athletic status of the minor children in Grady, the unconditional care provided by the Petitioners, the potential negative effect a move to Texas would have on the minor children and the nomination of the Petitioners to serve as kinship guardians by the minor children, this [c]ourt finds by clear and convincing evidence the best interests of the minor children are served by the appointment of the Petitioners as the kinship guardians of the minor children pursuant to the [KGA].

{20} We conclude that these findings fail to demonstrate extraordinary circumstances. We acknowledge that Children have suffered the tragic loss of their Mother to cancer. We also acknowledge that Children's home has been in and around Grady, that their ties to the community are very strong, and that Children "nominated" Petitioners to be their guardians.[5] Specifically, the evidence is that Children want to finish going to school in Grady; they are both involved in team sports; they are both doing well academically; and Children are eligible for scholarships to go to college through the lottery program only if they remain in New Mexico. There was also evidence that Children were adjusting well under the circumstances of Mother's death, and Petitioners feared that Children would stop trying to excel if they were forced to go to Texas.

{21} On the other hand, it is undisputed that Father is a fit parent, and he desires to have custody of Children. Unlike the children in *Ashleigh R.* and *Victoria R.*, who had been left with the petitioners for years, the gaps in Father's custody of his children were due to the court-ordered custody arrangement in the divorce, not by his choice. The fact that Father may choose to move Children out of their present home community to Texas under the

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[5] Section 40-10B-11(A) allows a child who has reached his fourteenth birthday to "nominate" a guardian under the KGA. However, such a nomination is only effective if the statutory requirements for appointment of a kinship guardian have first been satisfied.

circumstances will result in a life-changing experience for Children, and undoubtedly result in emotional stress or apprehension to Children. However, there is no evidence that such a move will result in substantial likelihood of serious psychological harm or other serious detriment to Children. Whether Children should be moved to Texas is admittedly a difficult decision, but it is a parenting decision for Father, not the courts, to make.

{22} We also note that while Petitioners are without question seeking to help Children and that there is a bond between themselves and Children, however, there is no evidence that separating Children from Petitioners will result in serious psychological harm to Children. Children had only lived with Petitioners for two days before the petition was filed and had only stayed with them for brief periods before Mother died. Moreover, their relationship with Children does not rise to the level of a "psychological parent" as described by Judge Alarid in *Victoria R. See* 2009-NMCA-007, ¶ 14 (Alarid, J.) ("Psychological parents are the adult caregivers who meet the child's emotional and physical needs on a day-to-day basis for a sufficient period of time that the child comes to view the adult caregivers as the child's actual parents.").

III. CONCLUSION

{23} The district court order appointing Petitioners as kinship guardians of Children is reversed.

{24} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

I CONCUR:

TIMOTHY L. GARCIA, Judge

JONATHAN B. SUTIN (dissenting).

SUTIN, Judge (dissenting).

{25} At the outset, I observe that the Majority's Opinion is silent, and the issues are apparently moot as to Adam, who turned eighteen in June 2013.

{26} I see two reasons that the district court should be affirmed. First, as a matter of law, extraordinary circumstances were present rendering the court's appointment of Petitioners as guardians appropriate under Section 40-10B-8(B)(3). Second, under Section 40-10B-11(A), Children were permitted to nominate a guardian and, barring a finding by the district court that the appointment of their chosen guardian would be contrary to their best interests, the court was permitted, if not required, to appoint a guardian accordingly.

{27} On the issue of extraordinary circumstances, we review the district court's factual findings for sufficiency of the evidence, and we review de novo the legal question as to whether those findings "taken together under all the circumstances . . ., amount to extraordinary circumstances." *Victoria R.*, 2009-NMCA-007, ¶¶ 7, 24-26; *see also Slusser v. Vantage Builders, Inc.*, 2013-NMCA-073, ¶ 6, 306 P.3d 524 (stating that legal questions are reviewed de novo). In so doing, "we review the evidence in the light most favorable to support the [court's] findings, and we disregard contrary evidence." *Victoria R.*, 2009-NMCA-007, ¶ 25. On the issue of the district court's determination of what is in the best interests of children in terms of custody arrangements, our review is for an abuse of discretion. *State ex rel. Children, Youth & Families Dep't v. Senaida C.*, 2008-NMCA-007, ¶ 9, 143 N.M. 335, 176 P.3d 324.

Extraordinary Circumstances

{28} Section 40-10B-8(B)(3) provides that a guardian may be appointed pursuant to the Act if "the child has resided with the petitioner without the parent for a period of ninety days or more . . . 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[.]" (Emphasis added.) This case does not involve a situation in which Children lived with Petitioners for ninety or more days, nor is Father unwilling or unable to care for Children. Thus, the only relevant consideration under Section 40-10B-8(B)(3) is whether the circumstances here were "extraordinary."

{29} The meaning of "extraordinary circumstances" in the context of the KGA was discussed in *Ashleigh R.* and restated in this Court's opinion in *Victoria R.* It is defined as "a substantial likelihood of serious physical or psychological harm or serious detriment to the child." *Victoria R.*, 2009-NMCA-007, ¶ 28 (internal quotation marks and citation omitted); *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 and citations omitted)). Our Supreme Court has interpreted the "extraordinary circumstances" language in Section 40-10B-8(B)(3) "as a fail safe to allow courts to ensure that the Act is applied in a manner that adheres to the spirit of the Act." *Patrick D.*, 2012-NMSC-017, ¶ 29.

{30} Father has not demonstrated, nor has the Majority held, that the district court's factual findings lacked substantial evidentiary support. As such, the court's findings provide the relevant factual framework for our analysis. *See* Rule 12-213(A)(4) NMRA (stating that the district court's uncontested findings are deemed conclusive). Thus, in reviewing the court's order, the remaining consideration is whether the findings support its legal conclusion that "extraordinary circumstances" exist that justify the decision to appoint Petitioners as kinship guardians. *See Victoria R.*, 2009-NMCA-007, ¶ 24 (recognizing that whether extraordinary circumstances are present is a legal question).

{31} In support of its "extraordinary circumstances" conclusion, the district court found, among other things, that Children, both of whom were in high school, were "excelling in academics and athletics in Grady" where they had lived for eleven years; that in Grady, unlike in Pilot Point, they had a supportive network of family and friends; and that under the circumstances, moving to Texas would have a "potential negative effect" on Children. Although the district court did not use *Victoria R.*'s language defining "extraordinary circumstances," it was not required to do so. The court's meaning was clear. By referencing the "potential negative effect" that would result from removing Children from their community and support system built over the course of eleven years and disrupting their academic and extracurricular standing during their high school years, the district court implicitly found that requiring Children to move to Pilot Point would be seriously detrimental to them. Thus, I would hold that, as a matter of law, extraordinary circumstances were present, rendering the court's decision proper under Section 40-10B-8(B)(3).

Children's Preference and Best Interests

{32} An additional basis for affirming the district court's decision in this case is found in Section 40-10B-11. In relevant part, Section 40-10B-11(A) provides that "[i]n a proceeding for appointment of a guardian pursuant to the [Act] . . . the court shall appoint a person nominated by a child who has reached his fourteenth birthday unless the court finds the nomination contrary to the best interests of the child[.]" Thus, in the context of the Act, children age fourteen or older are empowered to nominate their own guardians, and a conforming appointment is subject only to a court's broad discretion to determine whether their best interests will be served by the appointment. *Cf. Senaida C.*, 2008-NMCA-007, ¶ 9 (stating that the district court is "vested with broad discretion and great flexibility in fashioning custody arrangements . . . that will serve the best interests of the children" (emphasis, internal quotation marks, and citation omitted)).

{33} The district court quoted the language of Section 40-10B-11(A) in its decision. Although the court did not rely exclusively on Section 40-10B-11(A) in making its determination, it found that Children, who were ages fourteen and sixteen, respectively, themselves filed the petition nominating Petitioner, Stanley J., to be their guardian. *See* § 40-10B-11(A) (stating in the context of a child who nominates a guardian, that the court shall make the appointment unless the court finds the nomination contrary to the best interests of the child); *see also* § 40-10B-8(A) (stating that, in the context of "a qualified person seek[ing] appointment," the court shall make the appointment if, among other things, the best interests of the minor will be served). And it further found that the best interests of Children would be served by appointing Petitioners as Children's kinship guardians. Notably, Father does not challenge, on appeal, the court's best-interests determination, and it is not the purview of this Court to substitute its judgment for that of the district court in considering the best interests of Children absent an abuse of discretion. *See Senaida C.*, 2008-NMCA-007, ¶ 9 (stating that a best-interest determination in the context of a custody arrangement is within the district court's discretion); *cf. Mayeux v. Winder*, 2006-NMCA-028, ¶ 32, 139 N.M. 235, 131 P.3d 85 (stating that in reviewing a discretionary decision, we

will not substitute our judgment for that of the district court).

{34} Thus, considering that the teenage Children nominated Stanley J. to be their guardian, and considering that the court found that the best interests of Children would be served by appointing Petitioners as Children's kinship guardians and did not find the appointment contrary to their best interests, I would also affirm the court's decision on the basis of Section 40-10B-11(A).

Additional Points

{35} Respectfully, I think that the Majority's discussion of the parental preference doctrine is out of place under the circumstances of this case. *See* Majority Op. ¶¶ 11-15. I have found no authority supporting the injection of the parental preference doctrine into an analysis of extraordinary circumstances in the context of the Act. I see no reason why discussion of the parental preference doctrine is necessary or useful in terms of defining "extraordinary circumstances" under the law and circumstances here. *See* Majority Op. ¶ 1. *Victoria R.* defined "extraordinary circumstances." *See* 2009-NMCA-007, ¶ 28 (defining "extraordinary circumstances" as "a substantial likelihood of serious physical or psychological harm or serious detriment to the child" (internal quotation marks and citation omitted)). As defined, "extraordinary circumstances" is "a fail safe to allow courts to ensure that the Act is applied in a manner that adheres to the spirit of the Act . . . [in light of the] cases that come under the Act [which] often involve unconventional family structures and unconventional facts." *Patrick D.*, 2012-NMSC-017, ¶ 29. Neither *Victoria R.* nor *Patrick D.* considered the parental preference doctrine when evaluating the meaning of "extraordinary circumstances." Further, particularly given the express statutory preference given to Children under Section 40-10B-11(A), I have substantial difficulty with the notion that the parental preference doctrine should play any role in this case.

{36} I further question the Majority's reliance on *J.J.B.*, *Shorty*, and *Ashleigh R.* in the context of this case for the reason that none of those cases involved children who were of an age or maturity level to express their custody preferences to or be heard by the district court. *See J.J.B.*, 1995-NMSC-026, ¶¶ 1, 4 (stating that the child was four years old at the time of the court's review); *Shorty*, 1975-NMSC-030, ¶ 1 (indicating that the children were of preschool age); *Ashleigh R.*, 2002-NMCA-103, ¶ 31 (indicating that the children's custody preferences were expressed through their grandparents' testimony). Contrary to the circumstances of *J.J.B.*, *Shorty*, and *Ashleigh R.*, Children in this case were of an age and maturity level to express their preferences. In this case, Children's ages, their concomitant academic and athletic achievements, their expressed guardianship preference, and their established relationships in Grady were central to the court's determination.

{37} In short, I do not consider *J.J.B*, *Shorty*, and *Ashleigh R.* to be persuasive authority in the context of this case. Unlike circumstances involving small children, removing the teenage Children from Grady at this stage of their lives and under the circumstances here ignores Children's statutory preferences and their best interests. The opposite conclusion

views the facts in the light most favorable to Father, contrary to the rule that we review in a light most favorable to support the court's findings. *See Victoria R.*, 2009-NMCA-007, ¶ 25.

{38} Further, reliance on an unacceptable view expressed by the minority in *Victoria R.* relating to Children's "psychological parents," is also out of order. Majority Op. ¶ 22. Respectfully, Judge Alarid's minority view in *Victoria R.* was rejected in the opinion of the Court in *Victoria R.*, and even were it entitled to some consideration in some circumstances, in the context of this case it is factually irrelevant.

{39} Nothing should prevent Father from continuing visitation with Children. When Father and Children's Mother divorced, the court's final divorce decree ordered a visitation schedule for Father and Children that was to be controlling in the event that Mother and Father could not agree on a visitation schedule. Although the final divorce decree entitled him to more frequent visits, the district court in the present case found that Father exercised visitation with Children "during each summer and spring break vacations." In the present case, the district court ordered Father to follow the visitation that comported with the final divorce decree and additionally ordered that he have visitation with Children each Thanksgiving, Christmas, and spring break from school. Thus, Father may continue to visit Children, and he may do so more frequently than previously permitted.

In Sum

{40} I believe that extraordinary circumstances, Children's ages and statutory preferences, and the court's best-interests determination fully support the district court's decision.

JONATHAN B. SUTIN, Judge

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2012-NMSC-017

Filing Date: May 30, 2012

Docket No. 32,944

In the Matter of Guardianship of PATRICK D., a child,

FREEDOM C.,

Petitioner-Respondent,

v.

BRIAN D. and PEGGY D.,

Petitioners-Petitioners.

ORIGINAL PROCEEDING ON CERTIORARI
Michael T. Murphy, District Judge

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Edward R. Ricco
Jocelyn C. Drennan
Albuquerque, NM

for Respondent

OPINION

CHÁVEZ, Justice.

{1} Several months after being granted sole legal and physical custody of Patrick D. (Child), Brian D. and Peggy D. (Grandparents) filed a petition for guardianship and custody pursuant to the Kinship Guardianship Act (the Act), NMSA 1978, §§ 40-10B-1 to -15 (2001). Julie Ann D. (Mother), Grandparents' daughter, consented to the guardianship, but

Freedom C. (Father) opposed it. After an evidentiary hearing, the district court found both Mother and Father unfit to raise Child. The district court granted guardianship to Grandparents, granted time-sharing privileges to both Mother and Father, and held that it would review the guardianship arrangement in twenty-four months, which would have been on or about November 4, 2011.

{2} Father appealed to the Court of Appeals, which reversed the district court. *Freedom C. v. Julie Ann D. (In re Guardianship of Patrick D.)*, 2011-NMCA-040, ¶¶ 1, 24, 149 N.M. 588, 252 P.3d 812. The Court of Appeals analyzed whether the prerequisites of Section 40-10B-8(B) had been satisfied, confining its analysis to Sections 40-10B-8(B)(1) and (3). *In re Guardianship of Patrick D.*, 2011-NMCA-040, ¶ 17. The Court of Appeals held that the consent provision in Section 40-10B–8(B)(1) was not satisfied because both parents did not consent to the guardianship. *In re Guardianship of Patrick D.*, 2011-NMCA-040, ¶ 18. The Court of Appeals also held that Section 40-10B-8(B)(3) was not satisfied because Mother continued to reside with Grandparents and Child and because neither Mother nor Father "had legal custody of Child during the critical ninety-day period." *In re Guardianship of Patrick D.*, 2011-NMCA-040, ¶ 20. The Court of Appeals also concluded that because neither of the prerequisites it analyzed under Section 40-10B-8(B) were satisfied, the district court did not have the authority to grant a guardianship of Child to Grandparents. *In re Guardianship of Patrick D.*, 2011-NMCA-040, ¶ 22. Instead, the Court of Appeals opined that the district court should simply have continued the custody arrangement it previously ordered without creating a guardianship. *Id*. ¶ 21.

{3} We granted a petition for writ of certiorari filed by Grandparents to consider (1) whether application of the Act is appropriate under the circumstances of this case, and (2) whether any of the prerequisites for its application were met. *Freedom C. v. Brian D. (In re Guardianship of Patrick D.)*, 2011-NMCERT-005, 150 N.M. 667, 265 P.3d 718. Because we conclude that Section 40-10B-8(B)(3) was met under the facts, circumstances, and procedure of this case, we reverse the Court of Appeals and remand to the district court to schedule a hearing to review the guardianship arrangement as previously anticipated by its order.

I. PROCEDURAL AND FACTUAL HISTORY

{4} This case has an unusual procedural history. Child, Mother, and Father lived with Grandparents for three years, during which time Grandparents financially supported the entire family. In October 2008, Father moved out of the house after Mother ended their relationship. Father filed a petition for a protective order, alleging domestic abuse by Mother. By filing the petition, Father gained temporary custody of Child. Two weeks later, the district court dismissed Father's petition, finding that it was not supported by substantial evidence. Mother filed an emergency motion seeking custody of Child, and both parents sought sole legal and physical custody of Child. In response, Father filed a petition to establish paternity, determine custody and time-sharing, and assess child support.

{5} The district court held a hearing on Mother's emergency motion on October 27, 2008. Each parent testified that the other parent had engaged in dangerous behavior toward Child. The district court found that it was in Child's best interests for Grandparents to have temporary sole legal and physical custody, with an opportunity for Mother and Father to have time-sharing arrangements.[1] The district court also appointed an expert under Rule 11-706 NMRA to make recommendations to the court regarding custody.

{6} At some point after this hearing, Father was detained by immigration officials because he had remained in the United States after his student visa had expired. Grandparents filed a petition for appointment of guardianship and custody under the Act on July 15, 2009, almost nine months after being granted sole legal and physical custody of Child, and while Father remained in detention. The district court held a hearing on all pending motions on October 19, 2009, after Father had been released from detention. Father, Mother, Grandparents, and Father's immigration attorney all testified during that hearing. The district court found Mother and Father unfit to raise Child, granted Grandparents' petition for kinship guardianship, and provided time-sharing for Mother and Father. The district court also held that it would review the kinship guardianship and time-sharing in twenty-four months.

II. DISCUSSION

{7} The Act was enacted to ensure that children in New Mexico have the opportunity to be raised by their relatives when both of their parents are unwilling and/or unable to care for them. The Legislature explained the Act's policy and purposes as follows:

> A. It is the policy of the state that the interests of children are best served when they are raised by their parents. When *neither parent* is able or willing to provide appropriate care, guidance and supervision to a child, it is the policy of the state that, whenever possible, a child should be raised by family members or kinship caregivers.
>
> B. The Act 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.
>
> C. The purposes of the Act [40-10B-1 NMSA 1978] are to:
>
> (1) establish procedures to effect a legal relationship

[1]It is not clear from the record under what authority the district court entered this order, although it may have been under the extraordinary circumstances doctrine recognized in *Vescio v. Wolf*, 2009-NMCA-129, ¶ 9, 147 N.M. 374, 223 P.3d 371.

between a child and a kinship caregiver when the child is not residing with *either parent*; and

(2) provide a child with a stable and consistent relationship with a kinship caregiver that will enable the child to develop physically, mentally and emotionally to the maximum extent possible when the child's *parents* are not willing or able to do so.

Section 40-10B-2 (emphasis added).

{8} A person appointed to be a guardian under the Act "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." Section 40-10B-13(A). A certified copy of the appointing order is satisfactory proof of the guardian's authority. Section 40-10B-13(C). Another important goal of a kinship guardianship is to give the parents an opportunity to maintain or rebuild their relationship with the child. *See* §§ 40-10B-8(E), -12(A).

{9} The Act grants district courts the authority to appoint a kinship guardian where "the court finds that a qualified person seeks appointment, the venue is proper, the required notices have been given, *the requirements of Subsection B . . . have been proved* and the best interests of the minor will be served by the requested appointment." Section 40-10B-8(A) (emphasis added). At issue in this case is whether "the requirements of Subsection B . . . have been proved." *Id.*

{10} Subsection B provides that:

A guardian may be appointed pursuant to the Act [40-10B-1 NMSA 1978] 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 [45-1-101 NMSA 1978].

Section 40-10B-8(B) (emphasis added).

{11} Grandparents contend that "parent" in Subsection B should be interpreted to mean that as long as one parent meets a requirement of Section 40-10B-8(B), the district court is authorized to consider granting a guardianship under the Act, even if the other parent does not meet any of the requirements. Grandparents rely on the language of Subsection B(1), which requires only that "*a* parent" has granted consent for the district court to be able to consider a kinship guardianship. Section 40-10B-8(B)(1) (emphasis added). On the other hand, Father contends that *both* parents must grant their consent for the district court to consider a kinship guardianship for the provisions of Subsection B(1) to apply. Father suggests that "a parent" as used in Subsection B(1) should be read to mean "both parents." This legal argument implies that this Court must read each alternative prerequisite in Section 40-10B-8(B) as an exclusive alternative such that *both* parents must satisfy the *same* prerequisite for the Act to apply.

{12} The way in which the parties frame the issue would give our courts only two options under the Act. Our courts could grant a guardianship (1) if only one parent meets one of these conditions, or (2) if both parents meet the same condition. We conclude, however, that neither of these interpretations is correct, and that the Legislature intended that both parents need to satisfy at least one of the three conditions, regardless of whether they satisfy the same condition.

A. Requiring Both Parents to Meet One of the Prerequisites of Section 40-10B-8(B), While Permitting Each to Meet a Distinct Prerequisite, Is Consistent With Both the Plural and the Singular Meanings of the Term "Parent" in This Section.

{13} We review questions of statutory construction de novo. *Debbie L. v. Galadriel R. (In re Guardianship of Victoria R.)*, 2009-NMCA-007, ¶ 7, 145 N.M. 500, 201 P.3d 169. In interpreting statutory language, "[w]e look first to the plain language of the statute." *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105. Ultimately, our goal in reviewing statutes is to effectuate the Legislature's intent. *State v. Cleve*, 1999-NMSC-017, ¶ 8, 127 N.M. 240, 980 P.2d 23. The Legislature has enacted the Uniform Statute and Rule Construction Act, NMSA 1978, §§ 12-2A-1 to -20 (1997), to assist courts with interpreting legislation.

{14} Section 12-2A-5(A) provides that the use of the singular *or* the plural in statutory language includes both the singular *and* the plural. *In re Guardianship of Patrick D.*, 2011-NMCA-040, ¶ 19. Therefore, Section 40-10B-8(B) must be read to encompass both the singular and the plural meanings of the word "parent." The word "parent" must retain both

its singular meaning (that only one parent need satisfy any given subsection) and its plural meaning (that each parent must meet the requirement of at least one subsection). Under this reading, each parent must meet one of the three prerequisites, regardless of whether each parent meets the same prerequisite. This interpretation is consistent with the policies and purposes that underlie the Act.

{15} The Legislature stated two policies in support of the Act: (1) "that the interests of children are best served when they are raised by their parents," and (2) "[w]hen neither parent is able or willing to provide appropriate care, guidance and supervision to a child . . . whenever possible, a child should be raised by family members or kinship caregivers." Section 40-10B-2(A). The Legislature also stated two purposes in enacting the Act: (1) to "establish procedures to effect a legal relationship between a child and a kinship caregiver when the child is not residing with either parent," Section 40-10B-2(C)(1), and (2) to "provide a child with a stable and consistent relationship with a kinship caregiver that will enable the child to develop physically, mentally and emotionally to the maximum extent possible when the child's parents are not willing or able to do so," Section 40-10B-2(C)(2). These policies and purposes must be read together and harmonized. *See State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022 (recognizing that separate provisions of the same Act must be read as a harmonious whole). The policy statement relevant to this case is the policy which provides that "[w]hen neither parent is able or willing to provide appropriate care, guidance and supervision to a child, it is the policy of the state that . . . a child should be raised by family members or kinship caregivers." Section 40-10B-2(A). The purpose relevant to this case is Section 40-10B-2(C)(2), which is to "provide a child with a stable and consistent relationship with a kinship caregiver that will enable the child to develop physically, mentally and emotionally to the maximum extent possible when the child's parents are not willing *or* [not] able to do so." (Emphasis added.) Reading the relevant policy statement in harmony with the relevant purpose, we interpret the Act to require courts to protect and facilitate relationships between a child and kinship caregivers when neither of the child's parents are able and/or willing to care for the child. In addition, however, the Act should be applied to allow the parents to maintain or rebuild their relationship with the child when doing so would be in the child's best interests. *See* § 40-10B-8(E).

{16} Our conclusion that the relevant policy and purpose of the Act is to facilitate and protect a relationship between the child and kinship caregivers when neither parent is able and/or willing to care for the child is consistent with each prerequisite in Section 40-10B-8(B). Subsection B(1) requires a parent's written consent to the appointment of a guardian, which indicates the parent's unwillingness to care for the child. Subsection B(2) applies if all of the parent's rights regarding the child have been terminated or suspended, thus making the parent unable to care for the child. Subsection B(3) applies when the child has not resided with one or both parent(s) for at least ninety days and one of the parents, who has legal custody of the child, is unwilling or unable to care for the child, or if there are extraordinary circumstances. When Subsection B(3) is applicable, both parents are deemed to be unable and/or unwilling to care for the child. The common thread between all of these

prerequisites is that both parents be unable and/or unwilling to care for the child.

{17} If we adopted Grandparents' interpretation that only one parent needs to satisfy Subsection B, then courts could grant kinship guardianships even when one parent is able and willing to properly care for a child. That result would ignore the Legislature's clear intent to provide for guardianships only in those circumstances where *neither* parent can fulfill this role.

{18} Conversely, if we were to read Section 40-10B-8(B) as requiring both parents to satisfy the same prerequisite, meaning that both parents must be unable or both must be unwilling to care for the child, the Act would fail to protect those children who have one unfit parent and one unwilling parent. Such a result squarely conflicts with the Legislature's clear intent, stated in Section 40-10B-2(A), that "[w]hen neither parent is able or willing to [care for his or her child], it is the policy of the state that [the] child should be raised by family members or kinship caregivers." Moreover, if the consent prong could only be applied when both parents consent, an unfit or absentee parent would have the right to veto a guardianship, despite that parent's inability or demonstrated unwillingness to care for the child. Such a result would be inconsistent with the Legislature's concerns for the child's best interests. *See* § 40-10B-8(A) (incorporating the "best interests of the minor" standard into the inquiry). Thus, we read Section 40-10B-8(B) as requiring each parent to meet one of its conditions, but not as requiring both parents to satisfy the same condition.

{19} Turning to the issue at hand, we are asked to decide whether the district court properly applied the Act in this case. We conclude that the district court properly applied the Act because the record shows that both parents satisfied Section 40-10B-8(B)(3). Before explaining why the parents satisfy Section 40-10B-8(B)(3), we address Father's contention that Grandparents did not preserve their argument regarding this subsection.

B. The Parties Adequately Preserved the Issue of Whether Both Parents Satisfied Any of the Provisions of Section 40-10B-8(B).

{20} Father makes two arguments as to why this Court should only consider Subsection B(1). First, he contends that the parties did not properly raise Section 40-10B-8(B)(3) before the district court. Second, Father argues that only Subsection B(1) is before this Court because the petition for certiorari only requested this Court to review Subsection B(1). We conclude that the parties "fairly invoked" the district court's ruling regarding Subsections B(1), B(2), and B(3), although the district court did not specify which subsection was proven by Grandparents when the court granted their petition for guardianship and custody. *See* Rule 12-216(A) NMRA (requiring parties to fairly invoke the ruling of the court in order to preserve an issue for appellate review).

{21} To properly plead a request for guardianship under Section 40-10B-5(B)(1), a petitioner must plead basic "facts that if proved will meet the requirements of Subsection B of Section 8 of the Act." Grandparents' petition and Mother's supporting motion to proceed

to determine legal and physical custody listed facts that would support application of Subsections B(1), B(2), and B(3). To satisfy Section 40-10B-8(B)(1), Grandparents alleged that Mother consented to the kinship guardianship appointment. They also alleged that both Mother and Father had legal custody. However, Grandparents acknowledged during oral argument before the district court that the district court had previously awarded Grandparents sole legal and physical custody of Child. This acknowledgment may have been relevant to application of Section 40-10B-8(B)(2). Also arguably consistent with Section 40-10B-8(B)(2), Mother's motion requesting the district court to proceed to determine legal and physical custody stated that, at the time of the petition, Grandparents "ha[d] sole temporary legal and physical custody of the child by order of this Court." Finally, to satisfy Section 40-10B-8(B)(3), Grandparents alleged that "[t]he minor child has resided with [Grandparents] for a period of more than ninety (90) days immediately preceding the date of this petition" and "[t]he child's father is unable to provide adequate care, maintenance, and supervision for the child."

{22} Father also specifically addressed all three subsections in his response to Grandparents' petition. Regarding Subsection B(3), Father argued that "[t]he petition fails to meet . . . item (iii) . . . [of Section 40-10B-8(B)] in that neither the mother nor the father had legal custody of the child per temporary order entered on October 31, 2008." Father cannot claim that Subsection B(3) was not before the district court when he actually argued the merits of granting a guardianship under Section 40-10B-8(B)(3) before the district court. As a result, the issue is adequately preserved for our review. In addition, even if we were to conclude that Grandparents did not adequately present this issue to the district court, because Father specifically argued the matter, the issue is preserved with respect to both Father and Grandparents. *See, e.g.*, *Grant v. Cumiford*, 2005-NMCA-058, ¶ 37, 137 N.M. 485, 112 P.3d 1142 (finding an issue preserved with respect to the respondent, even though it had only been raised and argued by a third party in the district court).

{23} Father's second argument, that the only issue in dispute before this Court is whether Subsection B(1) was satisfied in this case, is also without merit. The petition for writ of certiorari asks us whether the Court of Appeals properly concluded that Grandparents "did not meet the prerequisites for application of the [Act]," a phrasing which does not limit this Court to reviewing Subsection B(1). Consequently, we are free to assess the applicability of any of the subsections of Section 40-10B-8(B).

C. The District Court's Findings Adequately Support Its Application of the Act.

{24} We now discuss why we conclude that Subsection B(3) was satisfied in this case. Subsection (B)(3) provides that:

> [T]he 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.

Section 40-10B-8(B)(3) (emphasis added).

{25} Reference to "the parent" in the first sentence could be to either or both parents. In this case, the record reflects that Child resided with Grandparents without Father for more than ninety days before the petition for appointment of guardianship and custody was filed with the district court. Reference to "a parent having legal custody" can also refer to either parent. *Id.* As noted by Father, the district court had previously granted temporary sole legal and physical custody of Child to Grandparents. Thus, neither parent had legal or physical custody of Child. The authority relied upon by the district court for doing so is not in the record. The district court did not make a finding that Mother and Father were unfit to care for Child when it initially ordered legal and physical custody in favor of Grandparents, nor did the district court specify that "extraordinary circumstances" justified the change in legal and physical custody. Section 40-10B-8(B)(3).

{26} Thus, the record is not clear whether the district court was suspending all of the rights of the parents by granting sole legal and physical custody to Grandparents. Had the court done so, Section 40-10B-8(B)(2) would support the kinship guardianship. Because the district court also specified in its initial order that Father and Mother should have visitation privileges, it is reasonable to conclude that the district court also wanted both parents to continue to have some say regarding Child. The district court apparently wanted to afford both parents an opportunity to prove their willingness and their ability to care for Child.

{27} Although the procedure employed by the district court was unusual, we conclude that the court acted in a manner consistent with the spirit and intent of the Act, which includes Section 40-10B-8(B)(3). The district court (1) imposed the burden of proof on Grandparents, despite its previous order granting them sole legal and physical custody; (2) found that neither Mother nor Father was fit to care for Child, consistent with Subsection (B)(3); (3) included in its order a visitation requirement for both parents, evincing an intent to allow Mother and Father to maintain or reestablish a relationship with Child; (4) agreed to review the guardianship arrangement in twenty-four months; and (5) entered an order under the Act, a certified copy of which serves as proof of Grandparents' authority with respect to legal decisions involving Child, consistent with Section 40-10B-13(C).

{28} Further, the Act requires a petitioner to plead and prove which subsection(s) of Section 40-10B-8(B) apply justifying a kinship guardianship. Sections 40-10B-5(B) & -8. An appropriate pleading puts the respondents on notice of the allegations. Sections 40-10B-5 & -6. At the hearing on the petition, the petitioner must prove the allegations by clear and convincing evidence. Section 40-10B-8(C). In this case, had the district court concluded that Grandparents did not prove by clear and convincing evidence that Father was unwilling or unable to care for Child, the district court could not have granted the kinship guardianship to Grandparents. However, the district court found that Father was not fit to care for Child. Father did not challenge this finding. Mother expressed her unwillingness to care for Child

by consenting to the kinship guardianship. We conclude that these findings satisfy both Section 40-10B-8(C) and the spirit of Section 40-10B-8(B)(3).

{29} Father also argued before the district court that Section 40-10B-8(B)(3) could not technically be satisfied because neither parent had "legal custody" of Child at the time Grandparents filed their petition for guardianship. The Court of Appeals also adopted this reasoning. *See In re Guardianship of Patrick D.*, 2011-NMCA-040, ¶ 20. Father's rigid textual interpretation improperly ignores the "extraordinary circumstances" language also found in Section 40-10B-8(B)(3), which we read as a fail safe to allow courts to ensure that the Act is applied in a manner that adheres to the spirit of the Act. As we have previously recognized, cases that come under the Act often involve unconventional family structures and unconventional facts. *See In re Guardianship of Victoria R.*, 2009-NMCA-007, ¶ 12. It would undermine the spirit of the Act to allow a court to grant a kinship guardianship when the court finds both parents, who have legal custody, to be unfit, but not to allow a kinship guardianship when those parents, found to be unfit, have temporarily been deprived of legal custody over the child, for the protection of the child. Such a result would be anomalous. Consequently, we hold that a case in this unique posture falls within the spirit of the Act and the scope of Section 40-10B-8(B)(3), even though the Legislature may have failed to contemplate these precise facts when it passed the Act.

{30} Thus, we conclude that the Act was applied appropriately under the unique facts, circumstances, and procedure of this case. The complexity of this case would have been reduced had the district court articulated the findings of fact which supported the court's award of sole legal and physical custody to Grandparents and had the court stated the legal authority for its order. In addition, review of this case would have been less arduous had the district court also specified the basis for granting a kinship guardianship under these facts.[2] District courts are encouraged to do so in the future.

{31} Two additional issues were raised by Father that merit our response. First, Father alleges that the Act should not be applied in a way that favors one parent over the other. Second, Father contends that this matter should be remanded to the Court of Appeals instead of the district court so that the Court of Appeals can address a notice issue raised by Father but not addressed by the Court of Appeals in light of its disposition of the case.

D. The Fact that Mother Remained in the Same House as Child Does Not Preclude Application of the Act.

[2]For example, the district court may have declared that its prior order granting sole legal and physical custody to Grandparents was intended to suspend all of Mother's and Father's parental rights for purposes of Section 40-10B-8(B)(2). Alternatively, the district court may have announced that it considered the parents to have legal custody of Child for purposes of Section 40-10B-8(B)(3).

{32} Father contends that the Act should not be applied in this case because "[t]he KGA, which was intended to benefit children by enabling kinship caregivers to serve as surrogate parents, here was used to help one of Child's natural parents to defeat the other in a custody dispute." The Court of Appeals also adopted this rationale, explaining that allowing the Act to apply here would allow one unfit parent "to utilize the Act to unfairly engage in in-the-home, continual, and personal parenting of the child to the exclusion of the other parent." *In re Guardianship of Patrick D.*, 2011-NMCA-040, ¶ 20. We are not persuaded by this contention for three reasons.

{33} First and foremost, once the district court finds both parents unfit, as happened in this case, the court's duty is to act in the child's best interests. *See Shorty v. Scott*, 87 N.M. 490, 492-94, 535 P.2d 1341, 1343-45 (1975). Therefore, the extent to which the custody arrangement incidentally benefits one biological parent more than the other is irrelevant in deciding the proper arrangement under the Act once both parents have been deemed unfit.[3] The fact that the district court's arrangement incidentally benefits Mother does not invalidate this arrangement.

{34} Second, as pointed out by the Court of Appeals, even if the kinship guardianship is set aside, the district court should have continued the interim custody arrangement in favor of Grandparents. However, even under that arrangement, Mother could continue to live with Grandparents and Child until the custody dispute is resolved. *In re Guardianship of Patrick D.*, 2011-NMCA-040, ¶ 21. Therefore, whether Child was in Grandparents' legal and physical custody as a result of a kinship guardianship or other formal custody arrangement is irrelevant. Mother would have still been in the same household as Grandparents and Child.

{35} Third, applying the Act, rather than being "unfair[]," *id.* ¶ 20, advances the important goal of allowing the parents to maintain and rebuild a relationship with the child, Section 40-10B-8(E). This provision evinces an interest in encouraging the rehabilitation of parents who are presently unfit, rather than discouraging such rehabilitation. The result here should advance Mother's rehabilitation, and the provision for Father's visitation with Child also is consistent with this goal. Encouraging such rehabilitation also seeks to fulfill the expressed legislative policy under the Act that "the interests of children are best served when they are raised by their parents." Section 40-10B-2(A). Disposition of this case under the Act was entirely appropriate.

E. Father's Argument that He Received Insufficient Notice Is Moot Because Even

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[3]Notably, Father also had an equal opportunity to nominate potential guardians with whom he could have resided upon his release from immigration detention. Consequently, neither parent is inherently disadvantaged by allowing a parent with a close relationship to the proposed guardians to reside with them and maintain a close relationship with Child, if the district court awards guardianship.

if His Claim Has Merit, the Court of Appeals Can Only Order Relief to which Father Is Already Entitled.

{36} Father suggests that if we affirm the district court, we should remand this case to the Court of Appeals to address the issue of whether the district court erred in considering the merits of the petition (1) when Father was not given adequate notice of the hearing, and (2) before the district court had received the recommendation of the Rule 11-706 expert. However, we decline to remand this issue to the Court of Appeals because even if Father's claim has merit, the Court of Appeals can only order relief to which Father is already entitled, making this issue moot.

{37} We have recognized that "prudential rules of judicial self-governance, like standing, ripeness, and mootness, are founded in concern about the proper—and properly limited—role of courts in a democratic society and are always relevant concerns." *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 16, 149 N.M. 42, 243 P.3d 746 (internal quotation marks and citation omitted). "A case is moot when no actual controversy exists, and the court cannot grant actual relief." *State v. Pieri*, 2009-NMSC-019, ¶ 7, 146 N.M. 155, 207 P.3d 1132 (internal quotation marks and citation omitted). We previously found moot a defendant's argument that the district court erroneously ordered the defendant's commitment for a crime that was not covered by the statute upon which the district court relied. *State v. Adonis*, 2008-NMSC-059, ¶ 1, 145 N.M. 102, 194 P.3d 717. Because this Court had found the commitment consistent with a different crime that *was* covered by the statute and remanded to the district court to enter a new commitment order consistent with its opinion, it held that the additional complaint about the present commitment order was moot. *Id.* In contrast, we found another defendant's challenge to a conviction was not moot, even though both the sentence and parole had been served, because the conviction continued to have collateral consequences for the defendant. *See Garcia v. Dorsey*, 2006-NMSC-052, ¶ 17, 140 N.M. 746, 149 P.3d 62.

{38} Here, as in *Adonis*, the Court cannot grant any actual relief that Father is not already entitled to receive. If the Court of Appeals were to determine that the decision was made without sufficient notice or information, all it could do is remand to the district court to provide a new hearing and consider the expert's report. Father is already entitled to a new hearing on the guardianship issue under the terms of the guardianship order issued on November 4, 2009. The guardianship order stipulated that the order would automatically be reviewed in twenty-four months. That time period expired on November 4, 2011, which was several months ago. According to Father, the expert report is now available. On remand, Father can request that the district court reconsider the kinship guardianship and take into consideration the expert's report.

{39} This matter is remanded to the district court to conduct a hearing post haste regarding the continued need for a kinship guardianship and the legal rights and responsibilities of Mother and Father. On remand, the district court should enter appropriate findings and specify under what authority the court is ruling, regardless of the outcome of the case.

III. CONCLUSION

{40} The Court of Appeals is reversed and this matter is remanded to the district court for proceedings consistent with this opinion.

{41} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice

PATRICIO M. SERNA, Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

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The Indian Child Welfare Act & Kinship Guardianships

I. Does ICWA apply to kinship guardianships?

Yes. Our N.M. Kinship Guardianship Act is clear in three (3) places:

- § 40-10B-8(C) – "The burden of proof shall be by clear and convincing evidence, except that in those cases involving an Indian child as defined in the federal Indian Child Welfare Act of 1978, the burden of proof shall be proof beyond a reasonable doubt."
- § 40-10B-6(B)(5) – to whom notice shall be given: "if the child is an Indian child as defined in the federal Indian Child Welfare Act of 1978, the appropriate Indian tribe and any 'Indian custodian', together with a notice of pendency of the guardianship proceedings, pursuant to the provisions of the federal Indian Child Welfare Act of 1978."
- § 40-10B-5(B)(12): "whether the child is subject to provisions of the federal Indian Child Welfare Act of 1978 and, if so: (a) the tribal affiliations of the child's parents; and (b) the specific actions taken by the petitioner to notify the parents' tribes and the results of the contacts, including the names, addresses, titles and telephone numbers of the persons contacted, and copies of correspondence with the tribe;"

II. To which families do ICWA and these Children's Code sections apply?

The universe of families to whom these laws apply is limited: it only applies to statutorily-defined Indian children. Indian child is defined in ICWA at 25 U.S.C. 1903(4): "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

Hence, the two (2) threshold questions that the parties and the Judge will need to assess are:

1. is this kinship guardianship for an Indian child; and
2. what is that child's tribal affiliation?

Sometimes, there may be reason to believe a child may be an Indian child, but the proof or membership or eligibility for membership is not yet provided by the tribe to the agency and/or court. The Code of Federal Regulations provides clarity on ICWA requirements to help guide the Judge in these situations: 25 C.F.R. § 23.107.

Because these kinship guardianships are often filed *pro se*, they are not likely to be familiar with this area of law, so the Court will need to do a thorough inquiry to provide clarity for the parties going forward and to know the relevant law.

III. What are the procedural requirements to set up a kinship guardianship for an Indian child?

Before setting a hearing on the Petition for Kinship Guardianship, the Judge needs to review the pleadings closely to determine if the parties need guidance from the Court. You can use this list as a checklist to see if a scheduling conference or clarifying order is necessary before setting a hearing on the Petition.

Law	Requirement	Commentary
25 U.S.C. 1912(b)	**Attorneys**: Do the parents and the child have attorneys for the kinship guardianship case?	ICWA requires the appointment of an attorney for the parents and the child; the kinship-guardianship act does not have a similar requirement.
25 U.S.C. 1912(a); 40-10B-5(B)(12)	**Petition**: Must provide the court with: "(a) the tribal affiliations of the child's parents; and (b) the specific actions taken by the petitioner to notify the parents' tribes and the results of the contacts, including the names, addresses, titles and telephone numbers of the persons contacted, and copies of correspondence with the tribe."	This requires reading the petition and comparing it to this subsection of the law to do an assessment of whether the information required by law has actually been provided. This is also an avenue to find out whether tribal social services or a tribal court case may be occurring since our statute and form only request information concerning CYFD. If the child is in the legal custody of the tribe, then state court would not have jurisdiction.
25 U.S.C. 1912(a); 25 C.F.R. § 23.11, § 23.111; § 40-10B-6(B)(5); § 40-10B-5(B)(12)	**Notice**: Under the kinship-guardianship act, notice is required to the child's tribe; but, the petition requires a description of the specific actions taken to notify the parents' tribe. Under ICWA, notice of the proceedings is required to go to the child's tribe (by registered mail, return receipt requested).	The point under both statutes is to have proof that the Notice and Petition have been sent and received by the tribe. Be aware of the subtle difference in the statute's language as to parents' tribe and child's tribe. Often times, the parents' tribe is the same tribe as the child, but be aware that that may not be the case, including that siblings may be members of different tribes. Pointer: the Judge can make a better record for itself by requiring the parties to do one step more: file that proof with the court to demonstrate that the movant has complied with the law.

IV. What findings must the Judge make to set up a kinship guardianship for an Indian child?

The kinship guardianship act and ICWA requires at least the following three (3) things – in addition to the usual requirements for setting up a kinship guardianship:

1. A finding that the child is an Indian child;
2. A finding that the child's tribe has been notified;
3. A finding that the elements were proven beyond a reasonable doubt: § 40-10B-8C.

V. Making a better record: what is not necessarily required, but should be done by a Judge to create a better record and support a more professional practice?

Written findings. There is no better way for a Judge to demonstrate that she has followed the procedural requirements, appropriately considered the relevant law, and applied the law to the facts to the case than to write it down. While the press of business is something every Judge faces, the importance of being clear with the parties and making your own record should an appeal follow, is so very important to our system of justice. It has the added benefit of teaching the attorneys what the law requires, the seriousness of these cases, the preparation work and attention to detail that is required in making decisions about any family that affects their parental rights. ICWA specifically addresses who and how state actions for Indian children can be invalidated: 25 U.S.C.1914; 25 C.F.R. § 23.137.

Encourage tribal input. Often, tribes are not able to attend every hearing for every child, but that does not mean that the Judge should see that as a tribe not being interested in what happens to their tribal member. Allowing a tribe to participate by telephone, by Skype, or another manner is the best way to set the tone for the participants that the Judge takes seriously the position and opinion of the tribe. It also demonstrates and acknowledges the family's unique identity and the importance of their tribe's input. See 25 C.F.R. § 23.133.