State of New Hampshire
Supreme Court

NO. 2020-0079

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SEPTEMBER SESSION

Guardianship of Lunsford Children

RULE 7 APPEAL OF FINAL DECISION OF THE
NEWPORT FAMILY DIVISION

REPLY BRIEF

September 21, 2020

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

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I. DCYF is a "Guardian," Not a "Parent"

In the absence of an objecting parent, to establish a guardianship, a qualified person need only allege facts showing that a guardianship is in the minor's best interest. RSA 463:5, V. As noted in their brief, the Lunsfords did that. LUNSFORDS' BRF. at 35-38.

When a parent objects, however, the guardianship statute erects a much higher bar to establishing a guardianship. RSA 463:8, III(b) ("If a parent objects to the establishment of the guardianship of the person requested by a non-parent, … the burden of proof shall be on the petitioner to establish … that the best interests of the minor require substitution or supplementation of parental care and supervision to provide for the essential physical and safety needs of the minor or to prevent specific, significant psychological harm to the minor.").

DCYF asserts that the Lunsfords' petition was appropriately dismissed because, under the higher bar, the petitions did not allege that guardianship was necessary to protect the physical and safety needs of the children, or to prevent psychological harm. DCYF BRF. at 8.

That assertion overstates DCYF's legal authority to object to a guardianship, incorrectly assuming that DCYF is a "parent." RSA 463:8, III(b).

When DCYF attains custody of a child as a result of a neglect proceeding, it does not become "a parent." It becomes a "guardian." RSA 169-C:3, XIV ("'Guardian' means a parent or person appointed by a court having jurisdiction with the duty and authority to make important decisions in matters having a permanent effect on the life and development of the child, and to be concerned about the general welfare of the child."). The party with actual custody becomes a "custodian." RSA 169-C:3, X.

Hundreds of New Hampshire statutes involving children confer various duties and privileges on "parents or guardians" collectively. This includes many statutes unrelated to DCYF, *see, e.g.,* RSA 193:3-a, II (placement of twins in classrooms); RSA 314-A:8 (consent to a tattoo), and many others within DCYF's sphere. *See, e.g.,* RSA 169-C:2, II (care for child when "removed from the control of his or her parents, guardian, or custodian"); RSA 169-C:3, X (definition of "custodian"); RSA 169-C:3, XIV-a (definition of "household member"); RSA 169-C:3, XIX (definition of "neglected child"); RSA 169-C:3, XXII (definition of "out-of-home placement"); RSA 169-C:3, XXII (definition of "person responsible for a child's welfare"); RSA 169-C:6-a (emergency notification); RSA 169-C:7-a (petitions for protective orders); RSA 169-C:11 (persons subject to DCYF subpoena); RSA 169-C:12-f (rebuttable presumption of harm); RSA 169-C:16 (conduct and result of preliminary disposition); 169-C:17, II (consent orders); RSA 169-C:19 (conduct and result of dispositional hearing); RSA 169-C:20, V (child with disability); RSA 169-C:22 (modification of dispositional orders); RSA 169-C:25-a (access to medical records); RSA 169-C:33 (consent to certain medical procedures).

The guardianship statute, however, distinguishes between "parent" and "guardian" in this context. Only a *parent's* objection generates heightened allegations by the guardianship petitioner. This is because the constitutional right to parent belongs to parents, *see Troxel v. Granville*, 530 U.S. 57 (2000); *In re J.H.*, 171 N.H. 40, 51 (2018); *In re Bill F.*, 145 N.H. 267, 272 (2000), not to governmental agencies.

Because DCYF is not "a parent," but merely a "guardian," a petitioner such as the Lunsfords need only make the lower-bar allegation of best-interest contained in RSA 463:5, V, and not the higher-bar allegations of harm in RSA 463:8, III(b). Because the Lunsfords did, their petitions were erroneously

dismissed.

Even if the Lunsfords are incorrect about what allegations were required in their petitions, because the Lunsfords were prevented from participating in the neglect case, they had no ability to discern the legal status of DCYF or their grandchildren. They should therefore be held to the RSA 463:5, V standard that appeared reasonable to them at the time they filed their petitions.

II. DCYF Failed its Statutory Obligations By Abandoning the Lunsfords

In its brief, DCYF defends its actions regarding the Lunsfords by reciting that the agency twice contacted the Lunsfords and asked them to take emergency care of the children when they were found in the car with their mother passed out. DCYF BRF. at 2-3, 6, 9.

At the time of the calls, having sold their home faster than anticipated, the Lunsfords were living in a one-bedroom apartment, and constructing a large house to accommodate all three grandchildren. The Lunsfords told DCYF of their predicament, and have records to prove it. LUNSFORDS' BRF. at 10-11, 13. DCYF apparently disbelieved the Lunsfords, or chose to misunderstand their temporary obstacle as refusal. *Id.* at 13.

Despite the statutes directing DCYF to favor grandparents and sibling cohabitation, LUNSFORDS' BRF. at 31-34, DCYF did not inform the Lunsfords that saying no then would result in no forever. Had they known, the Lunsfords would have found a way. DCYF also did not make any effort to facilitate the Lunsfords taking immediate custody in less-than-ideal circumstances while their house was being built.

Rather than working with the Lunsfords to find a solution as the statutes direct, DCYF abandoned them, and then arranged to permanently block the Lunsfords from being a part of their grandchildren's lives. The Lunsfords believe that DCYF's insouciance would not have occurred had they been light-skinned and local.

III. Neglect Case Documents Were Made a Part of the Record

In its brief, DCYF denies it incorporated by reference records from the underlying neglect cases, claiming that it merely requested the court take "judicial notice" of them. DCYF BRF. at 4, 10, n.4.

A request for judicial notice of an entire docket, as opposed to a particular fact, is not meaningfully different from a request for incorporation by reference of the documents evidencing the noticed facts. *See, e.g., Gerrick v. State*, 451 N.E.2d 327, 331 (Ind. 1983) ("We construe the judge's act of 'incorporating by reference' into his waiver hearing the finding of probable cause made at the former hearing to be the same as taking judicial notice of a prior proceeding in the same court and the same cause of action.").[1]

In any event, in its motion to dismiss, DCYF went beyond simply asking for judicial notice; it requested the court give "consideration" to the underlying neglect records. It also indicated that the referenced records were "attached." MOTION TO DISMISS (Jan. 9, 2020), *Addendum to Brief* at 51.[2]

Whatever term DCYF employs – judicial notice or incorporation – the

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[1]The federal rules of civil procedure, and some state procedural rules, define judicial notice, and may therefore create a technical distinction between the two phrases in federal law and in those states. *See, e.g., Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011).

[2]DCYF also appears to say that because a guardianship petition requires identification of "pending proceedings affecting the minor," RSA 463:5, IV(c), that corroborates that its proffering of the underlying neglect record was merely judicial notice and not incorporation. DCYF BRF. at 10. Even if that were logical, the identification provision DCYF cites applies to the *petitioner,* whereas here it was *DCYF* that requested judicial notice. Moreover, the statute only requires identification of proceedings "so far as is known to the petitioner," RSA 463:5, IV, making apparent that the purpose of the provision is to avoid jurisdictional conflicts, not erect procedural barriers to guardianship petitions or affect access to records. Nonetheless, in compliance with the requirement, in their guardianship petition the Lunsfords identified the one proceeding about which they knew, which is the same neglect case of which DCYF requested judicial notice. PETITIONS FOR GUARDIANSHIP ¶¶ 11, 12 (Jan. 3, 2020), *Appx.* at 3, 9, & 15 (listing case number "627-2017-Jv-33-35").

records were specifically named, and DCYF asked the family court to apply its knowledge and understanding gained from those records to the guardianship case. DCYF further indicated that the underlying referenced records it expected the court to use for that purpose were attached. The record of the neglect case therefore became part of this case, and should accordingly be shared with the Lunsfords.

IV. Denial of Access to Incorporated Documents Became Ripe During Appeal

In its brief, DCYF claims that because the Lunsfords did not ask for copies of the incorporated-by-reference records below, they are barred from presenting them on appeal. DCYF BRF. at 13. The claim misunderstands the record below.

DCYF said in its pleading that it would like the referenced record of the neglect case, and the court's knowledge of it, to inform the court's guardianship decision regarding the Lunsfords. The Lunsfords had no reason to object, as they believed the cited record would vindicate DCYF's inattention to them. DCYF's notation of "see attached" indicated the referenced documents were attached – at least to the court's copy – and were therefore in the guardianship record. The court's oral references to the "underlying cases" confirmed that understanding. The Lunsfords had no reason to believe that they would later be prevented from accessing the referenced court records.

The Lunsfords' inability to access the records did not become apparent, and therefore did not become an issue, until the records were sought to assemble an appellate appendix. SUP.CT. R. 13(2) ("The moving party shall be responsible for ensuring that all or such portions of the record relevant and necessary for the court to decide the questions of law presented by the case are in fact provided to the supreme court. The supreme court may dismiss the case or decline to address specific questions raised on appeal for failure to comply with this requirement.").

Thus the issue was not ripe until the appeal, and there was therefore no need to preserve it below. *UNH v. Dorfsman*, 168 N.H. 450, 455 (2015) (defining ripeness); *State v. Gubitosi*, 153 N.H. 79 (2005) (injurious action occurred during appeal).

V. Statement of Facts Should Remain

In its brief, DCYF suggests this court should strike the statement of facts in the Lunsfords' brief. DCYF BRF. at 1 n.1.

Contrary to DCYF's assertion, DCYF BRF. at 1 n.1, the affidavit is part of the appellate record because it was "filed and considered in the proceedings in the trial court." SUP.CT. R. 13(1).

The affidavit was filed in the guardianship case and bears the guardianship docket numbers in its caption. AFFIDAVIT, *Appx*. at 48. The family court's decision regarding access to the incorporated-by-reference records was likewise issued in the guardianship case, with the guardianship docket numbers in its caption. ORDER (Aug. 7, 2020), *Addendum to Brief* at 59; LUNSFORDS' BRF. at 29. The affidavit was therefore part of the guardianship case below, and also part of the record in this appeal.

DCYF's argument is also disingenuous because, as the Lunsfords have noted, LUNSFORDS' BRF. at 28-29, it was DCYF which suggested filing of the affidavit that now constitutes the statement of facts, and because throughout its brief, DCYF references and relies on the Lunsfords' statement of facts.

Moreover, as noted in their brief, because the Lunsfords' guardianship petitions were unlawfully dismissed, the affidavit is the *only* existing description of the Lunsfords' situation.

Accordingly, the statement of facts in the Lunsfords' brief should remain in its entirety.

Even if the Lunsfords' statement of facts were struck, however, it does not alter the Lunsfords' contention that DCYF and the court erred in the ways detailed in their brief.

VI. Appeal is not Moot

In its brief, DCYF asserts this appeal is moot, and that the Lunsfords should not be allowed to "collaterally attack" the adoptions. DCYF BRF. at 5-7, 12-14.

The Lunsfords filed their petitions for guardianship two weeks before the adoptions. Those petitions put DCYF and the court on timely notice that there were willing and able grandparents who could keep the siblings together, that there were potential problems with the existing permanency plan, and that the proceedings theretofore had not taken all the statutes and family factors into account.

And had DCYF not unlawfully consented to the adoptions, the adoptions would not have been finalized.

To the extent this appeal is otherwise moot, the mootness was caused by DCYF and the family court, and could have been avoided had the adoptions been delayed. *See Hess v. Turner*, 129 N.H. 491 (1987) (case not moot where party's own actions caused alleged mootness).

The Lunsfords are not collaterally attacking the adoptions; they are requesting that DCYF and the court revert to the time their guardianship petitions were filed, and give them the consideration they are due.

VII. Short Delay is Beneficial, not Prejudicial

DCYF proclaims that "the Lunsfords filed their guardianship petitions for the sole purpose of trying to interfere with the children's adoptions." DCYF BRF. at 11. DCYF concedes, however, that guardianship with the Lunsfords would have delayed the children's permanency by only six months. DCYF BRF. at 10; RSA 170-B:19, IV(c).

Interference in this context is not a slur. The Lunsfords are motivated by love and compassion for their grandchildren. They believe the evidence will show that had they been given the consideration the law requires, they would have been granted guardianship, and then adoption.

The Lunsfords are ready and able to provide all three children a home together, and have made all necessary physical and regulatory arrangements to welcome the children into their family and community. A short delay to produce such a beneficial result – which is favored by the statutes – is not prejudicial.

CONCLUSION

This court should reach the merits of this appeal, reverse the dismissal of the Lunsfords' guardianship petitions, require the court divulge the records in the underlying neglect cases, and order the court to hold a hearing giving the Lunsfords an opportunity to show that placing their grandchildren with them is in the children's best interests, consistent with New Hampshire statutory directives.

Respectfully submitted,

Sandra and Clyde Lunsford
By their Attorney,
Law Office of Joshua L. Gordon

Dated: September 21, 2020

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

CERTIFICATIONS

I hereby certify that this brief contains no more than 2,318 words, exclusive portions which are exempted.

I further certify that on September 21, 2020, copies of the foregoing will be forwarded to Laura Lombardi, Esq., Assistant Attorney General.

Dated: September 21, 2020

Joshua L. Gordon, Esq.