IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE GUARDIANSHIP OF T. W., A MINOR.

WANDA W., A/K/A WANDA S.,
Appellant,
vs.
GLORIA W. AND ROMAN W.,
Respondents.

No. 48648

FILED

SEP 24 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from a district court order appointing guardians for a minor child. Eighth Judicial District Court, Family Court Division, Clark County; Gerald W. Hardcastle, Judge.

The underlying matter concerns the custody of appellant's ten-year-old child. It appears that the child has lived the majority of his life with respondents, the maternal grandparents.

Following an alleged incident at the child's school, involving appellant and the child, respondents petitioned the district court to be named the child's guardians. In their petition, respondents contended that (1) appellant suffers from various mental health conditions, (2) her living environment is not suitable for the child, and (3) appellant is unable to hold a job. The district court entered a temporary order naming the respondents as the child's guardians, and the matter was scheduled for an October 2006 hearing before a master. Appellant was served with notice of the hearing.

In the interim, respondents moved the district court to extend the temporary guardianship, and on September 28, 2006, a hearing, before a master, was conducted on the motion. Appellant was present at the

hearing and expressed her opposition to the temporary guardianship. Also during the hearing, the master directed that appellant undergo a psychological examination and that the ensuing report be filed in the district court by the October hearing.

Before the scheduled October hearing, appellant, proceeding in proper person, filed a petition to terminate the temporary guardianship. The matter was scheduled for a November 2006 hearing.

When the October hearing was conducted, appellant failed to appear. The record shows that the location of the hearing was changed, and according to appellant, she was at the courthouse the day of the hearing, but was unable to locate the room in which the hearing was held. While the master stated that the appellant was not present for the hearing, the master did not inquire as to appellant's whereabouts and whether appellant knew that the hearing had been relocated. Nevertheless, the four witnesses that appellant had subpoenaed appeared at the hearing and were sworn in and briefly questioned by the master and the respondents. The hearing transcripts show that the psychological report had not been filed at that time.

Without reaching the merits of the guardianship petition, the master orally concluded that since appellant did not appear at the hearing and, thus, did not oppose the guardianship, the petition should be granted.[1] On November 4, 2006, the district court entered a written order, granting the guardianship without any findings regarding whether appellant is a fit parent or that extraordinary circumstances exist to

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[1]The record does not contain a written recommendation or findings of fact from the master stemming from the October 2006 hearing.

warrant naming respondents the child's guardians.[2] Appellant has appealed from the November order appointing the guardians.

Before the notice of appeal was filed, the November hearing on appellant's petition to terminate the temporary guardianship was conducted before the same master, even though the matter appeared to be moot as a result of the district court's November 4, 2006 guardianship order. During the hearing, appellant testified that she was present at the courthouse during the October 2006 hearing and was unable to locate the hearing room. The master informed appellant that the temporary guardianship had been granted and "denied" her petition to terminate the guardianship. The record shows that on January 18, 2007, approximately one month after appellant filed her notice of appeal from the November order, a "Commissioner's Finding and Recommendation" was filed in the district court, addressing appellant's concerns raised during the hearing on her motion to terminate the temporary guardianship.

After reviewing appellant's civil proper person appeal statement and the record, this court directed respondents to file a response. Moreover, we remanded this matter to the district court for the limited purpose of determining whether a reasonable visitation arrangement between the child and appellant, pending resolution of this

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[2]See NRS 159.061(1) (recognizing a parental preference in guardianship proceedings); Locklin v. Duka, 112 Nev. 1489, 1493-94, 929 P.2d 930, 933 (1996); Litz v. Bennum, 111 Nev. 35, 888 P.2d 438 (1995); see also Matter of Guardianship & Estate of D.R.G., 119 Nev. 32, 37-38, 62 P.3d 1127, 1130 (2003). Cf. Bauwens v. Evans, 109 Nev. 537, 539, 853 P.2d 121, 122 (1993) (noting the judicial policy favoring a decision on the merits is heightened where the termination of parental rights is at issue), overruled on other grounds by Epstein v. Epstein, 113 Nev. 1401, 950 P.2d 771 (1997); see also NRS 128.005.

appeal, was appropriate. A certified copy of the district court's order, on remand, adopting a master's findings and recommendation awarding appellant supervised visitation has been filed in this court.[3]

The district court has broad discretion in determining questions of child custody, and the district court's custody determination will not be disturbed unless the court has clearly abused its discretion.[4] This court, however, must be satisfied that the district court's determination was made for appropriate reasons.[5] A district court's findings of fact will not be set aside unless they are clearly erroneous and not based on substantial evidence.[6]

NRS 159.061 provides a parental preference presumption in custody matters between a parent and a third party, stating that "[t]he parents of a minor, or either parent, if qualified and suitable, are preferred

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[3]With respect to the visitation order, we note that the commissioner mentioned that respondents and the child "intend" to move to California and stated that the move does not interfere with appellant's visitation rights. It is not clear from the record under what authority respondents were granted permission to relocate with the child to California. Cf. Schwartz v. Schwartz, 107 Nev. 378, 383, 812 P.2d 1268, 1271 (1991) (outlining factors a district court must weigh when a custodial parent seeks to relocate with a child to another state); see also Trent v. Trent, 111 Nev. 309, 315-16, 890 P.2d 1309, 1313 (1995) (emphasizing that the Schwartz factors must be considered in light of the availability of adequate, alternative visitation for the non-custodial parent).

[4]Guardianship of D.R.G., 119 Nev. at 37, 62 P.3d at 1130.

[5]Gepford v. Gepford, 116 Nev. 1033, 1036, 13 P.3d 47, 49 (2000).

[6]See Matter of Petition of Phillip A.C., 122 Nev. __, __, 149 P.3d 51, 57 (2006); see also Hermann Trust v. Varco-Pruden Buildings, 106 Nev. 564, 566, 796 P.2d 590, 591-92 (1990) ("Findings of fact of the district court will not be set aside unless clearly erroneous.").

over all others for appointment as guardian for the minor."[7] Even when the parental presumption applies, it can be rebutted by "showing parental unfitness or other extraordinary circumstances."[8]

Here, the record indicates that although appellant opposed the temporary guardianship and subsequently filed a petition to terminate it, the district court scheduled a hearing on the guardianship petition and appellant failed to attend. The record also shows, however, that on the day of the hearing, the hearing location was moved to another courtroom. The master waited to begin the proceedings, but when appellant failed to appear, the master proceeded with the hearing, instead of rescheduling. Appellant later testified that she was at the courthouse, but was unable to find the room where the hearing was held. The master determined that since appellant failed to appear at the hearing, she did not oppose the guardianship, yet appellant had previously opposed the guardianship, both orally and through her petition. The master, nevertheless, orally recommended that the guardianship petition be granted, essentially by default, without any application of the statutory criteria for determining a custody dispute between a parent and a third party.

This court favors a decision on the merits when parental rights are at issue.[9] In granting the petition for guardianship, the district court did not make findings regarding its determination, even though appellant opposed the guardianship. Specifically, the order failed to make any findings regarding appellant's alleged mental health issues and why

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[7]NRS 159.061(1).

[8]Guardianship of D.R.G., 119 Nev. at 38, 62 P.3d at 1131.

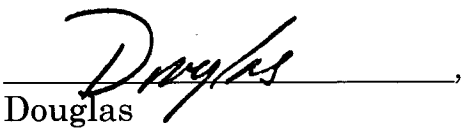
[9]Bauwens, 109 Nev. at 539, 853 P.2d at 122.

she is an unfit parent. Further, the appellate record does not contain the psychological report ordered by the master, nor did the district court, in its order, make any express reference to the report.

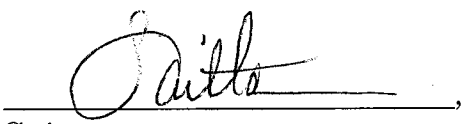
Granting the guardianship on a "default" basis was inappropriate under these circumstances. Additionally, the court did not make findings based on the statutory standard NRS 159.061 and seemingly did not consider the matter under this statute. Thus, the district court abused its discretion. Accordingly, we reverse the district court's order granting the guardianship petition and remand this matter to the district court for further proceedings consistent with this order.

It is so ORDERED.[10]

_____, J.
Parraguirre



_____, J.
Douglas



_____, J.
Saitta

cc: Hon. Gerald W. Hardcastle, District Judge, Family Court Division
Wanda W.
Michael R. Pontoni
Eighth District Court Clerk

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[10]In light of this order, we deny as moot, respondents' June 21, 2007 countermotion for limited remand.