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### **In re Guardianship of D.M.F., 139 Nev. Adv. Op. 38 (Sept. 28, 2023)**

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*In re Guardianship of D.M.F.*, 139 Nev. Advance Opinion 38 (Sept. 28, 2023)<sup>1</sup>  
DUE PROCESS IS OWED BY THE COURT IN CASES REGARDING A SUA SPONTE  
GUARDIANSHIP TERMINATION

**Summary**

A district court may sua sponte initiate the process for removing a guardian and terminating a guardianship. However, the court must protect the procedural due process rights of the protected minor, parents, and guardian by giving notice of the contemplated action and holding a hearing on the grounds of removal and termination, so the parties have a meaningful opportunity to be heard. When considering removal and termination of guardianship, the court must adhere to applicable statutes and rules under NRS Chapter 159A and the NSRG in determining whether removal and termination of guardianship are appropriate.

**Background**

At birth twin children, D.M.F. and A.F., tested positive for opiates and amphetamines, because of their parents' (Alexis M. and Antonio B.) methamphetamine use during the pregnancy. Yalonda F. (grandmother) served as a temporary guardian while the parents sought treatment. The parents were allowed to help with caretaking but were forbidden from sleeping with the children; this would be the role of the grandmother. One night, the children became fussy; the grandmother took care of D.M.F. while the parents took care of A.F. The parents fell asleep with A.F. in the same bed as them, and when they woke up, they found A.F. face down on the pillow and unresponsive. The investigations concluded that A.F.'s death did not result from abuse or neglect. CPS investigations revealed that both parents had relapsed, which caused the grandmother to seek legal guardianship over D.M.F.

One month after A.F.'s death, Yalonda petitioned the district court for appointment of guardianship over D.M.F. She stated that she was D.M.F.'s temporary guardian since birth and mentioned the agreement between her and the parents stating that if they relapsed, she would file for legal guardianship. Six months later, the district court issued an order stating that it reviewed under the Nevada Statewide Rules for Guardianship, an ex parte communication from another judge suggesting that there were possible misrepresentations made in the grandmother's petition. One of the concerns by the court was the fact that the grandmother failed to inform the court of A.F.'s death or CPS's ensuing investigation.

The district court questioned whether the grandmother should be the caregiver because her decision put A.F. in danger in the first place. The court observed that the grandmother could get guardianship through an NRS Chapter 432B case if CPS deemed guardianship appropriate. Despite there being no disqualifying factors, the district court listed three concerns regarding the grandmother's suitability as guardian. The district court found that the guardianship was granted under false pretenses. While the grandmother was willing to have the parents removed from the home, the district court stated that she would be unable to have the oversight necessary to

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prevent continued exposure to the parents. Thus, the district court found the removal of the grandmother as guardian in D.M.F.’s best interests and referred the matter to CPS for further investigation.

## **Discussion**

### ***Standard of Review***

Without an abuse of discretion, the Court will not question a guardianship determination.<sup>2</sup> Abuse of discretion happens in circumstances where the district court fails to supply reasons to support the determination<sup>3</sup>, exceeds the bounds of law, or makes an arbitrary decision.<sup>4</sup> They also abuse discretion when they base decisions on erroneous factual determinations or when they disregard controlling law.<sup>5</sup> Questions of law within guardianship determinations are reviewed de novo.<sup>6</sup>

### ***The district court has Authority to remove a guardian and terminate a guardianship, even absent a petition.***

NRS Chapter 159A governs guardianship proceedings concerning minors. Under NRS Chapter 159, “separate from an individual formally petitioning the court, the district court has its own ability to remove a guardian if it determines that one or more of the conditions set forth in NRS 159.185 have been satisfied.”<sup>7</sup> According to prior case law, the Court previously held that while various statutory provisions contemplate the filing of a petition for removal of a guardian by the party, “inherent in the district court’s jurisdiction over the guardianship is the power to appoint and remove guardians.”<sup>8</sup> Here, the Court concluded that the district court has the authority to sua sponte remove a minor’s guardian if one or more of the conditions set forth in NRS 159A.185 is satisfied and all other applicable requirements are met.

### ***The district court denied D.M.F. due process of law when it removed D.M.F.’s guardian and terminated the guardianship after the NSRG 5 hearing.***

Here, the Court agreed with D.M.F. stating that the NSRG 5 order failed to indicate that the district court was considering removal and termination, particularly where “no one requested that Yalonda be removed as guardian, or the guardianship terminated.” The United States Constitution and the Nevada Constitution provide that no person shall be deprived of a protected life, liberty, or property interest without due process of law.<sup>9</sup> Previous case law in this

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<sup>2</sup> Jason S. v. Valley Hosp. Med. Ctr. (In re Guardianship of L.S. & H.S.), 120 Nev. 157, 163, 87 P.3d 521, 525 (2004).

<sup>3</sup> Id.

<sup>4</sup> State v. Eric A.L. (In re Eric A.L.), 123 Nev. 26, 33, 153 P.3d 32, 36-37 (2007).

<sup>5</sup> MB Am., Inc. v. Alaska Pac. Leasing Co., 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016).

<sup>6</sup> Tahja L. v. State, Dep’t of Family Servs. (In re Parental Rights as to L.L.S.), 137 Nev. 241, 245, 487 P.3d 791, 796 (2021).

<sup>7</sup> Jones v. Friedman (In re Guardianship of Jones), 139 Nev., Adv. Op. 17, at 4, 531 P.3d 1236, 1243 (2023).

<sup>8</sup> Id. at 1242-43.

<sup>9</sup> U.S. Const. Amend. XIV, § 1; Nev. Const. Art. 1, § 8(2).

jurisdiction has shown that when a court sua sponte removes a guardian, without the formal filing of a petition, the court risks depriving a protected person of their autonomy which infringes on the individual's rights.<sup>10</sup> The Court also determined that the relationship between D.M.F. and his grandmother fits into the protected parent-child paradigm since the grandmother has served as his primary caregiver since birth. Important to recognize is that a guardian has a liberty interest in the care, custody, and management of a child under their protection akin to, but not entirely coextensive with, the rights of a parent.<sup>11</sup>

The Court recognized that the district court did not issue a citation to the guardian or any other interested persons to satisfy the requirements of NRS 159A.1855 and NRS 159A.1905 when a petition for removal or termination has been filed. Since there was no citation issued, the Court needed to rely on other actions of the district court to determine whether notice was provided. The Court concluded that the notice was not sufficiently provided.

None of the district court's orders provided a clear indication that removal and termination would be at issue at the hearing or in the court's subsequent order. Additionally, the second order did not indicate the potential for the drastic step of removal and termination such as directions to investigate potential substitute guardians. Further, the hearing that D.M.F. received cannot be construed as having provided them with due process of law. A full and fair hearing requires that the change in custody be supported by factual evidence and the party threatened with the loss of the parental right must be given the opportunity to rebut the evidence presented against them.<sup>12</sup> In this case, the investigator's report provided no recommendations or conclusions regarding the grandmother's suitability or D.M.F.'s health, thus giving no indication of the case regarding the need to remove or terminate guardianship. D.M.F. and the grandmother lacked the ability to adequately address concerns at the hearing. At the hearing, no testimony under oath was presented or considered. Furthermore, no party petitioned for removal or termination of the guardianship and the court did not indicate that it was sua sponte considering doing so. The lack of clarity throughout the entire process leaves the party with no ability to properly address the issues of removal and termination. The district court abused its discretion in its application of controlling law governing the removal of guardians and termination of guardianships and exceeded its authority in referring the matter to CPS. As such, D.M.F. and others concerned hold protected interests that deserve notice and an opportunity to be heard with respect to the removal and termination of guardianship.

### ***Removal of Yalonda as guardian.***

A district court may remove a guardian if it determines that one or more of several disqualifying factors exist, including the guardian's negligence in performing their duties, resulting in injury or a likelihood of injury to the protected minor.<sup>13</sup> A finding that removal serves the best interests of the protected minor does not by itself provide a basis for or trigger

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<sup>10</sup> Jones, 139 Nev., Adv. Op. 17, at 12, 531 P.3d at 1243.

<sup>11</sup> Simuro v. Shedd, 176 F. Supp. 3d 358, 384 (D. Vt. 2016)

<sup>12</sup> Moser v. Moser, 108 Nev. 572, 577, 836 P.2d 63, 66 (1992).

<sup>13</sup> NEV. REV. STAT. 159A.185(1) (2019).

removal; instead, it overcomes NRS 159A.186(1)'s functional presumption against removal. Removal initiated under NSRG 5 needs to satisfy one of the conditions under NRS 159A.185(1) and serve the best interests of the minor under NRS 159.186(2).

The Court determined that the district court abused its discretion in terminating the grandmother as guardian. The district court must first determine whether one of the enumerated conditions for removal under the statute exists, and if so, conduct a best-interests-of-the-child analysis. The district court justified removal based on the finding that the grandmother lied to the court to obtain the appointment.

All in all, the Court determined that the district court failed to apply the best interest factors found in NRS 159A.186(2), failed to find a predicate condition for removal under NRS 159A.185(1), and relied on unsupported and erroneous factual determinations.

### ***Termination of the guardianship.***

The Court determined that the district court abused its discretion in failing to make specific, supportable findings regarding the NSRG 10 factors before it terminated D.M.F.'s guardianship. Under NSRG 10(A), "the court shall not terminate the guardianship...without making specific findings" regarding three factors: (1) the protected minor's current health and welfare, (2) the reasons a guardianship should or should not be deemed necessary, and (3) whether maintaining the guardianship would serve the protected person's best interests. The district court's order focused on the supervised contact with the parents. The order did not address how termination would benefit the child and the district court did not identify any reason why the guardianship no longer remains necessary. It dismissed less restrictive alternatives and the best-interest analysis only looked at one factor and relied on unsupported findings.

### ***CPS referral.***

While CPS may determine whether grounds exist for an investigation into abuse or neglect, the district court cannot mandate that CPS find the existence of a statutory circumstance that warrants the initiation of an investigation. Additionally, the district court does not possess the authority to direct CPS to open a case under NRS Chapter 432B regarding placements. The district court disagreed with CPS's actions and suggested they should open a case with the juvenile court. However, the Court only ordered that the matter be sent back to CPS for them to investigate and take action as they see fit. This directive does not constitute an inappropriate order for CPS and is not an abusive exercise of discretion.

### **Conclusion**

The district court had the authority to sua sponte remove a guardian and terminate guardianship even in the absence of a petition seeking removal and termination. Further, the proceedings and resultant order did not comport with due process, i.e., the court did not give sufficient notice that it was contemplating removal and termination such that the parties had a meaningful opportunity to be heard. Additionally, the district court failed to consider applicable

statutes and factors for removal and termination, and the district court made unsupported factual determinations in reaching its conclusion. Lastly, while portions of the district court's order stated what CPS should do going forward, the ultimate order in this regard was to refer the matter to CPS for "action as they deem fit," which should not be considered an abuse of discretion. The appeal in this case was reversed and remanded for further proceedings consistent with the opinion of the Supreme Court of Nevada.