

**NON-REMOVABLE MILLE LACS BAND OF OJIBWE INDIANS
COURT OF APPEALS**

District of Nay-Ah-Shing

IN THE COURT OF APPEALS

IN THE MATTER OF THE GUARDIANSHIP OF:
C.J.B.

No. 2014 APP 04

L.L.,
Plaintiff-Appellant

vs.

MEMORANDUM DECISION

D.S.,
Defendant-Appellee

L.L. filed a notice of appeal from the July 3, 2014 order of the District Court dismissing her guardianship petition after submission of her case on the ground that she had failed to demonstrate a prima facie case for guardianship under Band Law.¹ This Court granted her appeal and issued an order on July 30, 2014 for briefs and an oral argument for September 26, 2014.

At the time for oral argument that day the father's trial counsel in proceedings involving Band Social Services indicated that he wished to be heard regarding a procedural irregularity. He asserted that even though the father was served with the notice of appeal he was not and even though he would not represent the father on appeal he felt

¹ Band Law requires a party seeking guardianship to demonstrate that a guardianship is "necessary and convenient", a very vague standard under the law.

he should have been notified. The mother's counsel in the action involving Band Social Services also appeared and also asserted that even though she could not represent the mother in this proceeding the mother was not served with the notice of appeal and that this prevented the Court from going further. Band Social Services' Attorney, Barbara Cole, similarly claimed that her client should have been served.

This Court then continued the matter until October 16, 2014 and invited the input of the GAL for the child and the Band's Family Services program. Both submitted updates to the Court indicating that the child was doing very well with the father and urging this Court to sustain the District Court's dismissal of the grandmother's guardianship action. The GAL and Todd Matha, the Band's Solicitor General, appeared at hearing on October 16 along with the grandmother and her family members. The father appeared telephonically.¹ All parties were given sufficient time to make their arguments to the Court. The Solicitor contended that under Band law Judge Osburn was correct to dismiss the grandmother's guardianship request after she submitted her case because she did not make a prima facie case that it was "necessary or convenient" to appoint a guardian for the child because the father was alcohol and drug-free and was available to provide for the child even though it was the mother from whom the child had been removed by Band Social Services, who placed the child with her mother- L.L.. The GAL also strongly urged this Court to sustain the lower court's decision arguing that the child is very happy with his father and the father has done a tremendous job of bringing his son into his home. The father has recently gained full-time employment at a Casino in Wisconsin and the child appears to be flourishing with him.

¹ The Court would note that the father had been informed by the GAL that the hearing was in the afternoon when it was actually scheduled for the morning. This Court does not penalize the father for this miscommunication and permitted him to be heard by phone.

The minor child involved in this case had been in the legal custody of Band Family Services with placement with the maternal grandmother, L.L., for approximately two and one-half years prior to her filing for guardianship. Despite this long period of time with the grandmother this Court notes that under Band law nothing vests a grandparent or other relative with any legally-enforceable right to retain custody of a child in foster care when a parent proves himself or herself fit to assume or reassume custody of the child. As the Solicitor noted at hearing even if the child had been with the grandmother for 17 years there is no provision of Band law that compels the Court to keep the child with the grandparent or other extended family in the face of a showing of parental fitness.

This should be contrasted with federal law, the Indian Child Welfare Act, 25 U.S.C. § 1901-1921, which appears to grant a grandparent, if she can demonstrate that she is an “Indian custodian,” as defined at 25 U.S.C. § 1903, the same rights as a parent when there is an attempt to remove the child from the grandparent. Other Tribes also grant especial rights to family members who have had children in their custody for extended periods of time. This is a recognition that extended family members, especially grandparents, play a traditional role in raising children and their rights should be considered and respected by tribal justice systems.

The Anishinaabe recognize the critical role grandparents play in raising children within the extended family and doodem. This Court and the District Court are charged with enforcing those cultural norms except when doing so conflicts with the Band law as expressed by the Band Assembly. The Band's Code does not expressly give a grandparent the right to keep the custody of a child away from a parent when that parent can demonstrate he or she is fit to assume custody, even when there has been a finding of parental unfitness in the past. The Band Assembly may want to consider giving grandparents whom have raised their grandchildren for a

certain period of time an equal right to a parent to maintain that custody, but until such laws are passed by the Band Assembly this Court must enforce the laws enacted by the Band Assembly.

The grandmother stated at hearing that Band Family Services encouraged her to file for guardianship of her grandson because she had the child so long in her home and the parents were not working on their case service plan. She did so and was provided legal counsel for the hearing. The father opposed the request for guardianship and claimed that he was a fit parent. The grandmother presented her case and the lower court applied the correct standard- necessary or convenient- in finding that the grandmother failed to make a prima facie showing of the need for guardianship. In summary the lower court concluded that because the father was a fit parent who could provide for his son it was not necessary to appoint the grandmother as the child's legal guardian.

This dismissal then triggered several other legal actions. Band Family Services moved to dismiss its child in need of protection action and urged the Court to place custody with the father. The father and mother then entered into a stipulation agreeing that they would share joint legal custody with the father to have physical custody. The grandmother was not privy to this stipulation and is not given any particular rights-custodial or visitation- in the order denying her guardianship, in the order dismissing the CHIPS proceeding, or in the joint custody order. It is unclear why the mother was given joint legal custody.

Ironically, by filing for guardianship the grandmother lost the custody of the child and now has no legally-enforceable rights to even see her grandchild. At hearing it was revealed that the mother lives with the grandmother so she gets to spend time with her grandson when the mother has her visitation rights. The Parties also indicated that the father has been very willing to accommodate visitation for the grandmother.

Despite what appears to be somewhat of an injustice to the grandmother Band law required the results reached by the Court below. The length of time the child was with the grandmother did not override the right of the father to contest the guardianship and Judge Osburn applied the correct legal standard in denying the guardianship. The only issue before this Court is whether the lower court erred in dismissing the guardianship action, not whether the subsequent actions of the Court in dismissing the CHIPS petition and granting the father and mother joint legal custody was correct.

The only concern this Court has with the order dismissing the guardianship action is that the District Court did not grant to the grandmother independent visitation rights. Certainly after 2 and ¹/₂ years the child and grandmother are closely bonded and it is in the child's best interests to maintain a relationship with her.

WHEREFORE IT IS HEREBY

ORDERED, ADJUDGED, AND DECREED that this Court affirms the July 3, 2014 order of the District Court dismissing the grandmother's guardianship petition and remands back to the District Court with instructions to ensure that the grandmother has independent visitation rights and the right to refile for guardianship should the child be removed from the father for any reason in the future.

So ordered this 24th day of October 2014.

B. J. Jones

Special Magistrate

Ravna Churchill

Ravna Churchill Rayna

Churchill

Chief Justice

Brenda Moose

Brenda Moose

Associate Judge

ATTEST: Tina Merrill
Clerk of Courts