

IN THE SUPREME COURT OF THE STATE OF NEVADA

B.Y. AND A.F.,  
Petitioners,  
vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
STACY MICHELLE ROCHELEAU,  
DISTRICT JUDGE,

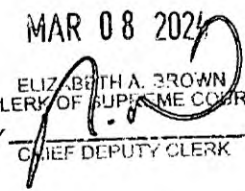
Respondents,  
and

ATHENA BURDISS; LATOYA  
BURDISS; SHERICE INEZ FOSTER;  
IHAB YOUSSEF; AND ALAN-  
MICHAEL FOSTER, SR.,  
Real Parties in Interest.

No. 88027

FILED

MAR 08 2024

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

*ORDER GRANTING IN PART PETITION FOR WRIT OF MANDAMUS*

This emergency, original petition for a writ of mandamus challenges a district court ruling denying a petition for temporary guardianship over minor children aged 14 and 10. Real party in interest Sherice Inez Foster (the children's mother) and respondent District Judge Stacy Michelle Rocheleau have timely filed answers, as directed, and petitioners (the minor children) have filed a reply.

On October 4, 2023, real parties in interest Athena Burdiss and LaToya Burdiss filed a pro se petition for general guardianship over their four grandchildren, explaining generally that a guardianship was sought because the children had been exposed to unsafe conditions while living with Sherice, Sherice was currently living with a new partner with whom

the children felt unsafe and had not obtained independent housing or daycare, and Sherice refused to renew voluntary guardianship papers. Attached to the petition was a June 2023 letter signed by Athena and Sherice stating that Sherice allowed the children to live with Athena from March 2023 until further notice, as well as notarized six-month voluntary guardianship forms for each of the children dated April 19, 2023. The petition listed the children's parents' addresses as unknown. A citation to appear on January 18, 2024, was entered the same day, but one week before the hearing, the petition was denied without prejudice for failure to provide proof that the petition and citation were properly served or consents and waivers of service.<sup>1</sup> Five days later, the Burdisses caused to issue a new citation to appear, noticing a hearing for the next available date, April 18, 2024. Sherice filed an objection to the proposed guardianship the next day, disputing some of the allegations therein, including that she did not have a place for the children to reside.

On January 24, the two oldest children, petitioners B.Y. and A.F., acting through appointed counsel, filed an ex parte petition for the

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<sup>1</sup>It appears that the district court prematurely denied the petition for failure to timely provide proof of service, because NRS 159A.034(6) allows such proof to be filed "[o]n or before the date set for the hearing." While that provision applies to "notices" of hearings, a citation by definition provides notice of a hearing, NRS 159A.0145; NRS 159A.047, and a copy of the petition must be served with a citation, NRS 159A.047(2). Although we cannot fault the district court for applying NRCP 5 and employing modes of efficiency in view the statutes' obliqueness, we think the more specific statute, NRS 159A.034(6), must be read to apply here.

appointment of the Burdisses as temporary guardians.<sup>2</sup> In the temporary guardianship petition, petitioners explained that they were uncomfortable with their mother's new partner given the domestic violence they had historically witnessed with other partners, also noting the new partner's criminal background; asserted risk of physical and emotional harm should they return to their mother at this time; and pointed out that they had been or were likely to be unenrolled from their school, such that a temporary guardianship with their grandmother, with whom they had resided since March 2023, was necessary for their wellbeing. The petition pointed to presumptions under NRS 159A.053(4) and NRS 159A.061(4), which arise when a parent has not had care, custody, and control of their child for the preceding 6 months. Petitioners indicated that the parents had been notified by phone and both Sherice and A.F.'s father objected to the proposed temporary guardianship, while B.Y.'s father was in favor of it. The petition was accompanied by a declaration from Athena.

Two days later, on January 26, the district court entered minutes denying the petition for a temporary guardianship, recognizing that petitioners had resided with Athena for more than 6 months but indicating that no emergency was demonstrated as a basis for a temporary guardianship.<sup>3</sup> B.Y. and A.F. subsequently filed this emergency petition for

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<sup>2</sup>Petitioners also sought appointment of an investigator, which was granted.

<sup>3</sup>To date, this court has not been provided with any written order denying the petition for a temporary guardianship. The court also noted that Athena's declaration was not signed, which apparently resulted from a technical glitch and was corrected on January 26, after the minutes were entered.

a writ of mandamus seeking to compel the district court to grant a temporary guardianship. In it, they assert that the district court erred in failing to grant a temporary guardianship, as it is presumptively in their best interests under NRS 159A.053, Sherice is presumptively unsuitable under NRS 159A.061(4), and an active emergency exists. Because no adequate legal remedy exists to challenge the denial of temporary guardianship, we consider the petition. NRS 34.170.

### *DISCUSSION*

Temporary guardianships are governed largely by NRS 159A.053. They may issue upon a finding of good cause, so long as the petitioner attempted to provide pre-filing notice or was excused from so doing. NRS 159A.053(2). Here, petitioners provided notice in accordance with subsection (2)(a). While the statute does not otherwise define good cause, NRS 159A.053(4) provides that “[i]f no parent of the proposed protected minor has had the care, custody and control of the minor for the 6 months immediately preceding the petition, temporary guardianship of the person of the minor is presumed to be in the best interest of the minor.” Similarly, NRS 159A.061(4)(c) presumes a parent is unsuitable to care for their children if the children have been out of the parent’s care, custody, and control for the 6 months preceding the filing of a petition for guardianship. Here, petitioners have been out of the custody, care, and control of their parents since March 2023, well over the 6-month period after which the presumption applies. Thus, good cause for the temporary guardianship must be presumed.

In her answer, Judge Rocheleau asserts that, since the NRS 159A.053(4) presumption is rebuttable, logic dictates that it cannot apply to

temporary guardianship issued ex parte before a hearing is held, because the parents must have a chance to rebut it. While nothing in the statute indicates that the presumption is not rebuttable, *see* NRS 47.240 (noting that conclusive presumptions include only certain enumerated presumptions and a presumption “which, by statute, is expressly made conclusive,” and no others); *Presumption*, Black’s Law Dictionary (11th ed. 2019) (noting that, generally, “[a] presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption”), we do not read the statute as limiting the presumption’s application to extension decisions after a hearing. Rather, the presumption applies any time temporary guardianship is sought; the fact that it may not be rebutted until a hearing, at most 10 days after an ex parte appointment, NRS 159A.053(8), does not render it inapplicable at the ex parte stage. *See generally In re Amberley D.*, 775 A.2d 1158, 1163 (Me. 2001) (concluding that the risk of erroneous deprivation of parental rights due to appointment of an emergency guardian without notice to parents is lessened when the guardianship is limited in duration and the parent can obtain a hearing on the matter thereafter, at which the guardian bears the burden to show continuation of the guardianship is in the child’s best interest).

Judge Rocheleau also points to substantial concerns with the ex party nature of the request itself, ultimately concluding that no emergency necessitating an ex parte temporary guardianship existed. For instance, based on the original petition, the answer explains that the judge found Athena’s credibility questionable; noted that she had been allowing the children to spend time with their mother, including overnights, despite the

allegations; and pointed out that there did not appear to be any current issues with domestic violence or housing. Based on her review of the record, the judge determined that no emergency was shown, especially as Athena had not sought temporary guardianship over the two youngest children.

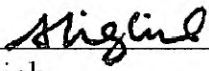
When temporary guardianship is requested *ex parte*, an affidavit explaining the emergency requiring appointment before a hearing must be provided. NRS 159A.053(3). While the district court appears to have thoroughly reviewed the record and we generally do not disturb the district court's fact-based and discretionary conclusions, here it appears that, at least in part, the district court's conclusions incorporated a misunderstanding as to who was seeking the temporary guardianship. As it was B.Y. and A.F. who filed the petition, as opposed to the Burdisses, the failure to seek temporary guardianship over all four children cannot form a basis for the conclusion that no emergency existed. Moreover, petitioners have been living with the Burdisses for several months with no valid guardianship in place, fear to return to their mother and her new partner (a fear that might not be completely unfounded, given their backgrounds), and allegedly are not enrolled in school, all with the hearing on general guardianship months out at the time the petition was filed. If no emergency warranted an immediate *ex parte* guardianship, nothing prevented the district court from requiring petitioners to provide notice and holding an expedited hearing before ruling on the petition for temporary guardianship.<sup>4</sup>

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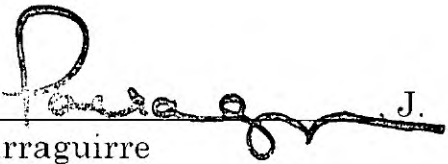
<sup>4</sup>We note that Sherice disputes many of the allegations made in the petition for temporary guardianship. These disputes may be raised in the

As the district court manifestly abused its discretion in failing to give the petition for temporary guardianship proper consideration under NRS Chapter 159A, we conclude that writ relief is warranted, in part. See *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981). Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to reconsider the petition for temporary guardianship on an expedited basis in accordance with this order.

  
\_\_\_\_\_, J.  
Stiglich

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Stacy Michelle Rocheleau, District Judge, Family Division  
Legal Aid Center of Southern Nevada, Inc.  
Alan-Michael Foster, Sr.  
Athena Burdiss  
Ihab Youssef  
LaToya Burdiss  
Sherice Inez Foster  
Eighth District Court Clerk

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district court at any hearing on the petition or hearing on whether an ex parte petition should be extended.