THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2020-0079

IN RE GUARDIASHIPS OF A.L., A.L. AND K.L.

MEMORANDUM OF LAW FOR THE DIVISION FOR CHILDREN, YOUTH, AND FAMILIES

The New Hampshire Division for Children, Youth and Families ("DCYF"), by and through counsel, the Office of the Attorney General, files this Memorandum of Law pursuant to Supreme Court Rule 16(4)(b).

INTRODUCTION

Appellants, Sandra and Clyde Lunsford, appeal from a decision of the 5th Circuit Court—Family Division—Newport (*Cardello*, J.), dismissing their petitions for guardianship over their three biological grandchildren for failure to state a claim under the guardianship statute, RSA chapter 463. At the time the Lunsfords filed their guardianship petitions, the children were already under the guardianship of DCYF following a termination of their biological parents' parental rights, and the children were the subjects of adoption petitions pending in the same court.

On appeal, the Lunsfords challenge placement decisions made by DCYF and the family court in the children's separate RSA chapter 169-C neglect cases. Those issues are not properly before the Court in this guardianship appeal. In addition, the Lunsfords seek access to confidential court records of those proceedings in an attempt to collaterally attack the

children's adoptions by individuals who are not parties to this appeal. Those discovery issues are also not properly before the Court in this appeal.

Because the children have been adopted and are no longer under the guardianship of DCYF, the Court should dismiss this appeal as moot. In the alternative, the Court should affirm the trial court's dismissal of the guardianship petitions for failure to state a claim under RSA 463.

STATEMENT OF THE CASE AND FACTS[1]

On January 3, 2020, the Lunsfords filed petitions seeking guardianship over A.L., A.L., and K.L., their three biological grandchildren. LA[2] 3-20. By January 2020, the children had been in out-of-home placements for over two years following findings of neglect against their parents. LB 13. When DCYF had removed the children from their parents' custody in September 2017, DCYF had contacted the Lunsfords and asked if they could take the children. LB 13. The Lunsfords

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[1] The Lunsford's Statement of Facts should be stricken in its entirety as it relies solely on an affidavit that is not part of the record for this appeal. *See Sup. Ct. Rule 13(1)* ("The papers and exhibits ***filed and considered in the proceedings in the trial court*** or administrative agency, the transcript of proceedings, if any, and the docket entries of the trial court or administrative agency shall be the record in all cases entered in the supreme court."). The Lunsfords did not file the affidavit until long after they had appealed the trial court's dismissal order to this Court. *See* LA 48-55 (Affidavit dated July 22, 2020). The trial court did not consider this affidavit when ruling on DCYF's motion to dismiss in January 2020; rather, the Lunsfords filed this affidavit, and the trial court considered it, in relation to a separate motion the Lunsfords submitted in July 2020, pursuant to RSA 169-C:25, I(b), seeking access to the confidential court records from the children's separate RSA 169-C neglect proceedings. LA 42-59.

[2] "LA" refers to the appendix filed by the Lunsfords; "SA" refers to the appendix attached to this memorandum of law; "Tr." refers to the transcript of the hearing held on January 13, 2020; and "LB" refers to the Lunsfords' brief.

said no. *Id.* DCYF contacted the Lunsfords again in December 2017, and again the Lunsfords said they could not accept placement of the children at that time. *Id.* In January 2018, the Lunsfords told DCYF they would not be able to provide a home for the children until at least September 2018—a full 12 months after the children's removal from the home. LB 32.

DCYF initially placed the children with their maternal grandmother in New Hampshire. SA 19. By the time the Lunsfords filed their guardianship petitions in January 2020, six-year-old K.L. had transitioned to the pre-adoptive home of her maternal aunt, and the two younger children—three-year-old twins A.L. and A.L.—had been residing in a pre-adoptive foster home for 18 months. Tr. 6-7. All three children were bonded and attached to their pre-adoptive parents, and the adoption proceedings were scheduled for a final hearing on January 13, 2020. Tr. 6, 15.

When the Lunsfords filed their guardianship petitions in January 2020, the children's RSA 169-C neglect proceedings and RSA 170-B adoption proceedings were pending in the same court. LA 5, 7, 11, 13, 17, 19; Tr. 5-6, 15. The Lunsfords were not parties to any of those proceedings. The family court had terminated the parental rights of the children's biological parents through a RSA chapter 170-C TPR proceeding and awarded DCYF guardianship of the children pending their adoptions. LB 8; Tr. 4; *see* RSA 170-C:11, II (providing that, once a court terminates the parental rights of the biological parents, DCYF or "another authorized agency" is appointed as the child's guardian and is vested with legal custody); *see also* LB 16 (stating that the children became eligible for adoption in April 2019).

On January 9, 2020, DCYF filed motions to dismiss the guardianship petitions, arguing that the petitions failed to state a claim upon which relief may be granted because all three children were already under the guardianship of DCYF and the petitions did not allege that the children needed substitute care. SA 17-28. DCYF asked the court to take judicial notice of the RSA 169-C neglect proceedings in which the family court had approved permanency plans for K.L.'s adoption by her maternal aunt and A.L. and A.L.'s adoption by their pre-adoptive foster parent. *Id*. DCYF had consented to the adoptions as required by RSA 170-B:5, I(e).[3] Tr. 6.

On January 13, 2020, the court held a hearing on DCYF's motion to dismiss the guardianship petitions. The court noted that "rather than articulating specific facts concerning acts or omissions or actual incidents involving the minors, which demonstrate that there's a need for guardianship in the hands of the [Lunsfords], the petitions rather appear to be a way to delay and prevent adoption—delay adoption and prevent the pending [adoption] petitions from going forward." Tr. 15. The court found that "the petitions do fail to state a claim under the statute" and granted

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[3] When, as in this case, the parental rights of biological parents have been terminated and DCYF has been made the child's legal guardian, DCYF's consent to an adoption is required. *In re A.D.*, 172 N.H. 438, 442 (2019); *see* RSA 170-B:5, I(e) (requiring surrender of parental rights from DCYF when it has been given "the care, custody, and control of the adoptee, including the right to surrender"); RSA 170-C:11, II (providing that, once a court terminates the parental rights of the biological parents, DCYF or "another authorized agency" is appointed as the child's guardian and is vested with legal custody); RSA 170-C:2, V(d) (defining "guardianship" in this context as "the duty and authority to make important decisions in matters having a permanent effect" on the child, including "the authority to consent to the adoption of the child").

DCYF's motions to dismiss. Tr. 15; LA 31.

Later that same day, the family court granted the three adoption petitions, finalizing the children's permanency plans of adoption. LB 23, 27. The Lunsfords attempted to file a motion to set aside the adoptions, which the family court clerk's office rejected because they were not a party to the proceedings, and this Court declined to accept the Lunsfords' appeal. *See In re Adoption of A.L., A.L., and K.L.*, Supreme Court Docket No. 2020-0210. The adoptions, therefore, are final. The children now have parents and are no longer under DCYF guardianship.

The Lunsfords filed this appeal of the dismissal of their guardianship petitions.

ARGUMENT

I. THE COURT SHOULD DISMISS THIS APPEAL AS MOOT BECAUSE THE CHILDREN ARE NO LONGER UNDER THE GUARDIANSHIP OF DCYF.

"Generally … a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead." *Londonderry Sch. Dist. v. State*, 157 N.H. 734, 736 (2008) (quoting *In re Juvenile*, 2005-212, 154 N.H. 763, 765 (2007)). "The question of mootness is one of convenience and discretion and is not subject to hard-and-fast rules." *Appeal of Hinsdale Fed'n of Teachers*, 133 N.H. 272, 276 (1990) (citation omitted). "Usually, unless a pressing public interest is involved, or the question is capable of repetition yet evading review, an issue that has already been resolved is not entitled to judicial intervention." *Id.* (quotation marks and citations omitted).

In a petition for a guardianship over a minor child, the petitioning party is required to assert that "the appointment is in the best interests of the minor," RSA 463:5, III(e), and to "include a statement describing specific facts concerning actions or actual occurrences involving the minor which are claimed to demonstrate that the guardianship . . . is in the best interests of the minor," RSA 463:5, V. The Lunsfords allege in each of their three petitions that guardianship is in the children's best interests for the following reasons:

> Our grandchildren have been in foster care with DCYF. We are the paternal grandparents and have completed foster parent training and certification in North Carolina so that the children can live with us. We have always had a close relationship with our grandchildren until they were placed in foster care. DCYF has not cooperated with our efforts to maintain contact or to be considered as placement option for the children. We are capable of taking care of the children.

LA 8, 14, 20. DCYF already had guardianship over the children at the time, so the Lunsfords' petitions essentially sought to terminate DCYF's guardianship and substitute the Lunsfords as the children's guardians. But the petitions stated no basis for DCYF guardianship termination, and, in any event, DCYF no longer has guardianship of the children. Moreover, the Lunsfords previously declined to provide a home for their grandchildren for the first 12 months after they were removed from their biological parents' care.

In the meantime, the children have been adopted and now have parents through a separate proceeding that has not been appealed and is final. The adoptions, in other words, are permanent. In light of these changed circumstances, there is no longer a justiciable controversy between

the Lunsfords and DCYF regarding guardianship over the children. DCYF no longer has guardianship over the children and the children are no longer in foster care. The children have been adopted; therefore, if the Lunsfords were to seek guardianship of the children under present circumstances, they would have to file new petitions consistent with RSA 463:5, alleging facts to demonstrate why the adoptive parents do not serve the best interests of the children. The children's adoptive parents—who are not parties to this current appeal—would be entitled to notice and the right to object and contest the guardianship petitions. *See* RSA 463:6, I, II(b) and :8, III(b). To establish a guardianship over the objection of the children's adoptive parents, the Lunsfords would be required to prove, by clear and convincing evidence, "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." RSA 463:8, III(b). Satisfying this standard is necessary to overcome the constitutional presumption that a fit parent acts in his or her child's best interest. *In re Guardianship of Nicholas P.*, 162 N.H. 199, 205 (2011).

Because the circumstances under which the Lunsfords challenged DCYF's guardianship over the children no longer exist, this appeal is now moot and should be dismissed.

II. THE TRIAL COURT PROPERLY DISMISSED THE GUARDIANSHIP PETITIONS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

In reviewing a trial court's order dismissing petitions for failure to state a claim upon which relief may be granted, this Court assumes the truth of all well-pleaded allegations of fact in the petitions, and construes all reasonable inferences from those facts in the light most favorable to the petitioner. *See Beane v. Dana S. Beane & Co*., 160 N.H. 708, 711 (2010). This Court will uphold the trial court's order if the well-pleaded facts do not constitute a basis for legal relief. *Id*. It is the burden of the appealing party, here the Lunsfords, to demonstrate reversible error. *See Gallo v. Traina*, 166 N.H. 737, 740 (2014).

As discussed above, a party petitioning for guardianship over a child is required to assert that "the appointment is in the best interests of the minor," RSA 463:5, III(e), and to "include a statement describing specific facts concerning actions or actual occurrences involving the minor which are claimed to demonstrate that the guardianship . . . is in the best interests of the minor," RSA 463:5, V. To establish a guardianship over the objection of the minor's parent, the petitioning party is required to prove, by clear and convincing evidence, "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." RSA 463:8, III(b). Similarly, to terminate a guardianship of a minor that has been established other than by consent, the petitioning party must prove, by a preponderance of the evidence, "that substitution or supplementation of

parental care and supervision is no longer necessary to provide for the essential physical and safety needs of the minor and termination of the guardianship will not adversely affect the minor's psychological well-being." RSA 463:15, V(a).

At the time the Lunsfords filed their guardianship petitions, the children were already under the guardianship of DCYF following a termination of their biological parents' parental rights. *See* RSA 170-C:11, II. Under such circumstances, guardianship vested DCYF with "the duty and authority to make important decisions in matters having a permanent effect" on the children, including "the authority to consent to the adoption of the child[ren]." RSA 170-C:2, V(d); *see also In re A.D.*, 172 N.H. 438, 442 (2019) ("When the parental rights of the biological parents have been terminated and DCYF has been made the child's legal guardian, DCYF's consent to the adoption is required."). The Lunsfords criticize DCYF for its choice of adoptive parents for the children, but the Lunsfords themselves declined DCYF's requests that they take the children, stating that they could not provide a home for the children for at least 12 months following their removal from their biological parents' care. During that time, the young children developed bonds and attachments to their out-of-home caregivers.

In addition, once parental rights were terminated, both state and federal law required DCYF to make reasonable efforts to implement as soon as possible the permanency plan ordered by the family court in the RSA 169-C neglect proceedings. *See* RSA 169-C:24-a, II ("Concurrent with the filing or joinder in a petition for termination of parental rights . . . the state shall seek to identify, recruit, and approve a qualified family for

adoption in accordance with the provisions of RSA 170-B . . . ."); RSA 169-C:24-c, II ("At a post-permanency hearing the court shall determine whether the department has made reasonable efforts to finalize the permanency plan that is in effect."); *In re Juvenile 2006-674*, 156 N.H. 1, 9 (2007) (Dalianis, J., concurring) (noting that the reason for a twelve-month permanency hearing under the Federal Adoption and Safe Families Act of 1997 is that "[c]hildren need and deserve permanent living arrangements"). Guardianship with the Lunsfords pending adoption would delay permanency for at least six more months. Tr. 9; *see* RSA 170-B:19, IV(c) (requiring placement in the adoptive home for at least 6 months before a final decree of adoption may be issued).

The children's permanency plans—adoptions approved by the family court in their RSA 169-C proceedings—were scheduled to be finalized just two weeks after the Lunsfords filed their guardianship petitions. *See* LB 23 ("The guardianship petitions were filed two weeks before any adoptions were consummated by the foster families."); Tr. 15 (trial court noting that the adoption petitions were scheduled for final hearing later in the day on January 13, 2020). RSA 463:5, IV(c) requires that a guardianship petition identify any pending adoption or juvenile proceedings involving the minor at issue. Therefore, it was not only appropriate, but necessary, for the trial court in this case to take judicial notice of the children's pending RSA 169-C and RSA 170-B proceedings.[4]

[4] Contrary to the Lunsfords' assertions, DCYF did not "incorporate by reference" into its motions to dismiss the entirety of those confidential proceedings; rather, DCYF simply asked the trial court to "take judicial notice" of those proceedings, as required by statute. SA 17, 21, 25; RSA 463:5, IV(c).

The trial court recognized that the Lunsfords filed their guardianship petitions for the sole purpose of trying to interfere with the children's adoptions. Tr. 15.

In their petitions, the Lunsfords alleged that guardianship was in the children's best interests because they were in foster care and the Lunsfords were their grandparents, had a close relationship with the children, and were capable of taking care of the children, LA 8, 14, 20, even though they had initially declined to take care of the children for the first 12 months of their out-of-home placement, LB 13, 32. By January 2020, the children were already receiving substitute parental care from their pre-adoptive parents while under DCYF guardianship. *See Petition of N.H. Div. for Children, Youth and Families*, 170 N.H. 633, 640 (2018) (Guardianship is considered only when both reunification with a parent and termination of parental rights and adoption are not appropriate.). Nowhere in the guardianship petitions, at no time during the motion to dismiss hearing, and nowhere in their appellate brief, do the Lunsfords allege how or why substitution or supplementation of the pre-adoptive parents' care of the children was necessary to provide for the essential physical and safety needs of the children or to prevent specific, significant psychological harm to the children.[5]

Because the guardianship petitions do not allege specific facts concerning actions or actual occurrences involving the children

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[5] Both below and on appeal, the Lunsfords focus solely on placement decisions made by DCYF and the family court in the context of the children's separate RSA 169-C proceedings. As discussed below, those issues are not properly before the Court in this guardianship appeal.

demonstrating that guardianship with the Lunsfords would be in the children's best interests despite the fact that their adoptions were about to be finalized, the trial court properly dismissed the petitions for failure to state a claim under RSA 463.

III. THE LUNSFORDS' ATTEMPTS TO COLLATERALLY ATTACK THE CHILDREN'S ADOPTIONS ARE NOT PROPERLY BEFORE THE COURT IN THIS APPEAL.

Through this appeal, the Lunsfords seek to challenge placement decisions of DCYF and the family court in the context of the children's RSA 169-C neglect proceedings—and thereby challenge the children's adoptions by persons not parties to this appeal—arguing that DCYF did not give them proper consideration as adoptive parents in the RSA 169-C and RSA 170-B proceedings. The Lunsfords also seek access to the confidential court records of the children's RSA 169-C proceedings, believing that those records will provide evidence to support their challenge to the children's adoptions. The Lunsfords' record requests—filed after they had already appealed to this Court—are untimely, and, in any event, their challenges to decisions made in the RSA 169-C and RSA 170-B proceedings are not properly before the Court in this guardianship appeal.

After the trial court dismissed the Lunsfords' guardianship petitions and they appealed to this Court, the Lunsfords filed motions in family court seeking access to the children's confidential RSA 169-C court records. LA 34-36, 39-47; LB 28 (acknowledging that the motions were filed "[a]fter this appeal was accepted for review"). The trial court granted the Lunsfords request for access to the records of the guardianship proceedings

on appeal, LA 36, but denied the Lunsfords' request for access to the confidential records of the children's separate RSA 169-C proceedings, LA 66-67. In denying the Lunsfords' request for access to the RSA 169-C records, the court observed that those records were not relevant to the issues on appeal in this guardianship appeal and found that the Lunsfords failed to demonstrate "good cause" to access the confidential records pursuant to RSA 169-C:25, I(b).

This is an appeal from the dismissal of guardianship petitions for failure to state a claim upon which relief may be granted. The Lunsfords did not seek access to the records of the separate RSA 169-C proceedings until after the trial court had already dismissed their guardianship petitions and they had appealed to this Court. Therefore, the Lunsfords' record requests were not timely filed and are not part of this appeal from the dismissal order. *See Sup. Ct. Rule 13(1)* ("The papers and exhibits filed and considered in the proceedings in the trial court or administrative agency, the transcript of proceedings, if any, and the docket entries of the trial court or administrative agency shall be the record in all cases entered in the supreme court."); *see also State v. Blackmer*, 149 N.H. 47, 49 (2003) (stating issues not raised in notice of appeal are not preserved for review).

In any event, even if the Lunsfords' record requests were timely, their attempts to collaterally attack the children's adoptions by challenging decisions made by DCYF and the family court in the children's unrelated RSA 169-C and RSA 170-B proceedings are not properly before the Court in this guardianship appeal. *See In re C.O.*, 171 N.H. 748, 758-60 (2019) (concluding that parent's challenge to circuit court orders issued in abuse and neglect proceeding under RSA 169-C was not properly before this

Court in appeal of TPR under RSA 170-C); *In re O.D.*, 171 N.H. 437, 443–44 (2018) (parents' claim that they were entitled to the appointment of counsel in the original neglect proceeding could not be raised in an appeal of the subsequent TPR proceeding). No one appealed the placement decisions made by DCYF and the family court in the children's separate neglect cases,[6] and the children's adoptions are final. In any event, placement decisions made in the RSA 169-c proceedings are not relevant to whether the Lunsfords' guardianship petitions state a claim under the guardianship statute, RSA 463, the only issue properly before the Court in this appeal.

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal as moot. In the alternative, this Court should uphold the trial court decision dismissing the Lunsford's guardianship petitions. In filing this memorandum of law, it is the State's position that oral argument is not necessary. Should the court request oral argument, Senior Assistant Attorney General Laura Lombardi will present oral argument on behalf of the State.

[SIGNATURE PAGE TO FOLLOW]

[6] At some point, the Lunsfords attempted to intervene in the RSA 169-C proceedings. LB 23. The family court denied their request, LB 23, and they did not appeal to this Court.

Respectfully Submitted,

STATE OF NEW HAMPSHIRE
DIVISION FOR CHILDREN,
YOUTH & FAMILIES

By its attorney,

GORDON J. MACDONALD
ATTORNEY GENERAL

Date: September 10, 2020

/s/ *Laura E. B. Lombardi*
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CERTIFICATE OF COMPLIANCE

This memorandum complies with the word limitation set out in Supreme Court Rule 16(11), by containing 3,982 words.

CERTIFICATION OF SERVICE

I hereby certify that copies of the foregoing were served via the e-file system to Joshua Gordon, Esq., counsel for Appellants.

September 10, 2020

/s/ *Laura E. B. Lombardi*
Laura E. B. Lombardi

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