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FILED

04/30/2025

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 24-0712

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 24-0712

IN RE THE GUARDIANSHIP OF A.D.H.,
a minor child

EDWARD MAX NELLIS and LENNORE JEAN
NELLIS,

Petitioners and Appellees,

and

KIMBERLY ROSE and SETH HENSLEY,

Respondents and Appellants.

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APR 30 2025

Bowen Greenwood
Clerk of Supreme Court
State of Montana

ORDER REMANDING A
BRIEFED CASE AND
DISMISSING APPEAL

Kimberly Rose (Rose)¹ is appealing herein from orders entered by the Twentieth Judicial District Court, Lake County, which transferred this proceeding to a court of competent jurisdiction in the State of Oregon. Upon review of the record and briefing, we have determined to remand this matter to the District Court for further proceedings and dismiss the appeal without prejudice.²

This proceeding was initiated in May 2020 by the filing of a petition for guardianship of A.D.H. by Petitioners Edward Max Nellis and Lennore Jean Nellis, Appellees herein. The petition identified Lennore Nellis as A.D.H.'s paternal grandmother, and Edward Nellis as A.D.H.'s step-grandfather. The petition stated that

¹ The caption lists both Kimberly Rose and Seth Hensley as Appellants, and both were likewise listed as Respondents in pleadings filed before the District Court. However, Hensley did not participate in the litigation, and only Rose is named as a signee and has signed the briefing on appeal.

² This order supersedes the order of this Court entered April 23, 2025, which classified this appeal for submission on briefs to a five-justice panel of this Court.

Edward and Lennore resided in Polson, Montana. A.D.H. was described as five years of age and, although his address was listed as Ronan, Montana, the petition stated that A.D.H. had resided with Petitioners for the previous 3 years. After initial procedural delays related to service of process and notice, the District Court, after a hearing in which only the Petitioners attended, entered an order granting a temporary guardianship of A.D.H. and appointing Petitioners in September 2020. Service of process had been accomplished upon Hensley, but not upon Rose, and the order stated that a permanent guardianship would not be granted until that service of process had been accomplished. Hensley did not appear and his default was entered.

After service of process was accomplished, the parties appeared before the District Court at the time set for a hearing on a permanent guardianship on October 28, 2020. A transcript of this proceeding is not included in the record, but a minute entry indicates, subsequently filed documents confirm, and the District Court's order of November 9, 2020, demonstrate that the parties, including Rose and Petitioners, consented to participate in mediation with a Settlement Facilitator appointed by the District Court to attempt to settle the matter.

The mediation conference was conducted on December 3, 2020, and resulted in Rose and the Petitioners entering a Settlement Agreement and Visitation Plan (Agreement). Rose did not oppose the guardianship and was permitted contact with A.D.H., intended to begin with telephone calls and then advancing, conditioned upon appropriate progress, to in-person visitation. The Agreement stated that Rose reserved the right to petition to terminate the guardianship "at a later, appropriate date." On December 7, 2020, the District Court entered an order appointing Petitioners as co-guardians of A.D.H. based upon Rose's consent, the Agreement, which the court incorporated by reference, and a finding that the guardianship was in the best interests of A.D.H. Hensley did not participate in the proceeding and his default was again noted.³

³ The District Court also found that A.D.H. was "not [] enrolled or enrollable in any Indian Tribe."

Nothing further is contained in the District Court record until July 15, 2024, at which time Rose filed a motion to terminate the guardianship, supported by affidavit, asserting that she had established employment, health insurance, sobriety, a lifestyle allowing her to be constantly available to parent A.D.H, and a stable home in Townsend, Montana, which was walking distance to local schools. Rose asserted that most of A.D.H.'s relatives lived in the area near her. Rose further contended that she had been denied contact with A.D.H. "since six months after the court granted" the guardianship. Rose further requested that the proceeding be transferred to Broadwater County, where she had lived the prior six years.

Petitioners, represented by counsel, filed a pleading in August 2024 opposing Rose's request for a change of venue and to terminate the guardianship. They also requested for "jurisdiction to be transferred to Klamath County, Oregon," because they "intend to file a Petition for Adoption of [A.D.H.]." Petitioners stated they had moved to Klamath Falls, Oregon, but did not state when this move occurred. They contended that Lake County was now an inconvenient forum. Rose filed a response to Petitioners' pleading on September 4, 2024, contending Petitioners had moved out of state without providing notice to the court or to her, that Petitioners had continually denied her requests for contact, and that the guardianship was never intended to be a permanent transfer of the custody of A.D.H. to the Petitioners. Rose requested "the Court to consider and communicate with Klamath County Court to advise that Montana and Lake County have jurisdiction over the case."

On September 18, 2024, the District Court entered an Order of Abeyance, stating that "th[is] matter shall be held in ABEYANCE until the Adoption matter is concluded," undoubtedly referencing the adoption proceeding that Petitioners stated an intention to initiate in Oregon. The District Court also ordered that "Petitioners shall notify this Court of the filing of the adoption proceeding within 30 days of the date of this Order and provide the contact information for the Oregon Court. At that time, the Court will have an informal jurisdiction conference with the Oregon Court pursuant to the UCCJEA."

On October 2, 2024, Petitioners filed a formal Petition to Transfer to Oregon, seeking “transfer [of] this guardianship and conservatorship matter to a Court of competent jurisdiction in Oregon pursuant to MCA § 72-5-624.” The short Petition alleged that Petitioners were full-time residents of Klamath Falls, Oregon, and that A.D.H. continued to reside with them there. The Petition requested that the District Court “hold a hearing on this petition, if necessary,” and provisionally issue an order directing Petitioners to seek guardianship and conservatorship of A.D.H. in Oregon. Rose filed a response opposing the request, and a motion for “[t]he stop of any adoption proceedings.” Rose’s briefing contended that, as of October 31, 2024, Petitioners had not initiated any proceeding in Oregon despite the District Court’s order giving them 30 days to do so and to notify the District Court. Petitioners responded in opposition to Rose’s motion, arguing the District Court did not “have jurisdiction to stop any pending adopting proceeding Oregon. There is no adoption proceeding pending in the Court or in any Montana Court. The Petitioners and the child no longer reside in Lake County, Montana and are in Klamath Falls, Oregon. Accordingly, Venue is proper in an Oregon Court.” Neither Petitioners’ petition for transfer of the proceeding to Oregon, nor their pleading filed in opposition to Rose’s motion, provided information about an Oregon Court or about a pending Oregon adoption proceeding.

On November 6, 2024, the District Court entered two orders. The first denied Rose’s motion to “stop” any adoption proceeding, stating the “Petitioners’ reasoning in their Opposition is the basis for the denial.” The second, titled Provisional Order Granting Petition to Transfer Proceedings to Oregon, stated that Petitioners and A.D.H. “are physically present in Klamath, Oregon and it is reasonably expected that their move is permanent.” The District Court therefore ordered that:

1. The guardianship and conservatorship are provisionally transferred to a court of competent jurisdiction in the State of Oregon.
2. The Petitioners are ordered to Petition such a Court for full guardianship and conservatorship or an adoption of the child.

From these orders, Rose has appealed to this Court.

Upon review of the record and briefing, we conclude that there is not a sufficient factual or legal record to conduct appellate review of Rose's challenge to the District Court's orders. The parties' appellate briefing does not discuss applicability of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA or Act), §§ 40-7-101, MCA, et. seq., which defines a "child custody proceeding" as one in which the "legal custody, physical custody, or visitation with respect to a child is at issue," and a "child custody determination" as one "providing for the legal custody, physical custody, or visitation with respect to a child," including "guardianship," which are potentially subject to the Act. Section 40-7-103(3), (4), MCA. It also appears under the Act that Rose's visitation rights to A.D.H., addressed within the Settlement Agreement and incorporated by the District Court in the guardianship order of December 7, 2020, qualifies this guardianship proceeding as one "in which the issue may appear." Section 40-7-103(4), MCA. Petitioners' appellate briefing acknowledges their error of seeking the District Court's transfer of the case pursuant to § 72-5-624, MCA, which addresses only adult guardianships, and instead they seek relief on appeal under the venue provisions of § 72-1-203(3), MCA. However, § 72-1-203(3), MCA, addresses venue when estate or protected person proceedings "are commenced in more than one court of this state." That is not the situation here. Thus, it will be necessary to resolve the issue under the UCCJEA.

While Rose requested a process of interstate court communication, and although the District Court referenced the need, after it would be advised of an Oregon Court's involvement, to "have an informal jurisdiction conference with the Oregon Court pursuant to the UCCJEA," the record does not reflect that this occurred before the case was purportedly transferred. Of course, before decisions can be properly made under the UCCJEA, the facts must be established, and here, no hearing was held or factfinding conducted to establish a record concerning the parties and the convenience of the forums eligible to further conduct the proceeding. Instead, the bare and minimal factual assertions of Petitioners' pleadings have simply been accepted as true. Consequently,


IT IS ORDERED that the District Court's order of November 6, 2024, provisionally transferring this matter to a court of competent jurisdiction in the State of Oregon is REVERSED.


IT IS ORDERED that this matter is REMANDED to the District Court to conduct proceedings to establish an adequate factual record necessary to establish the applicability of the UCCJEA, and enter such order(s) necessary to comply therewith; and


IT IS FURTHER ORDERED that this appeal is DISMISSED WITHOUT PREJUDICE. The usual provisions governing the right to appeal will apply upon the conclusion of proceedings conducted upon remand.

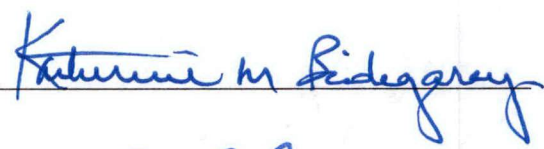
The Clerk is directed to provide a copy of this Order to counsel of record and to Kimberly Rose personally.

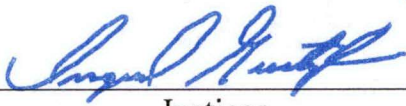
DATED this 30th day of April, 2025.











Justices

Chief Justice Cory Swanson has recused himself and took no part in these proceedings.