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2011 IL App (3d) 110093-U

Order filed June 29, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

<i>In re CUSTODY OF T.E.,</i>)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
a Minor)	Will County, Illinois,
)	
(Larry E. and Janice E.,)	
)	Appeal No. 3--11--0093
Petitioners-Appellants,)	Circuit Nos. 00--P--449 and 07--F--543
)	
v.)	
)	
Melissa M., f/k/a Melissa E.,)	Honorable
)	J. Jeffrey Allen,
Respondent-Appellee).)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's termination of the grandparents' 10-year guardianship over the minor was not against the manifest weight of the evidence, because the minor's mother presented evidence of a change in circumstances and the grandparents failed to show that it was in the minor's best interest for them to remain his guardian. The trial court's denial of the grandparents' petition for custody of the minor was not against the manifest weight of the evidence, because the grandparents failed to show that it was in the minor's best interest for them to have custody of the minor. The court did not abuse its discretion in allocating more than two-thirds of the GAL fees to the

grandparents.

¶ 2 The petitioners, Larry E. and Janice E., are the maternal grandparents of the minor, T.E. The respondent, Melissa M., formerly known as Melissa E., is the petitioners' daughter and T.E.'s mother. The petitioners were appointed guardians of T.E. and remained his guardians for 10 years. The petitioners appeal from the trial court's order granting Melissa's petition to terminate their guardianship and denying their petition for custody. The petitioners also argue that the trial court abused its discretion by allocating more than two-thirds of guardian *ad litem* (GAL) fees to them. We affirm.

¶ 3 **FACTS**

¶ 4 In 1999, Melissa became pregnant with T.E. when she was 18 years old. T.E. was born on June 20, 2000. Melissa lived in the petitioners' home before and after she gave birth to T.E. On July 19, 2000, with Melissa's written consent, the grandparents were appointed as T.E.'s guardians. Both parties agreed that the guardianship was created primarily for the purpose of adding T.E. to the petitioners' insurance and was intended to be temporary.

¶ 5 On June 25, 2007, Melissa filed a petition to terminate the petitioners' guardianship pursuant to the Probate Act of 1975 (Probate Act) (755 ILCS 5/1--1 *et seq.* (West 2008)). On July 30, 2007, the petitioners filed a petition for custody of T.E. pursuant to the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/501 *et seq.* (West 2008)). The trial court consolidated the two cases.

¶ 6 At trial, Melissa testified that when she consented to the guardianship she was under the impression that custody would revert back to her once she obtained stable housing, health insurance, and a steady income. Janice did not work outside the home and cared for T.E. when Melissa was

at school or work. After the first year of T.E.'s life, Melissa gradually became less involved in T.E.'s care.

¶ 7 In March 2003, Melissa moved out of the petitioners' home. T.E. remained with the petitioners. Melissa returned to visit T.E. twice a month. Six months later, Melissa moved back into the petitioners' home, but Janice remained T.E.'s primary caregiver. Janice was responsible for T.E.'s care both before and after school, as well as his speech therapy, homework, medical appointments, and extracurricular activities. Melissa testified that she did not participate in more of T.E.'s care because Janice was too controlling and criticized her parenting abilities and decisions. Melissa avoided some of her parenting duties in order to prevent arguments with Janice.

¶ 8 In July 2004, Melissa became pregnant with A.E., and she often spent the night at her boyfriend's home away from T.E. On March 12, 2005, A.E. was born, and Melissa moved in with A.E.'s father. T.E. remained with the petitioners because they would not allow T.E. to stay overnight at the home of Melissa's boyfriends. After two months, A.E.'s father left Melissa, and she moved back in with the petitioners and T.E. After Melissa returned, the petitioners continued to be T.E.'s primary caregivers and cared for A.E. while Melissa was at work.

¶ 9 In November 2005, Melissa started dating her current husband. In 2006, Melissa began taking A.E. with her for overnight visits at his home, but the petitioners would not allow her to take T.E. In February 2007, Melissa, her current husband, and A.E. moved into a home they had purchased. Melissa and her husband married on March 17, 2007. On June 25, 2007, Melissa filed for termination of petitioners' guardianship. In July 2007, the petitioners filed for custody of T.E.

¶ 10 Prior to Melissa filing for termination of guardianship, Melissa rarely, if ever, attended any of T.E.'s extracurricular activities and never participated in T.E.'s speech therapy, homework, or

school activities. After Melissa was married in 2007 she became more involved in T.E.'s life because the petitioners allowed visits in Melissa's home. In August 2007, per court order, Melissa was given visits on alternating weekends.

¶ 11 Witnesses for Melissa, which included her mother-in-law, father-in-law, sister-in-law, and family friends, testified that between 2008 and the time of trial in 2010 they observed T.E. in Melissa's home on many occasions. T.E. was very comfortable and well-adjusted in Melissa's home. They observed that T.E. had a normal parent-child relationship with Melissa and her husband, and that he was close with his siblings. T.E. called his stepfather "dad." Melissa's husband wished to adopt T.E. and A.E.

¶ 12 Melissa testified that T.E. and A.E. shared a bedroom, played together, and were very close as siblings. After his weekend visits, T.E. often requested to stay at Melissa's home for an extra day and often asked why he had to return to the petitioners' home. Melissa believed that it was in T.E.'s best interest to live in a "normal family unit" with his mother, half-brother, half-sister, and stepfather and for his grandparents to be in his life as grandparents instead of in a parenting role.

¶ 13 On January 18, 2008, the GAL filed a report noting that Melissa was more affectionate with A.E. than T.E. The report also indicated that T.E. was more affectionate with the petitioners than with Melissa. T.E. told the GAL that he had asked Janice if he could live with Melissa but she said no because she would miss him too much. T.E. also stated that he liked being in the petitioners' home and that Janice took care of him and helped him with his homework. The GAL noted that each party believed it was in T.E.'s best interest to be in their care and that T.E. was conflicted as to where he wanted to live. According to the GAL, T.E. wanted both to spend more time with A.E. and to maintain a close relationship with the petitioners. The GAL also noted that T.E. was well-adjusted

in the petitioners' home and it would be difficult for him to move, but opined that if T.E. spent more time with Melissa, without interference, their bond would grow. The GAL concluded that T.E. should be in Melissa's care and have extensive visitation with the petitioners.

¶ 14 Psychologist Robert Puls testified that the petitioners had hired him in May 2008 to provide counseling to T.E. for his anxiety resulting from the litigation of this case. According to Puls, a common theme in T.E.'s counseling was his anxiety related to the possibility of being taken away from the petitioners, whom he viewed as his psychological parents. T.E. told Puls that he wished to live with the petitioners in the home where he had always lived. Puls opined that removing T.E. from the petitioners would be psychologically devastating but also opined that a custody resolution, in either party's favor, would aid in relieving T.E.'s anxiety because he would be able to predict what would happen in his life.

¶ 15 In forming his opinions, Puls had never spoken with Melissa or her husband and had never observed T.E. in their care. Puls' opinions were formed from speaking with T.E. and Janice.

¶ 16 Court-appointed psychologist Mark Goldstein submitted an evaluation of T.E. conducted in September 2008. Goldstein concluded that T.E. had an adequate attachment to Melissa and her husband, but had a much more significant attachment to the petitioners, especially with Janice. Goldstein described T.E. as a fragile child and opined that "it would be potentially deleterious to move [T.E.] from his current stable environment." Goldstein recommended that the petitioners remain T.E.'s primary residential caregivers, noting that a change in school, friendships and activities would be stressful on T.E.

¶ 17 On October 28, 2009, Goldstein updated his report, indicating that T.E. experienced significant anxiety and anger as a result of the conflict between the parties. T.E.'s primary

attachment was to Janice, and he experienced separation anxiety when he was away from her. According to Goldstein, T.E. had generally positive attachments with his grandfather, Melissa, and stepfather and a very close attachment to his half-brother, A.E. Goldstein maintained his previous recommendation for the petitioners to remain T.E.'s primary residential parents and for Melissa to have increased visitation.

¶ 18 On July 23, 2010, the trial court granted Melissa's petition to terminate guardianship, denied the grandparents' petition for custody, and ordered that T.E. immediately be placed with Melissa. This court reversed the trial court's decision for applying the wrong legal standard and remanded the case for the legal standard from the Probate Act to be applied to the guardianship matter and the legal standard from Marriage Act to be applied to the custody matter. *In re Custody of T.E.*, No 3--10--0626 (2010) (unpublished order under Supreme Court Rule 23).

¶ 19 While this matter was pending on appeal, on September 14, 2010, the GAL made an oral report regarding T.E.'s transition into Melissa's custody. T.E. had indicated to the GAL that he had an enjoyable summer and had engaged in many activities with Melissa, his stepfather, and his siblings, such as going to the zoo and the beach. T.E. was excited about his new school and enjoyed frequently playing with his siblings. T.E. did not think it was necessary to speak with the petitioners on the phone every day.

¶ 20 On remand, on January 24, 2011, the trial court granted Melissa's petition to terminate guardianship and denied the grandparents' petition for custody. As to Melissa's petition to terminate guardianship, the trial court found that: (1) pursuant to section 11--5(b) of the Probate Act, T.E. had a living parent, Melissa, whose parental rights had not been terminated, whose whereabouts were known and who was willing and able to make and carry out day-to-day decisions concerning T.E.;

and (2) pursuant to section 11--7 of the Probate Act, Melissa was living, competent to transact her own business and was a fit person. The trial court noted that section 11--7 of the Probate Act had been repealed effective January 1, 2011, and section 11--14.1 of the Probate Act had been amended, adding language pertaining to the issue of termination of a guardianship. The trial court indicated that its ruling would be unchanged by application of the amendments but emphasized that its ruling was based on the statute in effect at the time of its initial ruling in July 2010.

¶ 21 As for the grandparents' petition for custody, the trial court found that based upon the best interest factors set forth in section 602 of the Marriage Act it was in T.E.'s best interest that Melissa have custody of T.E. and the petitioners have reasonable visitation.

¶ 22 Of the \$10,762.50 in GAL fees, the trial court allocated 70% (\$7,533.75) to the petitioners to pay and 30% (\$3,228.75) to Melissa. The petitioners appeal.

¶ 23 ANALYSIS

¶ 24 The petitioners appeal the termination of their guardianship and the denial of their petition for custody. They also appeal the trial court's allocation of GAL fees.

¶ 25 On review, we will not disturb a trial court's custody determination on appeal unless it is against the manifest weight of the evidence. *In re Estate of K.E.S.*, 347 Ill. App. 3d 452 (2004). A custody decision is against the manifest weight of the evidence when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *K.E.S.*, 347 Ill. App. 3d 452.

¶ 26 I. Guardianship Action

¶ 27 The petitioners appeal the trial court's termination of their guardianship over T.E. In making its ruling on January 24, 2011, the trial court relied upon sections 11--5 and 11--7 the Probate Act.

755 ILCS 5/11--5, 11--7 (West 2008). Section 11--5(b) of the Probate Act sets forth the standing requirements for a nonparent to seek an appointment as a guardian, providing that a person who files a petition for guardianship will have the petition dismissed if the child has a parent who is willing and able to carry out day-to-day child-care decisions. *In re R.L.S.*, 218 Ill. 2d 428 (2006).

¶ 28 Section 11--7 of the Probate Act, which was repealed as of January 1, 2011, provided that parents who are competent to transact their own business and are fit persons are entitled to the custody of the children. Section 11--7 of the Probate Act represented a codification of the superior rights doctrine, which holds that parents have the superior right to the care, custody, and control of their children. 755 ILCS 5/11--7 (West 2008); *R.L.S.*, 218 Ill. 2d 428.

¶ 29 In this case, we do not address the appointment of a guardian, but a termination of a guardianship already established. Prior to its amendment effective January 1, 2011, the Probate Act did not address the termination of a guardianship prior to the minor reaching the age of majority. Absent statutory standards for termination of guardianship, case law governed a natural parent's attempt to terminate a guardianship, establishing that:

"[The natural parent] had to show some change in circumstances, or otherwise she could bring frequent petitions to terminate at any time, but first [the guardian] had the burden of proof to overcome the superior-rights doctrine that a parent has a superior right to custody of her minor children. Further, [the guardian] had to show that it was in the children's best interests that she retain the guardianship." *K.E.S.*, 347 Ill. App. 3d at 462, quoting *In re Estate of Webb*, 286 Ill. App. 3d 99, 101 (1996); see also *In re Estate of Wadman*, 110 Ill. App. 3d 302 (1982).

¶ 30 As of January 1, 2011, the Probate Act specifically addresses the termination of a

guardianship, providing that for a parent to terminate a guardianship the parent must establish, by a preponderance of the evidence, that:

"a material change in the circumstances of the minor or the parent has occurred since the entry of the order appointing the guardian; unless the guardian establishes, by clear and convincing evidence, that termination of the guardianship would not be in the best interests of the minor." Pub. Act 96-1338 (eff. Jan. 1, 2011) (amending 755 ILCS 5/11--14.1(b) (West 2008)).

Under section 11--14.1(b), the following factors are to be considered in determining whether termination of a guardianship is in the minor's best interest:

(1) The interaction and interrelationship of the minor with the parent and members of the parent's household.

(2) The ability of the parent to provide a safe, nurturing environment for the minor.

(3) The relative stability of the parties and the minor.

(4) The minor's adjustment to his or her home, school, and community, including the length of time that the minor has lived with the parent and the guardian.

(5) The nature and extent of visitation between the parent and the minor and the guardian's ability and willingness to facilitate visitation." Pub. Act 96--1338 (eff. Jan. 1, 2011) (amending 755 ILCS 5/11--14.1 (West 2008)).

¶ 31 In this case, at the time the guardianship was established, Melissa had consented to the guardianship so T.E. would have the petitioners' insurance. The guardianship was meant to be temporary until Melissa was more mature and could handle T.E.'s daily care and she could provide for T.E. on her own. From the time T.E. was approximately one year old until he was seven years

old, the petitioners took care of all of T.E.'s needs. At the time of the hearing, Melissa had overcome her prior deficiencies and established a stable home for T.E., and she was able to provide for his day-to-day care.

¶ 32 Therefore, Melissa was entitled to custody of T.E. unless the petitioners could establish, by clear and convincing evidence, that termination of their guardianship would not be in T.E.'s best interest. In considering the best interest factors set forth in section 11--14.1 of the Probate Act, the evidence established that T.E. had a good relationship with Melissa, his stepfather, and his siblings, as their relationships had progressively become closer over the three years since T.E.'s visitation in their home began in 2007. Melissa and her husband are able to provide a safe, nurturing, and stable environment for T.E. Although T.E. lived with the petitioners for 10 years, he had also lived there with Melissa for the majority of that time. In addition, T.E. had lived with A.E. for 23 months in the petitioners' home.

¶ 33 The record supports Melissa's contentions that during T.E.'s visits with her, he was very comfortable and well-adjusted in her home as well as in the community. The record also indicates normal parent-child relationship and sibling bonds have been established between T.E. and all the members of Melissa's household. Melissa's husband is willing to adopt T.E., and both Melissa and her husband are willing to facilitate T.E.'s extremely close relationship with the petitioners. Furthermore, the GAL reported that T.E. was adjusting to his new home and school without any problems.

¶ 34 Consequently, the trial court's finding that it was in T.E.'s best interest to terminate the petitioners' guardianship was not against the manifest weight of the evidence. We affirm the termination of the petitioners' guardianship.

¶ 35

II. Petition for Custody

¶ 36 The petitioners also argue on appeal that the trial court erred in denying their petition for custody of T.E.

¶ 37 The Marriage Act provides that a custody petition can be filed by a person other than a parent, but only if the child is not in the custody of a parent. 750 ILCS 5/601(b) (West 2010). The court shall determine custody in accordance with best interest of the minor. 750 ILCS 5/602 (West 2010).

¶ 38 In determining the best interest of the child under the Marriage Act, the court must consider the statutory factors listed in section 602(a). 750 ILCS 5/602(a) (West 2010). The factors applicable in this case are: (1) the wishes of the child's parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school and community; (5) the mental and physical health of all individuals involved; and (6) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child. 750 ILCS 5/602(a) (West 2010).

¶ 39 Here, the petitioners failed to establish that an award of custody in their favor would be in T.E.'s best interest. The record shows that T.E. had a conflict of loyalty as to where he wished to reside and each party felt it best for him to live with them. T.E. was very close with his siblings and had a positive relationship with each of the parties. It appears from the record that at the outset of this case T.E. was much closer with the petitioners. However, as the case progressed so did T.E.'s bond with Melissa, his stepfather and his siblings. At this point in time, it appears that T.E. is comfortable in Melissa's home and well-adjusted to his new school and community. Therefore, the

trial court's denial of the petitioners' custody petition was not against the manifest weight of the evidence.

¶ 40

III. GAL Fees

¶ 41 On appeal, the petitioners also argue that the trial court improperly apportioned the GAL fees by requiring them to pay a 70% portion. The allocation of GAL fees rests within the discretion of the trial court. *K.E.S.*, 347 Ill. App. 3d 452. When determining the proper allocation of GAL fees, the court is to consider the total circumstances of the parties, including their financial resources and relative ability to pay. *McClelland v. McClelland*, 231 Ill. App. 3d 214 (1992).

¶ 42 Here, the record is not clear as to the basis upon which the fees were apportioned. Although Melissa's household income was somewhat higher than the petitioners' income, she has five people in her household compared to the petitioners' household of two. Given the deferential standard of review, we hold that the trial court did not err in apportioning the GAL fees.

¶ 43

CONCLUSION

¶ 44 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 45 Affirmed.