2015 IL App (3d) 130465-U

Order filed March 26, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

BRIAN K. YARBROUGH,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Petitioner-Appellant,	)	Peoria County, Illinois,
	)	
v.	)	Appeal No. 3-13-0465
	)	Circuit No. 13-P-237
	)	
KRISTINE D. LENART, a/k/a/	)	Honorable
KRISTINE D. PERDUE, a/k/a/	)	Chris L. Fredericksen,
KRISTINE D. FONTAINE,	)	Judge, Presiding.
	)	
Respondent-Appellee.	)	

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed nonparent's petition for guardianship of a minor for lack of jurisdiction under the Probate Act notwithstanding handwritten "joint custody agreement" purportedly signed by minor's mother and notwithstanding petitioner's undisputed role in caring for the minor where the minor's mother was willing and able to make and carry out day-to-day decisions regarding the minor's care and in fact did so, the minor resided with his mother for several days each week, and the minor's mother had not voluntarily relinquished physical custody of the minor.

¶ 2 The petitioner, Brian Yarbrough, filed a petition for guardianship over the respondent's son, Ian. The respondent, Kristine Lenart, moved to dismiss the petition for lack of jurisdiction, arguing that the petitioner lacked standing to file the petition under the Probate Act (755 ILCS 5/1-1 et seq. (West 2012)). After conducting an evidentiary hearing, the trial court granted the respondent's motion and dismissed the petition. This appeal followed.

¶ 3 FACTS

¶ 4 The respondent's son Ian was born on December 17, 1999. The petitioner is not Ian's biological father. Sometime after Ian was born, the petitioner and respondent began a romantic relationship. The couple lived together with Ian until they broke up in September 2005. The petitioner testified that, when he and the respondent broke up, the respondent wanted him to "stay in the picture" and "continue to be Ian's dad" because that was what Ian had been calling him. According to the petitioner, the respondent drafted and signed a handwritten agreement to share "joint custody" of Ian with the petitioner. The petitioner attached this purported agreement as Exhibit A to his petition for guardianship. The purported agreement, which was entered as evidence during the hearing, reads as follows:

> "I Kristine Danielle Lenart agree to share joint custody of Ian Michael Lenart with his father Brian Keith Yarbrough until said minor is the legal age of eighteen years old. Any pertinent decisions dealing with said minor shall be discussed with both Kristine Lenart and Brian Yarbrough until a final decision can be agreed upon. Neither party shall remove said child from the state in which he resides this includes removing said child for vacations etc. without the permission of the other legal guardian. If anything should happen to Kristine Danielle Lenart or Brian Keith Yarbrough to the point of not having the ability to

care for the minor the sole guardianship shall be put in the hands of the surviving parent."

The document is dated September 17, 2005, and is purportedly signed by "Kristine D. Lenart." The petitioner did not sign the document. The petitioner attached a notarization of the purported document, also dated September 17, 2005, signed by "Shirley K. Wilkinson," a notary public. The petitioner later testified that Shirley K. Wilkinson is his mother.

¶ 5 During the hearing on the guardianship petition, the petitioner testified that he and the respondent had abided by the terms of the purported "joint custody" agreement for more than eleven years. The petitioner stated that, by agreement of the parties, Ian stayed with him for approximately four days per week and with the respondent approximately three days per week. The petitioner claimed that he took Ian to medical appointments and that he and the respondent made joint decisions regarding Ian's medical treatment. The petitioner testified that he took Ian to and from school in Metamora, took him to sporting events, and "d[id] everything just like a regular father would." However, the petitioner admitted that he was not biologically related to Ian and that he had not formally adopted him or filed a court petition for custody. He also admitted that the respondent was Ian's biological mother, that she had not terminated her parental rights as to Ian, and that she was involved in the day-to-day decisions regarding Ian's life.

¶ 6 The respondent also testified at the hearing. She admitted that, after she broke up with the petitioner, the petitioner continued to have a good relationship with Ian. She also admitted that the petitioner was authorized to pick Ian up from school and that he sometimes took Ian to doctor's appointments as a matter of "convenience" because she had a job and the petitioner was not working at the time. However, the respondent testified that she never relinquished physical

care or custody of Ian to the petitioner. She stated that she made all of the decisions regarding Ian's medical care and that she, not the petitioner, attended all of the parent/teacher conferences at Ian's school. The respondent denied making joint decisions with the petitioner regarding Ian's care and denied ever feeling that she needed to get the petitioner's permission to do anything regarding Ian.

¶ 7 Although the respondent admitted that the purported agreement submitted by the petitioner appeared to be written in her handwriting and appeared to bear her signature, she testified that she did not remember writing or signing the agreement. She also stated that she did not recall having any conversations with the petitioner which led to the purported agreement. During cross-examination, the respondent acknowledged that the petitioner has been a "fairly good father" to Ian, and she admitted naming the petitioner as Ian's "father" in various Metamora and East Peoria school documents. She also admitted that she allowed Ian to stay with the petitioner every other weekend, just as she allowed Ian to stay with her mother and sister. However, she denied sharing custody of Ian with the petitioner.

¶ 8 After considering the evidence presented and the arguments of the parties, the trial court found that the petitioner lacked standing to seek guardianship of Ian under section 11-5(b) of the Probate Act (755 ILCS 5/11-5(b) (West 2012)) and granted the respondent's motion to dismiss the petition for lack of jurisdiction. The court ruled that it lacked jurisdiction under the statute because Ian's mother is alive, there was "no evidence that her parental rights have been terminated," and the evidence "clearly showed" that she was "willing and able to make and carry out *** day-to-day child care decisions concerning [Ian]."

¶ 9 The trial court rejected the petitioner's arguments that he had standing to seek guardianship under section 5/11-5(b) of the Probate Act because the respondent had "voluntarily

relinquished physical custody" of Ian and/or consented to the petitioner's appointment as Ian's guardian in the purported "joint custody" agreement. The court held that the written agreement purportedly signed by the respondent was "not binding because it wasn't witnessed by two disinterested individuals," as required by the version of the Probate Act in effect at the time the agreement was purportedly executed. Accordingly, the trial court held that the purported joint custody agreement "did not give [the petitioner] joint custody or guardianship under the Probate Act." Moreover, relying upon our appellate court's decision in *In re the Guardianship Estate of Tatyanna T.*, 2012 IL App (1st) 112957, the trial court noted that the provision in section 11-5(b) regarding the parent's relinquishment of physical custody was not in effect when the parties' joint custody agreement was purportedly executed in 2005 and could not be given retroactive effect. Thus, although the trial court found that the petitioner had a "close relationship with Ian," it ruled that the petitioner "[is] not and cannot be [Ian's] guardian" based on the facts presented and the applicable law. This appeal followed.

¶ 10 ANALYSIS

¶ 11 The petitioner argues that the respondent removed Ian from the petitioner's home in May 2013 and later permanently removed him from the State of Illinois "in direct violation of" the purported joint custody agreement. Based on the terms of that agreement and the parties' alleged conduct for the past 11 ½ years (including the petitioner's alleged sharing of "custody" and responsibility for Ian's care), the petitioner argues that he is entitled to be appointed Ian's permanent guardian under section 5/11-5(b) of the Probate Act. The petitioner maintains that the respondent consented to the petitioner's appointment as Ian's guardian in the written "joint custody" agreement. He also maintains that the respondent relinquished physical custody of Ian in that agreement and by her subsequent actions.

¶ 12 Generally, pursuant to section 11–5(a) of the Probate Act, once a petition for guardianship is filed, "the court may appoint a guardian * * * of a minor * * * as the court finds to be in the best interest of the minor." 755 ILCS 5/11–5(a) (West 2012); *In re A.W.*, 2013 IL App (5th) 130104, ¶ 12; *Guardianship Estate of Tatyanna T.*, 2012 IL App (1st) 112957, ¶ 20. However, prior to January 1, 2011, the Probate Act provided that "[t]he court lacks jurisdiction to proceed on a petition for the appointment of a guardian of a minor if (i) the minor has a living parent, adoptive parent or adjudicated parent, whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor, unless the parent or parents consent to the appointment or, after receiving notice of the hearing under Section 11-10.1, fail to object to the appointment at the hearing on the petition or (ii) there is a guardian for the minor appointed by a court of competent jurisdiction. 755 ILCS 5/11–5(b) (West 2004). On January 1, 2011, the legislature amended section 5/11-5(b) to provide that the court also has jurisdiction if "the parent or parents voluntarily relinquished physical custody of the minor." Pub. Act 96-1338 (eff. January 1, 2011). There is "a rebuttable presumption that a parent of a minor is willing and able to make and carry out day-to-day child[-]care decisions concerning the minor, but the presumption may be rebutted by a preponderance of the evidence." *Id.*

¶ 13 " '[T]he standing requirement contained in [section 5/11-5(b)] protects the superior rights of parents and ensures that guardianship proceedings pass constitutional muster.' " *A.W.*, 2013 IL App (5th) 130104, ¶ 13 (quoting *Guardianship Estate of Tatyanna T.*, 2012 IL App (1st) 112957, ¶ 21). "By allowing a guardianship petition to proceed to a hearing on the merits over the wishes of a parent only when the parent has been established to be unwilling or unable to carry out day-to-day child-care decisions, the Probate Act respects the superior rights of parents

while also insuring to protect the health, safety, and welfare of children." *In re R.L.S.*, 218 Ill. 2d 428, 441 (2006). Section 5/11-5(b) "establishes the threshold statutory requirement that a petitioner must meet before the court can proceed to a determination of the best interests of a child." *A.W.*, 2013 IL App (5th) 130104, ¶ 13 (quoting *Guardianship Estate of Tatyanna T.*, 2012 IL App (1st) 112957, ¶ 21).

¶ 14 However, the Probate Act also provides that "[a] parent *** whose parental rights have not been terminated, may designate in any writing *** a person qualified to act under Section 11-3 to be appointed as guardian of the person or estate, or both, of an unmarried minor or of a child likely to be born." 755 ILCS 5/11–5(a-1) (West 2004). The designation "must be witnessed by 2 or more credible witnesses at least 18 years of age, neither of whom is the person designated as the guardian." *Id.*

¶ 15 When a court grants a motion to dismiss a guardianship petition following an evidentiary hearing, "the reviewing court must review not only the law but also the facts, and may reverse the trial court order if it is incorrect in law or against the manifest weight of the evidence." *Guardianship Estate of Tatyanna T.*, 2012 IL App (1st) 112957, ¶ 19 (internal quotation marks omitted). A trial court's ruling is against the manifest weight of the evidence "only if it is unreasonable, arbitrary and not based on the evidence, or when the opposite conclusion is clearly evident from the record." *Guardianship Estate of Tatyanna T.*, 2012 IL App (1st) 112957, ¶ 19; see also *In re Estate of Michalak*, 404 Ill. App. 3d 75, 96 (2010). "In reviewing a probate court's determination, all reasonable presumptions are made in favor of the trial court, the appellant has the burden to affirmatively show the errors alleged, and the judgment will not be reversed unless the findings are clearly and palpably contrary to the manifest weight of the evidence." *Guardianship Estate of Tatyanna T.*, 2012 IL App (1st) 112957, ¶ 19 (quoting *In re Estate of*

Vail, 309 Ill. App. 3d 435, 438 (1999)). Moreover, we may affirm the trial court's decision "on any basis appearing in the record, whether or not the trial court relied on that basis." *Mitsias v. I–Flow Corp.*, 2011 IL App (1st) 101126, ¶ 47.

¶ 16 In this case, the petitioner admits that he is not Ian's parent, that the respondent is Ian's biological mother, and that the respondent had not terminated her parental rights as to Ian. He does not claim that he has ever been appointed Ian's guardian by a court of competent jurisdiction. Accordingly, the petitioner may establish standing to file a guardianship petition only by showing that the respondent consented to his appointment as Ian's guardian or by rebutting the statutory presumption that the respondent was "willing and able to make and carry out day-to-day child-care decisions" regarding Ian. 755 ILCS 5/11–5(a-1), 5/11–5(b) (West 2004).

¶ 17 The petitioner relies heavily upon the purported written "joint custody" agreement to establish standing. Such reliance is misplaced. Even assuming *arguendo* that the purported written agreement is a valid agreement that was actually executed by the respondent and that the agreement was admissible evidence, it would not establish the petitioner's standing to file this action. As the trial court noted, the agreement was not signed by two disinterested witnesses, as required by section 11–5(a-1) of the Probate Act, and is therefore not binding under that Act. See *Guardianship Estate of Tatyanna T.*, 2012 IL App (1st) 112957, ¶¶ 26-27.

¶ 18 Moreover, the evidence presented during the hearing does not suggest that the respondent consented to the appointment of the petitioner as Ian's guardian or that the respondent was unwilling or unable to make and carry out day-to-day decisions regarding Ian's care. To the contrary, the petitioner conceded that Ian lived with the respondent several days per week and that the respondent was involved in the day to day decisions regarding Ian's care. At most, the

evidence suggests that the respondent allowed Ian to stay with the petitioner several days per week and to maintain a close relationship with the petitioner. Even assuming that the respondent consulted with the petitioner on certain decisions regarding Ian's care (which the respondent denies), there is no evidence that the respondent ever sought or consented to have the petitioner formally appointed as Ian's legal guardian.

¶ 19 The petitioner also argues that the purported joint custody agreement and the respondent's actions after she executed that agreement show that the respondent voluntarily relinquished physical custody of Ian to the petitioner, thereby granting the petitioner standing to file a guardianship petition. We do not find this argument persuasive. As an initial matter, the Probate Act did not vest trial courts with jurisdiction to hear guardianship petitions when a minor's parent "voluntarily relinquishes physical custody of the minor" until January 1, 2011. That was more than five years after the parties' written "joint custody" agreement was purportedly executed. The January 1, 2011, jurisdictional amendment was a substantive change in the law that may not be applied retroactively to the respondent. *Guardianship Estate of Tatyanna T.*, 2012 IL App (1st) 112957, ¶ 25. Accordingly, we may not consider the written "joint custody" agreement (or any conduct performed by the respondent prior to January 1, 2011) in determining whether the respondent voluntarily relinquished physical custody of Ian to the petitioner. *Id.* ¶¶ 25-26.

¶ 20 In any event, even if we were to consider all of that evidence, we would not find that the respondent voluntarily relinquished physical custody of Ian. The written "joint custody agreement" does not state or imply that the respondent relinquished physical custody of Ian; rather, it merely provides that the respondent and the petitioner agreed to share decision-making authority and to confer with each other regarding Ian's care.

¶ 21 Moreover, the respondent's conduct after the purported agreement was executed only confirms that she retained physical custody of Ian. As the petitioner acknowledged, the respondent's parental rights were never terminated, Ian lived with the respondent for several days each week, and the respondent was involved in the day-to-day decisions regarding Ian's care. The parties never filed a custody petition seeking to transfer physical custody of Ian from respondent to the petitioner. Nor did the parties ever file a petition seeking to formally designate the petitioner as Ian's guardian. During the hearing, the respondent testified that she never relinquished physical care or custody of Ian to the petitioner. She stated that she made all of the decisions regarding Ian's medical care and that she, not the petitioner, attended all of the parent/teacher conferences at Ian's school. The respondent denied making joint decisions with the petitioner regarding Ian's care and denied ever feeling that she needed to get the petitioner's permission to do anything regarding Ian. Regardless, even if the respondent had shared decision-making authority with the petitioner in certain respects, that would not establish a relinquishment of physical custody. In sum, the petitioner has provided no evidence that the respondent knowingly waived or abandoned her legal right to custody of Ian or voluntarily relinquished physical custody of him.

¶ 22 Accordingly, we cannot say that the trial court's ruling that the petitioner lack standing to file a petition for guardianship under the Probate Act was contrary to law or against the manifest weight of the evidence. We therefore affirm the trial court's dismissal of the petition for lack of jurisdiction.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, judgment of the circuit court of Peoria County is affirmed.

¶ 25 Affirmed.