2011 IL App (3d) 110416-U

Order filed November 10, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

MIKE ZELAZOWSKI and ELIZABETH ZELAZOWSKI, respectively as executor and parents of NATALIA ZELAZOWSKI, deceased, mother of J.L.,	) Appeal from the Circuit Court) of the 12th Judicial Circuit,) Will County, Illinois,
Plaintiffs-Appellees,	)
v.	) Appeal No. 3-11-0416) Circuit No. 05-F-293
EARL LAMB,	) Honorable) M. Thomas Carney,
Respondent-Appellant.	) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice Schmidt specially concurred.

ORDER

¶ 1 *Held:* The trial court erred by finding that the maternal grandparents had standing to sue for custody of the minor. The father never voluntarily and indefinitely relinquished custody of the minor, and instead appeared ready, willing, and able to take over custody of the minor upon the natural mother's death.

¶ 2 After a trial, the trial court awarded residential custody of the minor, J.L., to his maternal grandparents, Mike and Elizabeth Zelazowski. On appeal, the minor's father, Earl Lamb, argues that

the trial court erred by finding that the Zelazowskis had standing to sue for custody of J.L. He also argues that the trial court committed an error at the standing hearing by admitting a document into evidence without the proper foundation. Finally, Earl alleges that the trial court erred by considering conduct that had no bearing on the relationship between Earl and J.L. at the best interest hearing. We reverse.

¶ 3 FACTS

¶ 4 J.L. was born to Earl Lamb and Natalia Zelazowski on December 16, 2003. Earl and Natalia never married, and after J.L.'s birth, Natalia and J.L. resided with the Zelazowskis, with Earl visiting J.L. at least once a week. Natalia died in an automobile accident on January 19, 2007.

¶ 5 On March 13, 2007, the parties entered into an agreement regarding J.L. The agreement stated that J.L. would "remain temporarily" with the Zelazowskis, and Earl would have the right to reasonable visitation. The agreement provided that "[a]ny party may spread this Agreement of record in the Circuit Court of Will County *** with regard to the care, custody and visitation relating to [J.L.], with notice to counsel for the parties." In addition, the agreement was "without prejudice to anyone's rights," and it expired on April 24, 2007.

¶ 6 On April 27, 2007, Earl filed a motion for custody of J.L. and to stop child support payments. That motion was heard on June 14, 2007, and Earl appeared *pro se*. Earl explained that he was trying to find an attorney that he could afford. He further explained that he "just wanted to get it in court so that [the Zelazowskis] can't have legal *** rights to fight for [J.L.] because they were–he was in their possession for such a long time and I didn't do nothing." The following exchange then took place:

"THE COURT: Okay. Why don't we do this then. Was this your agreement

originally to have the child reside at the [Zelazowskis']?

[EARL]: I don't agree with it. They–what was going to happen is we were trying to take care of this out of court and over, you know, a six [month] to a year period, we were going to–I am going to start getting him more and more every day. And if they felt that I was unfit, they disagreed with me taking him, after that we would go to court."

¶ 7 The court continued:

"Would you be willing to agree to let the child stay with the [Zelazowskis] until you can get counsel, we can get a hearing date, get it before the Court, see what we can either agree to or set it for hearing? What is your position in doing that at this point?

[EARL]: That would be fine. I mean, I feel [J.L.] should spend more than ten hours a week with me, though."

¶ 8 The trial court then ruled, "[b]y agreement we're going to leave the child in physical possession of the [Zelazowskis] with no objection." Earl obtained an attorney and filed his petition for custody on July 19, 2007.

¶ 9 On May 16, 2008, a hearing was held to determine whether the Zelazowskis had standing. At the hearing, the Zelazowskis introduced the agreement into evidence. Over counsel's objection, the court considered the document and ruled:

"Well, up until now I was inclined to agree with [Earl's] position that the [Zelazowskis] did not have standing, but this document entitled agreement and signed by [Earl], and then paragraph eight stating that either party may spread this of record in this case with regards to care, custody, it looks like visitation, I don't believe–I believe they may have standing."

¶ 10 This matter proceeded through various stages of discovery, and eventually made it to trial on July 21, 2010. The court awarded residential custody of J.L. to the Zelazowskis on August 19, 2010. The matter continued to discuss holiday visitation, and a final joint parenting order was entered on May 27, 2011. Earl filed his notice of appeal on June 15, 2011.

¶ 11 ANALYSIS

¶ 12 On appeal, Earl contends that the trial court erred by relying on the agreement to determine that the Zelazowskis had standing to sue for custody of J.L., and by admitting the agreement into evidence without proper foundation. He also argues that the trial court erred by considering irrelevant factors at the best interest hearing.

¶ 13 I. Jurisdiction

¶ 14 As an initial matter, the Zelazowskis argue that this court lacks jurisdiction because Earl filed his notice of appeal more than 30 days after the entry of the order awarding residential custody of J.L. to the Zelazowskis. Specifically, they contend that the order of August 19, 2010, was a final order that Earl had to respond to within 30 days in order to preserve his appeal, and Earl did not file his notice of appeal until June 15, 2011. We disagree.

¶ 15 Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) provides that, "any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable." In the instant case, after the trial court decided that the Zelazowskis should have residential custody of J.L., the court entered various orders that dealt with holiday visitation schedules and entered a final joint parenting agreement on May 27, 2011. Because there were still claims between the parties after the August 19, 2010, order, that order was arguably not final and appealable under Rule 304(a) until the trial court entered a final joint parenting agreement.

¶ 16 The Zelazowskis rely on *In re Custody of Purdy*, 112 Ill. 2d 1 (1986) to support their position. In *Purdy*, our supreme court held that, in a postdissolution proceeding, an independent child custody order is final and appealable when entered, even though certain incidental matters remained to be determined. *Id.* However, *Purdy* and its progeny are distinguishable in that those cases focus on acquiring appellate jurisdiction *before* the trial court rules on all of the parties' claims. See also *In re Marriage of A'Hearn*, 408 Ill. App. 3d 1091 (2011). In this case, Earl did not file an appeal until after all the claims below were adjudicated. While Earl could have potentially filed an appeal in this case earlier, his failure to do so does not defeat this court's jurisdiction. Although multiple appeals are allowed when child custody is at issue, they are not required. Accordingly, we have jurisdiction to hear the case on its merits.

¶ 17 II. Standing

¶ 18 Earl's first claim on appeal is that the trial court erred by relying on the agreement to award the Zelazowskis standing to seek custody of J.L. We review his claim *de novo. In re Custody of M.C.C.*, 383 Ill. App. 3d 913 (2008).

¶ 19 Section 601 of the Illinois Marriage and Dissolution of Marriage Act provides that a nonparent may seek custody of a child "only if [the child] is not in the physical custody of one of his parents[.]" 750 ILCS 5/601(b)(2) (West 2008). "Physical custody" has been interpreted to mean "something more than mere physical possession of the child at the time custody litigation is initiated." *In re Custody of Gonzalez*, 204 Ill. App. 3d 28, 31 (1990). The standing requirement is designed to " 'ensure[ ] that the superior right of natural parents to the care and custody of their children is safeguarded.' " *In re A.W.J.*, 197 Ill. 2d 492, 497 (2001) (quoting *In re Petition of*

Kirchner, 164 Ill. 2d 468, 491 (1995)). However, a natural parent can waive any objection to the standing of the nonparent by voluntarily and indefinitely relinquishing custody of the minor. *In re Custody of Menconi*, 117 Ill. App. 3d 394 (1983). Without establishing standing, the nonparent would have to establish that the surviving parent is unfit in order to pursue custody. *Gonzalez*, 204 Ill. App. 3d 28.

¶ 20 There is no dispute that J.L. was in the physical possession of the Zelazowskis after Natalia's death. The issue in the instant appeal is whether Earl waived his objection to the Zelazowskis' claim of standing by allowing J.L. to reside with them.

¶ 21 In order to establish standing, the nonparent "must show the biological parents no longer have physical custody of the child because the parents 'voluntarily and indefinitely relinquished custody of the child.' " *M.C.C.*, 383 Ill. App. 3d at 917 (quoting *In re Custody of Ayala*, 344 Ill. App. 3d 574, 588 (2003)). Factors the court should consider are who had physical possession of the child at the time the custody petition was filed, how that person obtained possession, and the nature and duration of the possession. *Id.* Because no one factor controls, each case is highly fact dependent. *Id.*

¶ 22 The Zelazowskis point to three instances which they argue demonstrate that Earl relinquished custody of J.L. The first is when he decided to leave J.L. with the Zelazowskis upon learning of Natalia's death. The second is when he entered into the agreement with the Zelazowskis on March 13, 2007. The third is when he agreed to allow J.L. to reside with the Zelazowskis while he obtained an attorney.

¶ 23 First, we do not think that Earl's reluctance to take J.L. from the only home he has ever known on the weekend of his mother's death constitutes waiving his objection to the Zelazowskis'

standing. Upon Natalia's death, physical custody of the minor transferred to Earl, despite the fact that J.L. lived in the home of the Zelazowskis. *In re Custody of Peterson*, 112 Ill. 2d 48 (1986). The law does not require that the surviving parent immediately request custody of his child upon the death of the other natural parent; instead, he must request physical custody "in a timely manner." *M.C.C.*, 383 Ill. App. 3d at 919. In this case, Earl ultimately filed his motion for custody approximately three months after Natalia's death.

¶ 24 The Zelazowskis next argue that the agreement indicates that Earl voluntarily relinquished physical custody of J.L. However, the agreement stated that J.L. "shall remain temporarily" with the Zelazowskis, thus referring to the fact that the Zelazowskis would temporarily keep physical custody of J.L. In essence, the agreement maintained the status quo. Earl never voluntarily relinquished custody of his son. Moreover, the agreement was not indefinite, and in fact it was set to expire on April 24, 2007.

¶ 25 The trial court apparently relied on paragraph eight of the agreement to find that the Zelazowskis had standing. Paragraph eight states that any party may spread the agreement in court with regard to the care, custody, and visitation of J.L., but it does not indicate that Earl voluntarily and indefinitely relinquished custody of J.L. See *In re Custody of Cannon*, 268 Ill. App. 3d 937, 941 (1994) (quoting *In re Custody of McCuan*, 176 Ill. App. 3d 421, 427 (1988) (stating that "nonparent must show that the parent has relinquished 'legal custody' of the child, rather than merely physical possession").

¶ 26 While it is arguable that the use of the word "custody" in paragraph eight should have alerted Earl that the Zelazowskis were "developing a position for standing," (*Peterson*, 112 Ill. 2d 48, 54) Earl later explained that the Zelazowskis would only be vying for custody if they later determined

that he was unfit. He further explained that after signing the agreement, he believed the parties would work out of court to transition J.L. into his home within six months to a year. In addition, Earl filed a motion three days after the expiration of the agreement to regain custody of J.L., thus demonstrating that he was diligently pursuing his right to custody.

¶ 27 Finally, the Zelazowskis argue that Earl temporarily relinquished custody of J.L. when he agreed in open court to allow J.L. to stay with the Zelazowskis until he obtained an attorney. However, this agreement did not relinquish Earl's custody of J.L. The trial court stated that Earl was agreeing to the Zelazowskis' temporarily retaining physical possession of J.L., and the trial court did not change physical custody. After the hearing, Earl acted quickly to obtain an attorney, and within a month he filed a new custody petition and for immediate turnover of J.L. In total, it took Earl approximately six months to put his custody petition in final form, with some of the delay explained by the fact that Earl believed the parties would transition J.L. into his home outside of court proceedings. See *Cannon*, 268 Ill. App. 3d at 943 (stating "Illinois courts appear reluctant to find the child has been with the nonparent for a 'substantial' period of time if the nonparent had physical custody only for several months.")

¶ 28 The Zelazowskis rely on *Gonzalez*, 204 Ill. App. 3d 28, in support of their position that Earl waived his objection to the Zelazowskis' claim of standing. In *Gonzalez*, the mother and father married in 1979 and divorced in 1983, with custody being awarded to the mother who died in 1986. *Id.* Upon the mother's death, both the maternal grandparents and the father, who was stationed in Germany as part of the U.S. Air Force, requested custody of the minor child. *Id.* After a hearing, an agreed order was entered awarding temporary custody of the minor to the grandparents, and for the minor to be transferred to the father "as soon as possible consistent [*sic*] with the best interests

of the minor child." *Id.* at 30. After the father obtained an early honorable discharge, he sought custody of the minor. *Id.* The trial court awarded custody to the grandparents. *Id.*

¶ 29 On appeal, we found that the father's agreement to allow the grandparents temporary custody of the child pending a decision on permanent custody was dispositive of the standing issue. *Id.* We stated that:

> "where the surviving parent voluntarily places the child with the grandparents or other nonparents, particularly where the parent is unable to provide the care the child requires, it has been held that the standing was derived from the parent's voluntary relinquishment of physical possession of the child for an extended period of time." *Id.* at 31.

¶ 30 Moreover, we held that the agreed order entered into by the father and the grandparents invoked the "best interest of the child" standard which further indicated that the father was waiving any right to object to the standing of the grandparents. *Id.* at 32.

¶ 31 *Gonzalez* is distinguishable from the instant case. Here, Earl never relinquished temporary custody of J.L. to the Zelazowskis. While Earl agreed to let J.L. temporarily reside with the Zelazowskis in the past, it appears from the record that he only agreed to the arrangement to prevent further traumatizing J.L. as opposed to an inability to care for his son. No evidence was presented at the standing hearing to suggest that Earl was unable or unwilling to parent J.L. after Natalia's death in 2007. In addition, Earl's "agreements" with the Zelazowskis regarding the possession of J.L. were always of a short duration, never for "an extended period of time." *Id.* at 31.

¶ 32 Earl did not waive his objection to the Zelazowskis' claim of standing because he never voluntarily and indefinitely relinquished custody of J.L. Therefore, his objection to standing was preserved. The Zelazowskis lacked standing to sue for custody of J.L.

¶ 33 Because we find that the Zelazowskis lack standing in this case, we do not need to examine Earl's remaining arguments. *Peterson*, 112 Ill. 2d 48.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Will County is reversed.

¶ 36 Reversed.

¶ 37 Justice Schmidt, specially concurring:

¶ 38 I concur in the judgment.