2015 IL App (4th) 150082-U

Appellate Court of Illinois,
Fourth District.

In re the GUARDIANSHIP OF A.D., a Minor,
Terry Helm and Brenda
Helm, Petitioners–Appellants,
v.
Angela MILLER, Respondent–Appellee.

No. 4–15–0082.
|
June 16, 2015.

Appeal from Circuit Court of Macon County, No. 14P325, Albert G. Webber, Judge Presiding.

ORDER

Justice TURNER delivered the judgment of the court:

***1** ¶ 1 *Held:* Where the evidence showed respondent had very limited involvement in her minor child's life as she left the minor with petitioners, married, and started a family, the trial court's finding respondent did not voluntarily relinquish physical custody to petitioners was against the manifest weight of the evidence.

¶ 2 In December 2014, petitioners, Terry and Brenda Helm, filed a petition for guardianship of A.D. (born in 1998), Terry's biological granddaughter. That same month, the Macon County circuit court entered an order appointing petitioners as A.D.'s temporary guardian. Respondent, Angela Miller, A.D.'s biological mother, filed a petition to vacate petitioners' temporary guardianship, asserting, *inter alia,* they did not have standing to bring the petition for guardianship. After a January 2015 hearing, the court dismissed the petition for guardianship, finding petitioners lacked standing to file it.

¶ 3 Petitioners appeal, contending the trial court erred by (1) refusing to consider the issue of respondent's fitness in determining standing and (2) dismissing their petition for guardianship. We reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 A.D.'s biological parents are respondent and her first husband, Jeremy Durbin. In their divorce proceedings, respondent received custody of A.D. Durbin was not a party to the guardianship proceedings. Respondent later married David Miller. Respondent's biological parents are Terry and Cindy Dannewitz. For 35 years, Terry has been married to Brenda.

¶ 6 Petitioners filed their petition for guardianship on December 8, 2014. The next day, the trial court entered an order appointing petitioners as A.D.'s temporary guardian. On December 22, 2014, respondent filed a petition to vacate the temporary guardianship, asserting she was a fit and proper person to care for A.D. and petitioners lacked standing to petition for guardianship.

¶ 7 On January 23, 2015, the trial court held an evidentiary hearing on the issue of standing. Petitioners both testified, called respondent as an adverse witness, and presented the testimony of A.D. Respondent presented the testimony of Miller, Dannewitz, and Decatur police officer Chad Louden. The evidence relevant to the issues on appeal is set forth below.

¶ 8 Terry testified A.D. had lived with him and Brenda most of the time since A.D. was in kindergarten. She was currently a junior in high school and had her own room at their house. Only for a couple of short periods of time had A.D. resided with respondent. After respondent lost her home on Water Street, respondent also resided with petitioners for "a time." It had been four or five years since respondent had last resided with them. For the past four years, A.D. had resided exclusively at petitioners' home. Terry had never received any financial support from respondent for A.D.'s care. Respondent had brought food in for A.D. every once in a while. Terry had paid most of A.D.'s medical bills, except more recently, respondent had given Brenda a medical card for A.D.

***2** ¶ 9 Over the past four years, respondent would stop by about once a week to get her mail and every once in a

while she would go to A.D.'s bedroom and say something to her. At school, petitioners' address is listed as A.D.'s home address. Teachers contact petitioners about A.D.'s performance at school. When A.D. was in kindergarten, respondent gave Terry a sheet authorizing him to consent to medical care for A.D.

¶ 10 Respondent had recently removed A.D. from petitioners' home for a week. A.D. told them she had been moved back and forth between respondent's and Dannewitz's homes during the time she was gone. While in her mother's care, A.D. ran away from school. Terry drove A.D. to the police station to turn herself in.

¶ 11 Brenda testified respondent brought A.D. to her because A.D. kept getting kicked out of preschools. At that point, Brenda began taking and picking A.D. up from school every day. In the beginning, A.D. attended schools based on respondent's address. Since the third grade, she has been attending the schools for petitioners' address. The decision of what school A.D. would go to was made by respondent. Throughout A.D.'s schooling, Brenda has been the one to attend parent-teacher conferences and help A.D. with her homework. Brenda explained A.D. was currently taking a lot of accelerated classes for college. Brenda also testified they received no financial support for A.D., and A.D. did live with respondent for about six months when respondent lived on Water Street. With respondent's consent, A.D. had lived with petitioners. Respondent had not visited with A.D. very often over the past four years. A.D. had gone months at a time without having face-to-face contact with respondent. Respondent had not shown affection and concern for A.D. and more than once had failed to call A.D. on her birthday. Brenda took A.D. to most of her doctor's appointments. Brenda would call respondent when A.D. was sick. Additionally, Brenda testified respondent could come to their house any time she wanted.

¶ 12 A.D. testified she had lived with petitioners since kindergarten, and they provided all of her food, clothing, and shelter. They paid for her cellular telephone. Respondent would occasionally bring snacks for her. Brenda was the one who helped A.D. with her homework. According to A.D., petitioners were the ones who took her to doctor's appointments. In November 2014, when A.D. needed to go to the hospital, petitioners were the ones who took her and called respondent to inform her of the situation. After her trip to the hospital, respondent took A.D. to respondent's home. The next day, respondent took her to Dannewitz's home. Respondent did not have a place for A.D. to stay at her home. A.D. went back and forth between the two homes until she ran away. A.D. further testified she had stayed at respondent's home twice over the past five years. Petitioners had never kept her from seeing respondent, and she had never heard them tell respondent she could not come to their home. Additionally, A.D.'s last contact with her father was in 2011.

***3** ¶ 13 Respondent testified she got custody of A.D. after she divorced Durbin, and she inconsistently received child-support payments from Durbin. She had never given petitioners any money for child support. When A.D. was in kindergarten, respondent and A.D. lived with Dannewitz. When A.D. was in first grade, respondent had a house on Water Street, and A.D. lived with her the entire time respondent lived on Water Street. While living on Water Street, respondent would pick A.D. up after work at petitioners' home and bring her back to the Water Street home. Around 2007, they moved in with petitioners. Respondent testified she lived there until she married Miller in 2012. While living with petitioners, she was the one to make the day-to-day decisions for A.D. and provided her with food and clothing. Respondent also testified she was the one to make decisions about A.D.'s medical care. Petitioners had often volunteered to help out and provide care for A.D. Respondent admitted letting Brenda take care of all of A.D.'s schooling.

¶ 14 Respondent also testified petitioners had never prevented her from seeing A.D. until they got the temporary guardianship. She denied ever voluntarily relinquishing custody of A.D. and had never consented to any type of guardianship. Respondent now has a ten-month-old daughter with Miller. They recently moved to a home on Wood Street that was larger and had a bedroom for A.D.

¶ 15 Officer Louden testified respondent reported A.D. as a runaway when she did not return after school to respondent's home or Dannewitz's. Officer Louden called Terry, who informed him A.D. was not with him but she had stopped by his house in the afternoon. At that time, A.D. had stated she was going to run away, and Terry asked her to leave. Terry told Officer Louden he could not force A.D. to do anything.

¶ 16 Miller testified he had been married to respondent for four years, and during that time, A.D. had stayed overnight at their home for two or three weekends. Petitioners had not prevented him and respondent from seeing A.D. They tried to see A.D. once a week. They lived in a different school district from petitioners. Miller testified A.D. lived elsewhere because she wanted to go to school where petitioners lived. Miller testified respondent had voluntarily let A.D. stay with petitioners because it was in A.D.'s interest. To his knowledge, respondent made the medical and schooling decisions for A.D. He also testified respondent was living with petitioners when he started dating her.

¶ 17 Dannewitz testified A.D. lived with her when A.D. was very young but denied knowing where A.D. resided after she finished kindergarten.

¶ 18 At the conclusion of the hearing, the trial court found petitioners lacked standing to bring their guardianship petition. In so ruling the court found the following:

> "The real question here I believe for the Court to proceed further is did or did not [respondent] voluntarily relinquish physical custody of the minor. There is evidence both ways on this. Clearly, she has lived most of the time with [petitioners]. Her time with [respondent] has been limited. The evidence is in conflict. It is the burden of the petitioners here by a preponderance of the evidence to prove that there was a knowing and voluntarily [*sic*] relinquishment of physical custody by [respondent].
>
> ***4** Again, there is evidence on both sides of this. But the burden was on the petitioners. I do not see here there was the type of evidence of a knowing, voluntary and affirmative act or acts by [respondent] to permanently give up physical custody of this minor. I acknowledge again the evidence is in conflict on that, but the burden was on [petitioners] to prove that by a preponderance of the evidence. I do not see that."

Additionally, while the court emphasized the hearing was not a best-interest hearing, it did note that, if it was such a hearing, it would agree with the guardian *ad litem* that it was in A.D.'s best interest to remain with petitioners.

¶ 19 On January 30, 2015, petitioners filed their timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff.Jan.1, 2015). Accordingly, we have jurisdiction under Illinois Supreme Court Rule 301 (eff.Feb.1, 1994).

¶ 20 II. ANALYSIS

¶ 21 We begin by noting that, at oral arguments, petitioners withdrew their fitness argument. Thus, we will only address whether the trial court erred by dismissing petitioners' guardianship petition.

¶ 22 Under section 11–5(a) of the Probate Act of 1975 (Probate Act) (755 ILCS 5/11–5(a) (West 2012)), 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 ." However, section 11–5(b) of the Probate Act (755 ILCS 5/11–5(b) (West 2012)) provides a trial court lacks jurisdiction to hear a petition for guardianship of a minor when:

> "the minor has a living 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: (1) the parent or parents voluntarily relinquished physical custody of the minor; (2) after receiving notice of the hearing under Section 11–10.1, the parent or parents fail to object to the appointment at the hearing on the petition; or (3) the parent or parents consent to the appointment * * *. There shall be 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."

¶ 23 The aforementioned standing requirement " 'protects the superior rights of parents and ensures that guardianship proceedings pass constitutional muster.'

" *In re Guardianship Estate of Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 21, 976 N.E.2d 431 (quoting *In re Guardianship of A.G.G.,* 406 Ill.App.3d 389, 394, 948 N.E.2d 81, 85 (2011)). It "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." *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 21, 976 N.E.2d 431. However, if the nonparent fails to meet the threshold requirement, then the nonparent lacks standing, and the trial court should refrain from asserting jurisdiction to proceed on the petition. See 755 ILCS 5/11–5(b) (West 2012); *In re R.L.S.,* 218 Ill.2d 428, 448, 844 N.E.2d 22, 34 (2006) (noting the nonparents lack standing to proceed with their guardianship petition unless the court finds they rebutted the presumption the parent is willing and able to make day-to-day child-care decisions).

***5** ¶ 24 Generally, the determination of whether a nonparent has standing requires an evidentiary hearing. See *In re A.W.,* 2013 IL App (5th) 130104, ¶ 15, 994 N.E.2d 726. When the trial court grants a motion to dismiss following such a 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." (Internal quotation marks omitted.) *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 19, 976 N.E.2d 431 (quoting *Hernandez v. New Rogers Pontiac, Inc.,* 332 Ill.App.3d 461, 464, 773 N.E.2d 77, 81 (2002)). " '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.' " *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 19, 976 N.E.2d 431 (quoting *In re Estate of Michalak,* 404 Ill.App.3d 75, 96, 934 N.E.2d 697, 717 (2010)).

¶ 25 On appeal, petitioners assert the trial court's finding they did not show by a preponderance of the evidence respondent had voluntarily relinquished physical custody of A.D. was against the manifest weight of the evidence. Respondent disagrees.

¶ 26 In *Tatyanna T.,* 2012 IL App (1st) 112957, ¶¶ 29–31, 976 N.E.2d 431, the First District examined the language contained in section 11–5(b) of the Probate Act. It noted "our courts have defined 'voluntary relinquishment' as the affirmative act of waiving or abandoning a known right." *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 29, 976 N.E.2d 431. Moreover, the First District sought guidance from the case law addressing section 601(b)(2) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/601(b)(2) (West 2008)), which then provided a nonparent could commence custody proceedings for a child " 'only if he is not in the physical custody of one of his parents.' " *Tatyanna T.,* 2012 IL App (1st) 112957, ¶¶ 30–31, 976 N.E.2d 431. Under that section, our supreme court has held the determination of physical custody " 'should not turn on who is in physical possession, so to speak, of the child at the moment of filing the petition for custody .' " *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 31, 976 N.E.2d 431 (quoting *In re Custody of Peterson,* 112 Ill.2d 48, 53–54, 491 N.E.2d 1150, 1152 (1986)). Another case emphasized the determination " 'turns not on possession; rather, it requires that that parent somehow has voluntarily and indefinitely relinquished custody of the child.' " *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 31, 976 N.E.2d 431 (quoting *In re Marriage of Rudsell,* 291 Ill.App.3d 626, 632, 684 N.E.2d 421, 425 (1997)). Additionally, "our courts have held that 'not every voluntary turnover of a child will deprive the parent of physical custody. Rather, the court must consider such factors as (1) who was responsible for the care and welfare of the child prior to the initiation of custody proceedings; (2) the manner in which physical possession of a child was acquired; and (3) the nature and duration of the possession.' " *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 31, 976 N.E.2d 431 (quoting *In re A.W.J.,* 316 Ill.App.3d 91, 96, 736 N.E.2d 716, 721 (2000)).

***6** ¶ 27 In *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 34, 976 N.E.2d 431, the reviewing court applied the aforementioned factors and did not find the parent had voluntarily relinquished physical custody of the minor. The court noted the parent had presented evidence she was involved in many aspects of the minor's care and welfare prior to the proceedings, including being present for birthdays and holidays and having the minor stay with her on numerous occasions. *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 34, 976 N.E.2d 431. It was also undisputed the petitioners voluntarily brought the minor child to the parent's home upon her request, and the parent repeatedly rejected the petitioners' requests to grant them custody of the minor in a written document. *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 34, 976 N.E.2d 431. Additionally, the parent presented evidence the arrangement she made with the petitioners was temporary in nature and she always intended to retain custody of the minor once she was back

on her feet. *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 34, 976 N.E.2d 431. Last, the minor had been living with the parent for close to a year. *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 34, 976 N.E.2d 431.

¶ 28 In addition to addressing the factors, the *Tatyanna T.* court noted the evidence did not show any formal designation of the petitioners as guardians over the minor nor were the parent's parental rights ever terminated. *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 33, 976 N.E.2d 431. The petitioners did not provide any evidence suggesting the respondent waived or voluntarily relinquished her rights and granted the petitioners custody over the minor. *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 33, 976 N.E.2d 431. The petitioners also failed to establish a legal concept of a "constructive guardianship" over a minor. *Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 33, 976 N.E.2d 431.

¶ 29 Unlike in *Tatyanna T.,* the evidence did not show respondent was involved in many aspects of the minor's care and welfare. The trial court found respondent's time with A.D. had been "limited." Petitioners presented ample evidence they were the ones providing A.D.'s food, care, schooling, and shelter since respondent moved out of petitioners' home. Respondent even admitted she had never been involved in A.D.'s schooling and did not give petitioners money for A.D.'s needs, even when she received child-support payments for A.D. Petitioners' evidence respondent did not even contact A.D. on her birthday more than once was also uncontradicted. Respondent's own husband testified A.D. had only stayed overnight with them two or three times in the four years he and respondent had been married. The only real dispute was over who took care of A.D.'s medical needs. Moreover, it was undisputed A.D. had been living with petitioners since at least when respondent moved out of petitioners' home to marry Miller. Until a week before the hearing, respondent did not even have room for the minor in her home with Miller. Thus, again unlike *Tatyanna T.,* the evidence did not show petitioners' care for A.D. was temporary in nature. Even when respondent demanded to have A.D. back at the hospital in November 2014, A.D. did not stay with respondent full-time as A.D. testified she was shuffled back and forth between respondent's and Dannewitz's homes. Additionally, while the parent in *Tatyanna T.* repeatedly denied the nonparents' requests to grant them custody of the minor in a written document, no evidence was presented that had taken place in this case. Here, respondent's actions suggest she was happy with petitioners raising A.D. until something happened with A.D. that she did not like.

***7** ¶ 30 In this case, besides respondent's self-serving statements, the evidence overwhelmingly showed respondent by her actions had voluntarily relinquished physical custody. The trial court's finding to the contrary was against the manifest weight of the evidence. Accordingly, we find petitioners did have standing to bring their guardianship petition.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we reverse the Macon County circuit court's judgment and remand for further proceedings.

¶ 33 Reversed and remanded.

Presiding Justice POPE and Justice APPLETON concurred in the judgment.

All Citations

Not Reported in N.E.3d, 2015 IL App (4th) 150082-U, 2015 WL 3792905