ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
OCT - 7 2022
JOHN D. HADDEN
CLERK

IN THE MATTER OF THE GUARDIANSHIP OF B.D.B.:

STEPHEN TODD FRANZ and TISHA FRANZ,

Appellants,

vs.

BRIANNA BURTON,

Appellee.

Case No. 119,578

Rec'd (date) 10-7-22
Posted
Mailed
Distrib
Publish ___ yes X no

APPEAL FROM THE DISTRICT COURT OF
OKLAOHOMA COUNTY, OKLAHOMA

HONORABLE ALLEN J. WELCH, TRIAL JUDGE

AFFIRMED

Stephen Todd Franz
Oklahoma City, Oklahoma — *Pro Se*

Brianna Burton
DeSoto, Texas — *Pro Se*

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Stephen Todd Franz and Tisha Franz appeal a decision of the district court refusing to grant them a general or special guardianship over the minor child BDB. On review, we find this decision to be within the trial court's discretion and affirm.

BACKGROUND

The procedural history here is lengthy. Both parties have appeared *pro se* at times. The Franzes have also appeared through five different counsel and BDB's mother, Ms. Burton, through four.[1] The record provided on appeal does not begin until some eighteen months after the case was commenced. We piece together the following general background from the trial court's later orders and the associated docket sheet.

BDB was born eight to ten weeks premature in February 2014. He spent several months in the neo-natal intensive care unit (NICU). In December 2014, after his release from the hospital,[2] the DHS received a referral indicating that ten-month-old BDB had suffered "non-accidental trauma" at the hands of a caregiver while Burton was at work. DHS filed a deprived petition as Oklahoma County Case JD-2014-456. The father's parental rights were terminated, and BDB was placed in the foster care of the Franzes, where he remained until November 2017. At this time Burton and BDB, then three-and-a-half years old, were reunified after Burton completed an ISP, and the deprived proceeding was dismissed.

In July 2018, eight months after reunification, the Franzes filed a petition alleging that Burton was unfit as a parent because she was not taking care of

---

[1] Including various other counsel who appeared for specific purposes, the trial court counted a total of fourteen counsel appearing and withdrawing. Both parties are *pro se* on the appeal.

[2] The court noted in its order of May 6, 2020 that the period BDB was in the NICU is variously described as two, four, or six months in DHS records.

BDB's medical needs.[3] They asked to be appointed as BDB's general and special guardians. The Franzes initially succeeded in obtaining an emergency guardianship order without Burton's participation, but the trial court vacated this order two days later. The court appointed a guardian ad litem (GAL) for BDB.[4]

Shortly after the Franzes filed their petition seeking guardianship, Burton relocated with BDB to Texas. Burton stated that she did so, at least in part, to get away from what she perceived as harassment by the Franzes after reunification. On discovering this in November 2018, the Franzes filed a writ of habeas corpus seeking BDB's return, another request for emergency guardianship, and an "objection to relocation," apparently arguing either that Burton could not relocate with BDB without permission of the court, or that they had standing to object to Burton and BDB's move. The court denied these requests, finding that they were without any legal basis. Burton and BDB have been residents of Texas since approximately August 2018.[5]

---

[3] The Franzes had obtained BDB's post-reunification pharmacy records and calculated that the amount of anti-seizure medication Burton had picked up for BDB was substantially less than the amount prescribed.

[4] Much of the next year was devoted to increasingly virulent skirmishing between the Franzes and the GAL, who did not share the Franzes' assessment of BDB's best interests. This contentious relationship culminated in a contempt citation filed by the GAL, and a (*pro se*) request in the Franzes' pre-trial statement that the GAL should be investigated for "criminal activity."

[5] Because Burton and BDB were Oklahoma residents at the commencement of proceedings in July 2018, the court retained jurisdiction over this petition, although neither Burton nor BDB have been a resident of Oklahoma for almost four years now. It is clear that a new proceeding, if any, must be commenced in Texas. 43 O.S. § 551-201.

In February 2019, the Franzes submitted a *pro se* trial brief. The brief intermixes the statutory and common-law process for a deprived adjudication by the state with the grounds for a private party to seek a guardianship. The central theme of the petition was, however, that BDB required anti-seizure medication, and that Burton was failing to regularly administer that medication. The matter was tried in March of 2019, and the court subsequently denied the Franzes' petition for guardianship.

The Franzes filed a *pro se* motion to reconsider. The motion centered on an argument that certain medical records the court had considered had not been disclosed to them. Burton, also unrepresented at the time, did not appear or file an opposition and the court vacated its original decision. The proceedings continued, and the Franzes filed another motion seeking emergency guardianship, which was denied.[6] The matter was retried in April 2021. The court again denied the Franzes' guardianship petition. The Franzes appeal.

STANDARD OF REVIEW

This Court reviews questions regarding the appointment of a guardian for an abuse of discretion. *Matter of K.S.*, 2017 OK 16, ¶ 8, 393 P.3d 715, 717. An abuse of discretion occurs when the district court errs with respect to a pure, unmixed question of law or there is no rational basis in evidence for the ruling. *Id.*

---

[6] The docket sheet indicates that, after their original application, the Franzes filed some six additional motions seeking guardianship of BDB during the pendency of this case.

ANALYSIS

The primary basis of the Franzes' appeal concerns the trial court's refusal to consider an unanswered request for admission as conclusive.

The Franzes sent requests for admission to Burton asking her to admit or deny that BDB missed more than 150 doses of anti-seizure medication during a 250-day period after reunification. Burton did not reply. The Franzes argue that the court was therefore required to deem this an admitted fact pursuant to 12 O.S. § 3236(A). The Franzes then argue that, in light of this admission, the trial court abused its discretion in denying their guardianship application.

We find that this argument does not properly account for subsection (B) of the relevant statute, however. Subsection B is clear that "[a]ny matter admitted under this section is conclusively established *unless* the court on motion permits withdrawal or amendment of the admission." 12 O.S. § 3236(B) (emphasis added). The court notes in its order that it did so here, citing the rule of *White v. White*, 2007 OK 86, ¶ 7, 173 P.3d 78, 79.

White concerned a child custody case and a similar rule. District Court Rule 4(e) provides that an unanswered motion "may be deemed confessed." The mother in *White* argued that the allegations contained in an unanswered motion to modify custody from father to mother should be deemed confessed pursuant to Rule 4(e). The trial court did so and held that the "confessed" allegations demonstrated a material change of circumstances pursuant to *Gibbons*,[7] giving

---

[7] *Gibbons v. Gibbons*, 1968 OK 77, 442 P.2d 482, requires a party to show a "material change in circumstances" as a prerequisite to the court's consideration of whether modifying custody between parents would be in the child's best interests.

the court a basis to transfer custody to mother. The Supreme Court reversed, stating:

> [T]he best interests of the child must be a paramount consideration of the trial court when determining custody and visitation. The interests of judicial economy are by far secondary. Rule 4e was not intended to provide a mechanism for default judgment in a request for modification of child custody.

Id. ¶ 9 (citations and quotation marks omitted). The Court concluded:

> The trial court's rigid adherence to Rule 4e in this matter presents a particularly egregious abuse of discretion. In a custody dispute, the trial court's ultimate responsibility is to protect the best interests of the child throughout the judicial proceeding.

Id. ¶ 11.

Although the statutory rule relied on here is not District Court Rule 4(e), strict application of 12 O.S. § 3236(A) would have the same effect as the trial court's application of District Court Rule 4(e) in *White.* A default finding evidencing unfitness as a basis for transferring custody to a third party is at least as serious, if not more so, than a default finding of a "change of circumstances" justifying consideration of a change of custody between one parent and another. Courts have repeatedly cautioned that the right of parents to make decisions concerning the care, custody, and control of their children is fundamental. *Craig v. Craig,* 2011 OK 27, ¶ 21, 253 P.3d 57, 62; *Neal v. Lee,* 2000 OK 90, 14 P.3d 547; *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

We agree with the trial court's application of *White* and cannot find it abused its discretion in denying the Franzes' invitation to declare the requested admission conclusive. The trial court, following *White*, refused to "deem [the

mother's] failure to respond to discovery as a 'default mechanism' whereby [the Franzes] will be awarded guardianship and physical custody" without evidence.

The Franzes argue that this decision is in error because it "encourages parties not to participate in discovery, then rewards them for doing so."[8] Given the fundamental and constitutional underpinnings of the parent-child relationship, we cannot agree that these interests should be set aside by sanctions intended to encourage judicial economy or compliance with discovery. We find the court's decision properly reflects the law in this area, and the court did not err by refusing to find that the unanswered request for admission established uncontroverted fact.

The next question is whether any other issues are raised. The Franzes' brief is not specific whether they raise a theory *other* than that the court improperly refused to declare the unanswered request for admission constituted unchallenged fact. Although the brief appears to tie all the arguments to this alleged error, it *can* be interpreted as also alleging that the trial court's decision was not in the best interests of BDB, or without a rational basis, even absent any "admission" based in 12 O.S. § 3236(A). We will interpret it so.

Under Oklahoma law, the presumption is that a minor child's best interest "is served by placement with its natural parent in the absence of clear and

---

[8] The court did, in fact, impose significant sanctions on Burton for her failure to cooperate in discovery. The court granted the Franzes a motion in limine, which barred Burton from introducing any witnesses or evidence at trial. In the case of an allegedly intellectually disabled parent facing losing physical custody of her child, who was unrepresented at the time discovery was propounded, and was unrepresented at trial, we believe these sanctions were sufficient under the circumstances.

convincing evidence establishing that the parent is unfit." *In re Guardianship of M.R.S.*, 1998 OK 38, ¶ 14, 960 P.2d 357, 361. A third-party seeking custody must affirmatively, not comparatively, show the natural parent is unfit. *Ingles v. Hodges*, 1977 OK 18, ¶ 9, 562 P.2d 845, 846.

Paraphrasing their brief, the Franzes argue that 30 O.S. § 1-111 requires a guardian be appointed "to assure that the essential requirements for the health and safety of the person are met" and that the evidence clearly demonstrated that BDB's essential requirements for health and safety, in the form of the seizure medication, were not being met.[9] They next argue that, as this evidence overcame any presumption that Burton was fit, the court was required to order a guardianship.

A presumption is a "procedural tool" which compels "a conclusion of fact in the absence of evidence against the conclusion." *Bed Bath & Beyond, Inc. v. Bonat*, 2008 OK 47, ¶ 18, 186 P.3d 952, 956 (citing *Conaghan v. Riverfield Country Day School*, 2007 OK 60, 163 P.3d 557). Evidence sufficient to overcome the presumption that Burton is fit does not establish that Burton was unfit. It merely established that there was sufficient evidence of unfitness such that no presumption could be applied, leaving a disputed question of fact for the trial court to resolve.

---

[9] Title 30 O.S. § 1-111 technically states no "requirements." It is the "definitions" section of the Oklahoma Guardianship and Conservatorship Act, and states that a "'guardian of an incapacitated person' means a person who has been appointed by a court ... to assure that the essential requirements for the health and safety of the person are met, to manage the estate or financial resources of the person, or both."

The trial court resolved the disputed question in favor of Burton, and there was a rational basis in the evidence for the trial court's conclusion. In its orders, the trial court recognized that BDB has missed some doses of seizure medication. It noted that BDB's case had been referred to the Oklahoma DHS, but no action was found necessary. The report of the second GAL[10] notes that she had also referred BDB to Texas authorities for a "welfare check," and that no services had been recommended. The report also detailed that BDB had been under the care of a new primary care physician in Texas and been seen by a specialist on referral after suffering seizures in 2019. It noted that BDB's medication was increased after a seizure in March 2019, and no seizures had been reported since. The court also noted in its first order denying guardianship that there was no evidence of BDB experiencing seizures after 2019, and no evidence that Burton had failed to pick up prescriptions or administer medications since the dosage increase. The court noted that BDB is making "A's and B's" in school. It found that the "Petitioners have not established by clear and convincing evidence that the Respondent is unfit."

The court also engaged in a best interest analysis, noting "the trauma that this child would undoubtedly experience if he was uprooted from his mother's care, his environment and support system in Texas and placed with Petitioners, who have not seen this child in 3½ years." The court found this factor "outweighs concerns about Respondent's diligence about attending to his medical needs." It

[10] This is not the first GAL with whom the Franzes had a severe conflict, but a second GAL appointed later.

also noted that the Franzes would not be a likely first choice for guardians if Burton were found unfit, as they would be "essentially strangers" to BDB at this time.[11]

The trial court considered the issues closely and produced two detailed orders. An abuse of discretion in a guardianship proceeding occurs when the district court errs with respect to a pure, unmixed question of law or there is no rational basis in evidence for the ruling. We find no error pursuant to that standard.

CONCLUSION

It appears that the Franzes desire to reverse the reunification and feel that BDB would be better off if he had remained in their care. Even if this were true, comparative advantage alone is not a basis to impose a guardianship or restrict the fundamental right of parents to make decisions concerning the care, custody, and control of their children. We affirm the decision of the district court.

AFFIRMED.

WISEMAN, P.J., and HIXON, J. (sitting by designation), concur.

October 7,2022

---

[11] BDB was removed from Burton's care at ten months and was three-and-a-half years old upon reunification. At the time this opinion issues, he will be eight.