

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

IN RE GUARDIANSHIP OF ANDREW K.

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IN RE GUARDIANSHIP OF ANDREW K., A MINOR CHILD.

AMANDA K. AND ROGER K., APPELLANTS,

V.

ED F. AND GAY F., APPELLEES.

Filed September 23, 2008. No. A-08-137.

Appeal from the County Court for Scotts Bluff County: G. GLENN CAMERER, Judge.
Affirmed.

Audrey M. Elliott, of Kovarik, Ellison & Mathis, for appellant.

Jerald L. Ostdiek, of Douglas, Kelly, Ostdiek & Bartels, for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

I. INTRODUCTION

The biological parents of Andrew K. filed a petition to terminate a guardianship for the child. The county court denied the petition after finding the parents to be unfit and ordered visitation to be supervised. Because we find competent evidence to support the county court's judgment, we affirm.

II. BACKGROUND

Amanda K. and Roger K. are the biological parents of Andrew, born in January 2002. Amanda is the custodial parent of two other children: a daughter from a previous marriage, born in March 1996, and a daughter born to Amanda and Roger in May 2000. Ed F. and Gay F. are the children's maternal grandfather and stepgrandmother, respectively. In February 2004, Ed and Gay filed a petition for appointment of a guardian for Andrew. Amanda and the child's paternal

grandparents agreed to the appointment of the guardians. In June 2004, the court appointed Ed and Gay as the child's guardians and placed the child's care, custody, and control with the guardians.

On August 31, 2007, the parents filed the operative petition to terminate the guardianship. The court conducted a trial on January 4, 2008. At that time, the child was nearly 6 years old.

The parties disputed the reasons for the establishment of the voluntary guardianship. Amanda explained that she was "a single mother" of three children due to Roger's incarceration. She had just obtained employment and was paying \$1,200 per month in daycare, but was "cut off" from financial help from social services. The child was having medical problems which caused Amanda to miss work, and she was in danger of losing her job. Amanda testified that Gay told her that Gay could miss work to take the child to the doctor and provide for medical and daycare expenses if Gay had a guardianship of the child.

Ed testified that the guardianship was established because Amanda was dating somebody other than Roger and because Amanda did not like some of Roger's behavior toward the child due to Roger's doubts that he was the child's father. Ed testified that Amanda approached the guardians about taking the child before Roger's release from prison in order to protect the child from Roger. Ed expressed concerns about Roger's violence, and he testified that Roger had kicked the back of Ed's leg, causing the meniscus on Ed's knee to tear. On cross-examination, Amanda admitted that Ed's concerns about the child's safety were also a reason for the guardianship.

Amanda sought termination of the guardianship because she believed that the reasons for the guardianship had been alleviated. She explained that she is no longer a single mother, that the parents have the means to support the child, and that they do not need daycare. Roger wanted the guardianship terminated because he loves the child and thinks that the child should be with his parents and sisters, with the guardians acting as grandparents rather than parents.

Amanda's aunt has had frequent contact with Amanda and Amanda's daughters since April 2006. Amanda's aunt articulated concerns about the parents' smoking in the children's presence and the children's lack of quality nutrition. Amanda's aunt testified that Amanda was motivated to seek termination of the guardianship due to a comment made by Gay at a family funeral. Amanda's aunt testified that Amanda told her in the summer of 2007 that Amanda was going to try to regain custody of the child or put him up for adoption because the emotional turmoil was too difficult for her.

The court received evidence about Roger's criminal history. None of his convictions involved child abuse, sexual abuse, or physical violence to Amanda or the children. The court also received evidence about the parents' tumultuous relationship. We set forth this evidence in greater detail in the analysis.

In August 2006, Amanda began seeing a counselor. Amanda testified that she and Roger are working on parenting and marital issues together with the counselor and that Amanda had completed a parenting course. Roger testified that he was not working on parenting issues with the counselor at the time of trial. Roger testified that he had voluntarily taken anger control classes; Amanda testified that Roger had not had anger treatment in the last 3 years.

The testimony established that the parents have moved on several occasions, but none of the moves were due to evictions. Amanda's daughters had attended six schools in 6 years, and Amanda testified that she had at least five residences in 2007.

Ed had concerns about the child's returning to his parents' care. His concerns included the parents' irregular visits, instability, and inability to stay at one location for very long. Ed did not want the child to be in the parents' presence when the parents argued. He was concerned about the child's safety and well-being while in the parents' care. Ed testified that in the past, Amanda had told him she was concerned about Roger's hitting her or fighting with her in front of the children. Ed also disliked that the parents smoked in the child's presence.

The court found by clear and convincing evidence that the parents were not fit and that it was in the child's best interests to remain with the guardians. In explaining the court's conclusion, it stated:

There's a lot of criminal behavior on the part of [Roger]. He acknowledges he has a very bad record. There's domestic violence in this case. There's protection orders. . . . This is a family which lives in periodic chaos. There's a lot of dysfunction shown here. There's multiple moves, lack of stability, the domestic violence issue that I mentioned. Lots of criminal behavior in the past.

The court ordered supervised visitation every Saturday.

The parents timely appeal.

III. ASSIGNMENTS OF ERROR

The parents assign that the county court erred in three respects. First, they allege that the court erred in determining that the parents were unfit and in denying termination of the guardianship. Second, they contend that the court erred in admitting evidence of Roger's crimes and the protection orders against him. Finally, the parents allege that the court erred in ordering supervised visitations between them and their child.

IV. STANDARD OF REVIEW

An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court. *In re Guardianship & Conservatorship of Cordel*, 274 Neb. 545, 741 N.W.2d 675 (2007). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

V. ANALYSIS

1. EVIDENCE OF CRIMES AND PROTECTION ORDERS

The parents contend that the court abused its discretion in admitting evidence of crimes which were committed and protection orders which were applied for prior to the guardianship.

In order that assignments of error concerning the admission or rejection of evidence may be considered, an appellate court requires that appropriate references be made to the specific evidence against which an objection is urged. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). It is not the function of an appellate court to scour the record looking for unidentified evidentiary errors. *Id.* In support of the parents' argument, their brief points to three

consecutive pages in the bill of exceptions. Accordingly, we consider only the parents' objection contained within those pages. The pages identified by the parents show that the guardians offered an exhibit containing Amanda's 1999 petition and affidavit to obtain a protection order against Roger along with other documents related to that petition. The parents' counsel objected, stating, "It's not relevant to the time frame in which the guardianship is in place. It's from 1999. This guardianship is from 2004 forward." The court overruled the objection and received the exhibit "for the limited purpose of establishing the ongoing problem which -- with history predating the time of the guardianship."

Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *In re Guardianship of Robert D.*, 269 Neb. 820, 696 N.W.2d 461 (2005). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.* Although Amanda applied for the protection order at issue before the child's birth, the fears she expressed about Roger are certainly relevant to parental fitness. We conclude the court did not abuse its discretion in admitting the exhibit.

In our review of the record, we also observe that during direct examination, the parents' counsel asked both Amanda and Roger about Roger's criminal history. It is a well-established principle that a party cannot complain of an error which that party has invited the court to commit. *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001). Because the parents' counsel first elicited testimony of Roger's criminal history, the parents cannot claim error from the trial court's admission of such testimony.

2. PARENTAL UNFITNESS

The parents argue that the county court erred in denying their petition for termination of the guardianship based on the court's finding of parental unfitness.

This court recognizes, as did the county court, the parental preference principle. The parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent. *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). Under the principle, a parent has a natural right to the custody of his or her child which trumps the interest of strangers to the parent-child relationship and the preferences of the child. *Id.* An individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent is unfit or has forfeited his or her right to custody. *Id.* Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent. *Id.*

The parents claim that their financial problems were the reason for the guardianship and that they no longer have such problems. They also claim that problems prior to the guardianship are in the past. To contrast the circumstances of the parties before the pendency of the guardianship, during such pendency, and after establishment of the guardianship, we set forth below the evidence as it fits within those three timeframes.

(a) Prior to Petition for Appointment of Guardians

Ed testified that before the child was 1 year old, Amanda would call the guardians to check on the child while she worked and Roger stayed home, and the guardians would ultimately take the child home with them. Ed testified that the guardians have had continuous full-time placement of the child since the child was 1½ years old.

Roger had been convicted of a number of crimes prior to the child's birth. He testified that he had been charged with breaking and entering three times. Roger's first felony conviction was in 1994 for breaking and entering, and he was put on probation. Roger testified that he violated probation but did not go to jail for the violation. A couple of years later, he was again convicted of breaking and entering and placed on probation. In 1998, Roger was charged with possession of a controlled substance, methamphetamine. The court found Roger guilty and sentenced him to 21 days in jail. Roger denied using drugs. In 1999, a jury convicted Roger of criminal mischief after he dented another person's vehicle, and the court sentenced Roger to 1 to 3 years' incarceration. In late 2001, Roger was arrested for stealing an automated teller machine. Based upon that incident, Roger was convicted of attempted burglary and, in July 2003, a court sentenced Roger to 1½ to 3 years' incarceration, which Roger served from July 2003 to July 2004.

The court received information about protection orders Amanda requested against Roger. Amanda testified that none were "for a full year," and Roger testified that he had only been served with one protection order. Amanda filed a petition for a protection order in July 1999 and stated in the affidavit that following an argument and Amanda's locking Roger out of the house, Roger kicked in the door and almost broke the chain on the door while Amanda was inside with one of her children. Amanda wrote that her daughter was "scared and upset" and that Amanda "fear[ed] for the safety of my three-year old daughter, for myself, and for my unborn child." In 2000, Amanda obtained a protection order, which Roger violated.

Amanda denied verbal abuse by Roger, but the record contains evidence to the contrary. She testified that in January 2000, Roger threw keys at her, raised his voice, and stole her compact discs. In February 2001, Roger punched Amanda in the mouth. In October 2001, Amanda filed for divorce. In May 2003, Amanda and Roger had a confrontation during which Roger caused the side window of a car to break by slamming the car door. Amanda testified that before Roger's sentencing in July 2003, Roger treated her and the children "horrible." She testified that he said in front of her daughters that he wished he never had children and he called Amanda a horrible mother. Roger did not recall making those statements.

(b) Period During Pendency of Proceedings

Roger was incarcerated during the pendency of the guardianship proceedings. Ed testified that sometime in 2004 while Roger was incarcerated, Amanda called Ed and asked him to come to her house because Amanda was beating one of her daughters with a hanger and did not think she could stop. When Ed got to Amanda's home, he observed the daughter crying and saw "marks on her back end."

(c) Period After Appointment of Guardians

Roger remained incarcerated until approximately 1 month after the appointment of the guardians. In 2006, he served 1 day in jail for issuing an insufficient funds check. Ed testified that Amanda told him that Roger stole copper wire from construction sites in July 2007.

In March 2006, Amanda filed for a protection order, but it was never served on Roger. In the written request for the protection order, she stated that Roger had twisted her arm and threatened to burn down her house. Amanda stated in the affidavit that she did not believe Roger would deliver “empty threats” any more and that she feared for herself and the children. At the instant trial, Amanda testified that she filed the protection order due to “stupidity” following a verbal argument where bad things were said, but that the argument was outside the children’s presence. She explained that “if a protection order can be served on him and he can’t have any contact with me for a year, then we won’t get back together and maybe stay apart. But I love Roger, he loves me. We always end up getting back together.”

Amanda filed for divorce in August 2004, and she obtained an order excluding Roger from the marital home. The complaint was not served on Roger. Ed and Walker both testified that in July 2007, Amanda told them she wanted to divorce Roger. Amanda denied making the statement and testified that she did not want to divorce Roger. She testified that Roger told her that she will never get divorced and that he will not let her live without him. The parents lived separately from approximately December 2006 to May 2007. But a social services worker with the Nebraska Department of Health and Human Services testified that when Amanda requested aid in 2006, Amanda wrote in the application that she was living with only her daughters and that it was not until September 2007 that Amanda informed the worker that Roger was living with them. Amanda testified that she had at least five residences in 2007.

Amanda requested State aid in 2006. In February 2007, the State, on behalf of Amanda and the parents’ daughter, filed a complaint against Roger to establish child support for the daughter. Amanda testified that at the time of trial, she had been working for the past 2 months, earning \$7 per hour. Roger testified that he had maintained steady employment since his release from prison. At the time of trial, he was working for a cattle company and earning \$14.50 per hour.

(d) Discussion on Parental Fitness

First, we emphasize that we have not engaged in an improper comparison of the guardians’ household versus the household of the parents. See *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998) (fact that person outside immediate family relationship may be able to provide greater or better financial care or assistance for child than can parent is insufficient basis to deprive parent of right to child custody).

The parents sought to terminate the guardianship upon the basis that the reasons for it had been alleviated. However, the evidence of the circumstances following the establishment of the guardianship does not support that contention. Roger and Amanda lived separately from at least December 2006 to May 2007; in that sense, Amanda was again acting as a “single mother.” And Amanda’s application for State aid certainly gives the appearance that she and Roger were still having financial problems. But a court cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems. *Gomez v. Savage, supra*.

In the case before us, the parents have not forfeited their right to custody of the child. The critical issue is whether the guardians established by clear and convincing evidence unfit on the part of Amanda and Roger. Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being. *In re Guardianship of Cameron D.*, 14 Neb. App. 276, 706 N.W.2d 586 (2005).

The evidence shows an unstable marital relationship between the parents. The parents' brief points out that their marriage has not been dissolved, but the evidence certainly does not lead to a firm belief that the marriage will, or should, continue. The frequent changes in residences and schools are also a concern. We recognize that Roger has been, for the most part, law abiding since his July 2004 release from incarceration. Although at trial Amanda denied any verbal abuse by Roger, her sworn statements in affidavits for protection orders contradict her denials. It is most alarming that, as late as March 2006, Amanda expressed fear for herself and the children in seeking a protection order against Roger. As we often state in a different context, "[A] court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child." *In re Interest of Anthony V.*, 12 Neb. App. 567, 583, 680 N.W.2d 221, 233 (2004) (quoting *In re Interest of S.L.P.*, 230 Neb. 635, 432 N.W.2d 826 (1988)). At this time, the parents continue to have personal deficiencies which will probably prevent them from performing reasonable parental obligations and which will probably result in detriment to the well-being of the child. We find competent evidence in the record to support the county court's finding of parental unfitness. We also emphasize that the guardianship is no more than a temporary custody arrangement and subject to termination in the future. See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004).

3. SUPERVISED VISITATIONS

The parents argue that the court erred in ordering that their visitation with the child be supervised. The court ordered supervised visitation every Saturday from 2 to 5 p.m. and explained, "I make this order because I am concerned about the safety of this child and I think it is necessary."

In a question about visitation, a parent's rights are not absolute but must yield to the best interests of the child. *Nielsen v. Nielsen*, 217 Neb. 34, 348 N.W.2d 416 (1984). When in the child's best interests, limits on visitation--an extreme measure--may be warranted. See *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001). As discussed above, the evidence shows an unstable relationship between the parents and fears expressed by Amanda about the safety of herself and the children around Roger. We conclude that based upon the trial record concerning the situation at that time, the court's order of supervised visitation is supported by competent evidence.

VI. CONCLUSION

We conclude that competent evidence supports the county court's finding that due to the parents' temporary unfitness, the guardianship should not be terminated at this time. We also find support in the evidence for the court's order that visitation should be supervised.

AFFIRMED.