

DIVISION II

CA08-710

March 11, 2009

GREGORY WORLEY & DEBBIE
WORLEY
APPELLANTS

APPEAL FROM THE LONOKE
COUNTY CIRCUIT COURT
[PR-2004-23]

V.

HONORABLE BARBARA ELMORE,
JUDGE

CALVIN SPRADLIN & MELBA
SPRADLIN
APPELLEES

AFFIRMED

In January 2004, Karissa Spradlin, then twenty-one months old, lost her mother, Khara, in a motor-vehicle accident; Karissa was injured in the accident that took her mother's life. On February 3, 2004, Karissa's paternal grandparents, appellees Melba and Calvin Spradlin, with the consent of their son and Karissa's father, Rodney, petitioned for appointment of guardianship of the person of Karissa. Rodney Spradlin signed the consent for guardianship on the day of Khara Spradlin's funeral while he was on leave from the Arkansas Department of Correction to attend the funeral.¹ The Spradlins did not tell

¹Rodney Spradlin was incarcerated on drug charges at the time of Khara's death; however, he is now out of prison, has supervised visitation with Karissa with supervision being provided by Melba Spradlin, and will not have unsupervised visitation until he has a negative hair-follicle drug test and two monthly negative urine tests thereafter. The trial court found that Melba Spradlin "was appropriate and protective and safeguarded the child in the past and can be trusted to do so in the future." This finding was specifically made in response to appellants' argument regarding an altercation that Melba and Rodney had when Melba would not allow Rodney to take Karissa with him to Hot Springs because Melba did not approve of the circumstances surrounding the trip. Appellants attempted to use this

appellants, maternal grandmother Debbie Worley and her husband Greg Worley, that they had filed for guardianship. The order appointing the Spradlins guardians of Karissa was entered on February 10, 2004, and the Spradlins accepted the appointment of guardianship on February 13, 2004.

Several years later, on August 14, 2007, the Worleys filed a motion for leave to intervene, arguing that they had equally shared care and responsibility for Karissa with the Spradlins immediately after Khara's death; that the Spradlins had not provided notice to them of the guardianship or of their intent to seek a guardianship; that the consent of the father was obtained while he was incarcerated, only four days after Khara's death; and that the Spradlins had engaged in conduct—alleging a superior right to the care, control, custody, and supervision of Karissa—that was against her best interests. The Worleys requested that they be allowed to intervene and to fully participate in the proceeding so that they could protect Karissa's best interests. In this motion, the Worleys asserted various reasons as to why they believed that it was in Karissa's best interests for them to be her guardian. The trial court granted the motion and allowed them to fully participate in a hearing on the issue of whether guardianship should remain with the Spradlins or be changed to the Worleys. After a full hearing, the trial court, at the request of the Spradlins, removed Calvin Spradlin as a guardian because he was a convicted felon (while his 1988 negligent-homicide conviction had been expunged in 1991, he had not been pardoned). But the trial court continued Karissa's guardianship with Melba Spradlin.

altercation to bolster their argument that Melba Spradlin was not an appropriate guardian.

The Worleys now appeal this decision, contending that the trial court erred (1) when it failed to remove Melba Spradlin as Karissa's guardian because their notice and due-process rights were violated by the guardianship appointment; (2) when it failed to grant their motion for substitution of guardians by relying upon an incorrect standard for the appointment of guardianship; (3) when it denied their motion for removal of Melba Spradlin as guardian and their substitution as guardians; and (4) when it left the guardianship with Melba Spradlin, which ran afoul of the legislative intent behind Arkansas statutory law. We affirm the trial court's decision.

Proceedings in probate are reviewed *de novo*, but a trial court's decision will not be reversed unless it is clearly erroneous, meaning that the reviewing court is left with a definite and firm conviction that a mistake has been made. *Jones v. Scott*, 92 Ark. App. 85, 211 S.W.3d 46 (2005). When reviewing the proceedings, we give due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Id.* While appellate courts will not set aside a trial court's findings of fact unless they are clearly erroneous, the same deference is not afforded to a trial court's conclusions of law. *Freeman v. Rushton*, 360 Ark. 445, 202 S.W.3d 485 (2005).

Notice/Due Process

The Worleys' first argument is that the trial court erred when it failed to remove Melba Spradlin as Karissa's guardian because their notice and due-process rights were violated by the guardianship appointment. They contend that they were entitled to notice of the Spradlins' petition for guardianship under Ark. Code Ann. § 28-65-207(b)(4) (Repl. 2004),

which provides that “notice of the hearing of the application for the appointment of the guardian shall be served upon . . . [a]ny other person who is the guardian of the person or of the estate of the alleged incapacitated person, *or any other person who has the care and custody of the alleged incapacitated person*, and the director of any agency from which the respondent is receiving services.” (Emphasis added.) The Worleys argue that they should have been given notice under this subsection because after the death of Khara, Debbie Worley moved from Missouri to Arkansas, and that when Karissa was released from the hospital, Debbie helped care for her daily in the Spradlins’ home; therefore, they had care and custody of Karissa and were entitled to notice.

Even if the Worleys should have been given notice at the time the guardianship was entered in February 2004, this point was rendered moot when the trial court allowed them to intervene, *over three years later*, when Karissa was about to start school and the Worleys wanted her to attend a private school in Hot Springs. A full hearing was held on the issue of whether the Spradlins should remain as Karissa’s guardians or if guardianship should be changed to the Worleys. By Debbie Worley’s own admission she had known of the entry of guardianship since at least March 2004. The Worleys cite *Dyer v. Ross-Lawhon*, 288 Ark. 327, 704 S.W.2d 629 (1986), for the proposition that persons objecting to the guardianship are entitled to put on evidence in opposition to the person seeking the guardianship appointment, and the denial of the opportunity to cross-examine witnesses and put on evidence was a denial of due process of law. The Worleys were not denied due process because they were given a full and complete hearing and were able to put on evidence and

cross-examine witnesses when they finally elected to challenge the guardianship more than three years after they first learned of it.

Standard of Appointment/Best Interests

The Worleys' second and third arguments are intertwined. Their second argument is that the trial court relied upon an incorrect standard for the appointment of guardianship of the person when it did not grant their motion for substitution of guardian. They contend that the trial court based its decision on the change-of-custody standard of whether or not there had been a material change in circumstances rather than the guardianship standard of the best interests of the child. The Worleys' third argument is that if the best interests of the child are examined, the trial court's denial of their motion to remove appellee Melba Spradlin as guardian and substitute them as Karissa's guardians was clearly erroneous. Under this point, they present a list as to why they are better qualified to be Karissa's guardians than Melba Spradlin. The Worleys also contend that appellee Melba Spradlin was unsuitable to be Karissa's guardian because she knowingly represented to the trial court that she and Calvin Spradlin were qualified to serve as guardians when she was aware of Calvin Spradlin's felony conviction.

Prior to appointing a guardian, the trial court must determine: (1) the person for whom a guardian is sought is either a minor or otherwise incapacitated; (2) a guardianship is desirable to protect the interests and needs of the incapacitated person; and (3) the person to be appointed as guardian is qualified and suitable to act as such. Ark. Code Ann. § 28-65-210 (Repl. 2004). Arkansas Code Annotated section 28-65-204(b)(1) (Repl. 2004) provides that

the court shall appoint as guardian the one most suitable and willing to serve, “having due regard to [a]ny request contained in [a] written instrument executed by the parent . . . of a minor child for the appointment of a person as guardian of the minor child.” “Where the incapacitated person is a minor, the key factor in determining guardianship is the best interest of the child.” *Blunt v. Cartwright*, 342 Ark. 662, 669, 30 S.W.3d 737, 741 (2000).

Citing *Jones v. Scott, supra*, the Worleys argue that here, as in that case, the trial court erroneously based its decision on a change-of-circumstances standard rather than the best interest of the child. In support of this argument, the Worleys point to the trial court’s statements at the close of the hearing, where the judge stated, “I haven’t seen anything that would cause this Court concern to change the guardianship from Ms. Spradlin. . . . I have seen nothing that has caused me concerns about the home that she lives in. The doctor couldn’t tell you any concerns.” The Worleys argue that these statements indicate that the trial court was looking for a change in circumstances, which was the improper standard to employ in the context of a guardianship. But they ignore the statements by the judge from the bench wherein she stated, “Ms. Spradlin being [Karissa’s] guardian is in her best interest, and the fact that the Worleys visit is in her best interest also. . . . I know I’m not going to make everybody happy here today. That’s the nature of my job. My job is to make sure that this child’s best interest is served.” Furthermore, the judge requested input from the attorney *ad litem*, who was of the opinion that it was in Karissa’s best interest for guardianship to remain with the Spradlins, with visitation for the Worleys. Additionally, the trial court was statutorily required to take into account the wishes of the minor’s parent; here, Rodney

Spradlin clearly indicated in the consent to guardianship that it was his desire for his parents to be appointed as Karissa's guardians. Finally, in the order denying a transfer of guardianship, the trial court held, "Petitioners [Worleys] have not met their burden of proof and the Court has not been presented with evidence sufficient to convince the Court to set aside the guardianship vested in Melba Spradlin and finds that it is, and continues to be necessary and in the best interest of the minor child." We hold that the trial court made its determination of guardianship based upon the proper standard of the best interests of the minor child.

The Worleys' above-mentioned list as to why they believe it is in Karissa's best interest for them to have guardianship rather than Melba Spradlin included the assertions that they have a safer and more stable home environment; that the Spradlins' health is not conducive to permanent care of a young child; that they have more time to devote to Karissa than does Melba Spradlin because Melba Spradlin works and Debbie Worley does not; that they are more financially responsible and better able to provide for Karissa; that they are better able to promote Karissa's educational opportunities; that the conditions on Karissa's visitation with her father were unrealistic and that Melba Spradlin would be unable to deny her son access to his daughter if he did not meet the requirements for his visitation; and that Melba Spradlin was unsuitable to serve as guardian because she was untruthful (when she knowingly represented to the trial court that she and her husband were qualified to serve as guardians while she was aware of Calvin's felony conviction). We do not find these arguments persuasive.

Our court's opinion in *Jones v. Scott* appears to be the basis for most of these arguments, none of which we find to be persuasive in this case. While the Worleys asserted that the Spradlins had moved several times since the guardianship was entered, there was no evidence that any of the residences were not appropriate for Karissa. The Worleys complained that the Spradlins lived by fields that were sprayed with pesticides and near a bayou where alligators might live; however, there was no testimony that Karissa was adversely affected by the pesticides, and there was testimony from an Arkansas Game and Fish Commission field agent that no alligator had ever been seen in that bayou. The Worleys expressed concern about Karissa riding a four-wheeler without a helmet and with an eight-year old cousin while at the Spradlins, but there was also testimony that the Spradlins now made the children wear helmets, and the trial court ordered that the proper safety equipment be utilized in activities, as well as ordering that there be no riding four-wheelers without an adult.

While the Spradlins have had some health issues, there was no testimony that any of those issues would prohibit them from taking care of Karissa. There was testimony that the Spradlins had experienced financial troubles in the form of bankruptcy as a result of hospital bills; however, there was no evidence that Karissa ever went without anything that she needed while she has been in the care of the Spradlins. There was testimony that Karissa was doing well in public-school kindergarten, and that she was cared for after school until Melba got off work. Although Debbie Worley testified that it was her belief that she and her husband were in a better position to take care of Karissa because they had more money, stated plainly, just because the Worleys may have more money than the Spradlins and can provide

more “things” does not equate to it being in Karissa’s best interest for the Worleys to be her guardians.

We find no merit in the argument regarding Karissa’s visitation with her father because there was testimony that Melba Spradlin prevented her son from taking Karissa with him when Melba believed it was not in Karissa’s best interest. Likewise, we find no merit in the argument that Melba is unfit to serve as guardian because she represented to the court that she and Calvin were qualified to serve as guardians even though he was a convicted but unpardoned felon. Calvin’s record had been expunged, and the Spradlins were under the belief that he was qualified to be a guardian with the expungement. When they learned that a felon had to be pardoned in order to be a guardian, they requested that the trial court remove Calvin as a guardian while they proceeded with the process of obtaining a pardon. Though a mistake, we find that there was no fraud perpetrated upon the court by the Spradlins, as the Worleys asserted.

Neither were the Worleys without their own flaws. Melba Spradlin was taking anti-depressants, which was one of the things the Worleys pointed out under their argument regarding the Spradlins’ health, but Debbie Worley was taking anti-depressant medication as well. Immediately before they filed for a change of guardianship, the Worleys made what were later determined to be false sexual allegations against Calvin Spradlin, forcing Karissa and Calvin’s other two grandchildren to temporarily leave the residence. And by their own testimony, the Worleys waited over two years after learning of the alleged “abuse” before they filed the allegations, and they did not confront the Spradlins, who had guardianship of

Karissa, about their concerns until they decided to seek guardianship of Karissa for themselves. These types of allegations are more disturbing than a bankruptcy filing or working during the day.

Karissa is a well-adjusted kindergartener who is by all accounts flourishing in the Spradlins' home, the only home that she has known since she was twenty-one months old. We hold that the trial court's decision to leave guardianship with Melba Spradlin is not clearly erroneous.

Convicted and Unpardoned Felon²

The Worleys' last argument is that the trial court's decision to leave the guardianship with Melba Spradlin runs afoul of the Arkansas General Assembly's legislative intent. Arkansas Code Annotated section 28-65-203(a) (Supp. 2007) provides that to be qualified to be appointed guardian, a person must be a resident of this state, eighteen years of age or older, and not a convicted and unpardoned felon. The Worleys argue that the trial court's decision to allow Melba Spradlin to remain as guardian while Calvin Spradlin remained in the house and continued to act as a *de facto* guardian was in direct conflict with the legislature's prohibition on convicted and unpardoned felons serving as guardians. However, as the Spradlins point out, they asked at the beginning of the hearing that Calvin Spradlin be removed as a guardian until the time he was granted a pardon (which he was in the process of trying to obtain), and the appellants made no objection. Furthermore, when the trial court

²We do not address whether a person with an expunged record remains a "convicted felon" for the purposes of Arkansas Code Annotated section 28-65-203(a).

determined at the close of the hearing that it was in Karissa's best interest for Melba Spradlin to remain as Karissa's guardian, the Worleys made no objection on the basis that they now argue on appeal. Arguments not raised before the trial court will not be considered for the first time on appeal. *Slaton v. Slaton*, 330 Ark. 287, 956 S.W.2d 150 (1997). There is no evidence that Melba Spradlin was a convicted and unpardoned felon; therefore, she was qualified to serve as guardian. Calvin Spradlin was removed at the Spradlins' request as a guardian due to the fact that he had not been pardoned, although his 1988 negligent-homicide conviction was expunged in 1991. In its order, the trial court specifically found no concern regarding the fitness of Calvin Spradlin and did not restrict his involvement or contact with Karissa. These are credibility determinations, and the trial court was in the best position to make those determinations.

Affirmed.

HART and HENRY, JJ., agree.