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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA12-371

	Opinion Delivered December 5, 2012
ROBERT HARVILL APPELLANT	APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NO. PR-2011-113-1]
V.	HONORABLE BOBBY McCALLISTER, JUDGE
DALE BRIDGES AND TAMMY BRIDGES APPELLEES	REVERSED

JOHN MAUZY PITTMAN, Judge

This is an appeal from an order granting appellees unsupervised visitation with their three minor grandchildren one weekend per month and one week during the summer. We reverse and vacate the visitation order.

On appeal, we give due deference to the superior opportunity of the trial court to view and assess the credibility of the witnesses, *Bethany v. Jones*, 2011 Ark. 67, 378 S.W.3d 731, and we will reverse a finding by a circuit court only if it is clearly erroneous. *In re Adoption of J.P.*, 2011 Ark. 535. A finding of fact is clearly erroneous when, despite supporting evidence in the record, the appellate court, viewing all of the evidence, is left with a definite and firm conviction that a mistake has been committed. *Id.* After reviewing this record, we are left with such a definite and firm conviction.

The record shows that appellant is the father of three minor children, ages eight, seven, and four at the time of the hearing. Appellees are the maternal grandparents of those children.

Appellees' daughter, the children's mother, had resided with the children in appellees' home briefly after she and appellant had amicably decided to obtain a divorce, but moved out of appellees' home with the children after friction developed between her and appellees over how the children should be parented. Subsequently, the children's mother received a telephone call from her sister asking if the children could spend the night at appellees' home for a farewell visit with a cousin who was moving out of state. She agreed to let the children spend the night. Within hours, appellees had obtained an ex parte order appointing them as guardians and granting them custody of the children.

Appellees obtained this order based on an affidavit stating that both their daughter and appellant were unfit parents. They stated in the affidavit that appellant was a habitual drug user, had failed to feed the children, and had subjected the children to extreme environmental neglect. Appellant consented to submit to a drug test and to allow appellees to test his house for mold and lead paint. Appellant passed all five drug tests that were administered, including a fingernail test that could detect if the subject had used drugs in the preceding six months. When the tests on his home revealed only the presence of mold, appellant obtained a suitable apartment and demonstrated that it was well stocked with food. Despite these actions, appellees continued to insist that appellant was unfit and sought to continue the guardianship permanently and retain custody of the children. In the alternative, they pled for an award of grandparent visitation should their request to be appointed guardians be denied. After a hearing, the trial court denied the guardianship request and returned the children to appellant.

However, the court granted appellees grandparent visitation pursuant to Ark. Code Ann. § 9-13-103 (Supp. 2011). This was clear error.

Section 9-13-103(c) establishes a rebuttable presumption that a custodian's decision denying or limiting grandparent visitation is in the best interest of the child. To rebut this presumption, a petitioner must prove that (1) the petitioner has the capacity to give the child love, affection, and guidance; (2) the loss of the relationship with the petitioner is likely to harm the child; and (3) the petitioner is willing to cooperate with the custodian if visitation with the child is allowed. We hold that appellees failed to rebut this presumption because the evidence is insufficient to show either that appellees' relationship with the children had been lost or that the appellees were willing to cooperate with appellant if visitation were allowed.

In order to establish a loss of a relationship under the statute, the petitioner must demonstrate that the relationship between grandparents and grandchild "had been lost or would be lost." *See Oldham v. Morgan*, 372 Ark. 159, 271 S.W.3d 507 (2008). Thus, if there is a relationship in existence that, while limited, has not been lost, and if there is no evidence that the relationship would be lost were grandparent visitation not established by the court, a grandparent's petition for visitation is premature. *See In re Adoption of J.P.*, 2011 Ark. 535. Here, there was no evidence of a loss of relationship as required by the statute because visitation had merely been limited rather than denied. It is undisputed that appellant allowed the appellees to visit the children for several hours each month before the filing of their petition for grandparent visitation. Appellees admitted at trial that they had not been precluded from visiting the children by appellant and that appellant had never told them that

they would not be allowed to visit the children in the future. Appellees, then, were not seeking visitation with their grandchildren per se, but instead sought an order increasing the amount of visitation that appellant was currently granting them and prohibiting appellant from being present during such visitation. Because appellees did not prove that they had been denied visitation, they failed to prove the loss in relationship necessary to satisfy the statute.

Our decision to reverse the order of grandparent visitation in the present case is equally based upon appellees' failure to show that they could and would cooperate with appellant were visitation allowed. Upon reviewing the record, we are convinced that the actions of the petitioners in this case unequivocally show that they will not cooperate with appellant but instead will be satisfied with nothing less than control over the children. Even when faced with negative drug tests, they continued to assert at the visitation hearing that appellant somehow faked the results. Appellant testified that his primary concern with permitting appellees to have unsupervised visitation is that they would continue to undermine his authority as parent and relationship with his children. The evidence indicates that this is precisely what appellees would do. The trial judge himself appears to have believed this to be a distinct possibility, insomuch as his order expressly allowed the parties to record their conversations with each other regarding the children. That the children think so, too, is shown by the fact that, when meeting with appellees' expert social worker, one of the older children cried and expressed fear that appellees would again take the children away from their father. We hold that the trial court's finding that appellees were willing to cooperate with appellant if visitation was allowed was clearly erroneous.

Reversed.

ABRAMSON and MARTIN, JJ., agree.

Jensen Young & Houston, PLLC, by: *Brent D. Houston*, for appellant.

Davidson Law Firm, by: *J. Paul Davidson*, for appellees.