Not designated for publication

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA 08-1022

ANGIE FLETCHER APPELLANT V. KEVIN SCORZA APPELLEE	**Opinion Delivered** May 6, 2009 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. PGD-07-2050] HONORABLE MACKIE M. PIERCE, JUDGE REVERSED

COURTNEY HUDSON HENRY, Judge

Appellant Angie Fletcher appeals from an order appointing appellee Kevin Scorza as the permanent guardian of her son J.F., whose date of birth is December 8, 1997. For reversal, appellant contends that the appointment of appellee as J.F.'s guardian is contrary to the law and the evidence presented at the hearing. We find merit in appellant's argument and reverse the guardianship order.

In 1999, appellant and J.F., her eighteen-month-old son, began living with appellee in New Orleans. Appellant and appellee continued to live together for almost six years, yet they never married. During that time, the couple had two children of their own, but they ended their relationship in early 2005. Appellant kept the children upon their separation. Shortly thereafter, a Louisiana court formally granted appellant custody of the parties' two children and ordered appellee to pay child support for them. Appellee exercised regular

visitation with all three of the children and lived with his mother, his younger brother, who is a minor, and his grandmother. In mid 2005, appellant obtained a job that required her to work during the evening hours. Consequently, appellee kept the children overnight while appellant worked. Under this arrangement, appellant transported the children to appellee's home in the evenings and retrieved them in the mornings. She also drove them to school and picked them up each afternoon. Meanwhile, appellant also attended school.

When Hurricane Katrina approached the New Orleans area in late August 2005, the parties decided that appellee would evacuate with the children as he had done when Hurricane Ivan made landfall in the region. Appellant could not accompany them, because her job as a law enforcement officer required her to remain in New Orleans. As a result, appellee, along with his mother, his brother, his grandmother, the parties' two children, and J.F. left New Orleans to escape the storm.

The parties believed that the evacuation would last only a matter of days. However, Katrina proved to be more devastating than they anticipated, and like so many others, both appellant and appellee lost their homes to the hurricane. In the week and a half following the storm, appellant stayed at city hall. Afterwards, she lived on a cruise ship, along with other city officials, for six or seven months. During this time, appellee and the other family members settled into a home in North Little Rock, and appellee enrolled the children in school there. The parties agreed that it was in the best interest of the children to remain in Arkansas because New Orleans and its school system were in a state of disarray. In addition, appellant had enrolled in nursing school prior to the hurricane, and she was scheduled to

begin classes in January 2006. However, because of the natural disaster, classes did not commence until April 2006. For the following year and a half, appellant not only worked but also attended nursing school until her graduation in December 2007.

At Christmas 2007, appellant transported the children to New Orleans, but she did not return them to Arkansas after the holiday season. On January 7, 2008, appellee filed a petition in the Pulaski County Circuit Court requesting an ex parte order requiring the return of J.F. to Arkansas. Appellee also asked to be appointed as J.F.'s guardian. In this petition, appellee alleged that he stood *in loco parentis* to J.F. because he was the only father J.F. had known and because he had maintained physical custody of J.F. since August 2005. Appellee also recognized that appellant had visited the child at least seven times since August 2005 and that she spoke on the phone with J.F. on a regular basis. Appellee asserted, however, that appellant was unfit because she had failed to discharge her obligations as a parent to care for and protect the child. The trial court granted appellee's petition for ex parte relief and appointed him as J.F.'s temporary guardian on January 7, 2008. Pursuant to that court order, appellee brought J.F. back to North Little Rock. On January 10, 2008, the court held a hearing at which the court confirmed the order of temporary guardianship. The court conducted a final guardianship hearing on April 15, 2008, and considered the testimony presented at this hearing, as well the testimony offered at the previous hearing.

Appellee introduced the testimony of his mother, Barbara Scorza, and Diane Heffington, who attended appellee's church. Both witnesses attested to appellee's close relationship with J.F. and to how well appellee cared for him. They spoke about the

cohesiveness of appellee's family and J.F.'s love for them and about the children's involvement in extracurricular and church-related activities. Ms. Scorza gave testimony relating problems experienced during appellant's last visit with the children. She also referred to a time that appellant did not visit with the children when Ms. Scorza brought them to New Orleans on a work-related trip. She also testified that appellee suffered a stroke in January 2007 and spent fourteen days in the hospital. Ms. Scorza said that appellant offered to take the children but that she told appellant that it was not necessary.

In his testimony, appellee stated that appellant's visitation with the children was not problematic and that appellant took the children to Disney World the previous summer. He testified that appellant called the children four or five times a month and that she had telephoned the children once a day since the previous hearing. Appellee stated that appellant called in December 2007 and asked for the children to come home because she had finished nursing school. Appellee testified that he told her that it would be best for the children to finish the school year in Arkansas and that they would discuss the matter in the summer.

Appellee further testified that he continued making his child-support payments to appellant after leaving Louisiana. He said that appellant did not offer to pay support for the children but that she provided money when he asked and that she sent gifts and money for birthdays and Christmas. He also stated that the children routinely came home with new clothes after visiting appellant. Appellee testified that he sought to have his child-support obligation terminated and that appellant was not pleased with him for pursuing that action. He said that appellant received the last payment of child support in August 2007 and that the

child-support case was closed in his favor in December 2007. He said, however, that the payments were still being deducted from his paychecks but that he was receiving refunds of the amounts withheld from his checks. Appellee added that appellant had no drug or alcohol-related problems.

Appellant testified that she graduated from nursing school on December 14, 2007, and that she worked as a staff nurse at the Oschner Clinic Foundation. She said that her hours were flexible and that she could adjust them as needed in order to care for J.F. Appellant stated that she lived in a two-bedroom home with her boyfriend and that she had obtained a loan to purchase a home. She testified that, after Katrina, the children had to stay with appellee since they both lost their homes and because New Orleans was dangerous. She said that she knew that the children were well cared for and safe with appellee. Appellant testified that she and appellee had an agreement that the children would return to New Orleans with her once she finished nursing school. She said that she was willing for J.F. to stay in Arkansas to finish the school year before being returned to her care.

Appellant also testified that she returned the child-support monies to appellee by purchasing things for the children and that she sent clothes, shoes, and money on a regular basis. She said that she visited the children nine or ten times since they left Louisiana. Appellant further testified that appellee always considered J.F. as his own child and that she was grateful for that gesture. She said that appellant had fathered a child with another woman after she and appellee separated and that, as far as she knew, appellee did not have visitation with the child and did not pay child support.

After the hearing, the trial court granted appellee's petition to be appointed as J.F.'s permanent guardian. In its order dated May 2, 2008, the trial court made the following findings: (1) that appellee was on equal footing with appellant because he stood *in loco parentis* to the child; (2) that there was no proof that appellant contributed to J.F.'s support other than providing gifts and money at Christmas and on birthdays; (3) that appellant made a conscious decision to delegate her parental responsibilities; (4) that appellant sought to regain custody only after appellee's child-support payments ceased; and (5) that appellant was unfit because a fit mother would not delegate parental responsibilities only so long as it benefitted her financially. Appellant filed a timely notice of appeal from this order.

Appellant argues on appeal that the trial court's decision is contrary to the law and is against the preponderance of the evidence. We review probate proceedings de novo, but we will not reverse the decision of the trial court unless it is clearly erroneous. *Freeman v. Rushton*, 360 Ark. 445, 202 S.W.3d 485 (2005). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Artman v. Hoy*, 370 Ark. 131, 257 S.W.3d 864 (2007). When reviewing probate proceedings, we give due regard to the opportunity and superior position of the trial court to determine the credibility of the witnesses. *Freeman*, *supra*.

Before appointing a guardian, the trial court must be satisfied that (1) the person from whom guardianship is sought is a minor or otherwise incapacitated; (2) a guardianship is desirable to protect the needs of that person; and (3) the person to be appointed guardian is

qualified and suitable to act as such. Ark. Code Ann. § 28-65-210 (Repl. 2004). 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, 30 S.W.3d 737 (2000).

It is well settled that our law establishes a preference for the natural parent in third-party custody cases and that preference must prevail unless it is established that the natural parent is unfit. *Robbins v. State*, 80 Ark. App. 204, 92 S.W.3d 707 (2002). This preference applies in guardianship cases as well. Ark. Code Ann. § 28-65-204(a) (Repl. 2004); *Blunt*, *supra*. The rights of parents are not proprietary and are subject to the related duty to care for and protect the child; thus, the law secures this preference only as long as parents discharge their obligations. *Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001). However, both this court and our supreme court have not hesitated to reverse third-party custody awards when it is not shown that the natural parent is unfit. *Devine v. Martens*, 371 Ark. 60, 263 S.W.3d 515 (2007); *Schuh v. Roberson*, 302 Ark. 305, 788 S.W.2d 740 (1990); *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988); *Moore v. Sipes*, 85 Ark. App. 15, 146 S.W.3d 903 (2004); *Robbins*, *supra*. By contrast, in *Freeman*, *supra*, the supreme court affirmed a guardianship of a child in his grandparents when the child had always lived in the grandparents' home and the father, though fit, had never spent any extended period of time with the child.

We find the case of *Devine v. Martens*, *supra*, to be instructive. There, the trial court granted permanent guardianship of a child to third persons, the child's grandparents. The trial court found that the natural mother was unfit because the mother had relinquished custody of the child to the grandparents; the mother maintained an unwholesome environment for

the child by exposing him to questionable art and nudity; the mother maintained an internet presence without regard to whether the child might see her photographs on the internet; the mother maintained a home environment that was dirty and smelled of urine; the mother permitted an excessive number of absences and tardiness at school; and the child developed bladder and bowel problems while living with the mother.

On appeal, the supreme court reversed the trial court's finding of unfitness. In so doing, the court likened the trial court's concerns about the mother to those typically found in dependency-neglect cases, where parents are given the opportunity to makes changes and to correct the problems in the home. The supreme court noted that the mother had corrected the deficiencies in her home and had made changes in her unusual lifestyle and held that the trial court erred by depriving her of custody. The supreme court's review of the record also led it to conclude that the mother had not abandoned the child. In its concluding remarks, the supreme court observed:

> This state's courts should not be in business of permanently removing children from their parents' custody simply because the parents have exercised poor judgment in caring for their children. Just as the Arkansas Juvenile Code recognizes the efforts of parents in dependency-neglect actions to improve their homes and parenting skills, we should encourage and recognize such improvements by parents in guardianship actions. Frankly, it is not in a child's best interests to take custody from a natural parent who has rectified all issues related to his or her fitness, and grant custody to a third party, such as the child's grandparents.

Id. at 74, 263 S.W.3d at 526.

In the present case, we also hold that the trial court erred by granting the guardianship petition. The parties agreed that J.F. would stay in Arkansas with appellee because of the

devastation and turmoil caused by Hurricane Katrina. Given the circumstances prevailing in New Orleans and appellant's lack of housing, appellant exercised wise judgment by permitting J.F. to remain with appellee. It would appear that the trial court questioned appellant's judgment for allowing J.F. to stay with appellee past the time when the court surmised that the situation in New Orleans had stabilized. However, during this time, appellant was making efforts to improve the quality of her life, and thus J.F.'s, by obtaining her degree in nursing. While the parties' agreement placed J.F. in appellee's temporary care, the evidence shows that appellant was not wholly derelict in her duties as a parent. Although appellant paid no support per se, it is undisputed that she sent gifts and provided money, clothing, and other necessities during this period of separation. Appellant also maintained consistent contact with J.F. by phone and visited with him on a number of occasions. Moreover, the trial court's finding that appellant's resumption of custody coincided with the cessation of child support is not justified on this record. The evidence shows that appellant stopped receiving appellee's child-support payments in August 2007, and not in December 2007 when she reclaimed the child. Instead, appellant's resumption of custody coincided with her graduation from nursing school.

Upon our review of the evidence and law, we are left with the definite and firm conviction that the trial court made a mistake in finding that appellant is an unfit parent. We recognize that appellee was not obligated to care for J.F., yet he provided for the child's needs during a difficult time when the child needed stability in his life. Thus, we commend appellee for his dedication to J.F. and his willingness to act as his guardian. However, the record

demonstrates that appellant is a fit parent, and thus the child's best interest favors returning him to her care. Therefore, we reverse the order appointing appellee as the permanent guardian of J.F.

Reversed.

GLOVER and BROWN, JJ., agree.