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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA11-785

PAULA GAMMILL AND STEVEN GAMMILL
APPELLANTS

V.

CHRISTA HOOVER
APPELLEE

Opinion Delivered December 14, 2011

APPEAL FROM THE STONE COUNTY CIRCUIT COURT, [NO. PR-09-63-4]

HONORABLE TIM WEAVER, JUDGE

REVERSED AND REMANDED

RAYMOND R. ABRAMSON, Judge

On October 24, 2009, appellee Christa Dornhoffer (now Hoover) left her 23-month-old daughter in the custody of her then boyfriend (now husband) Steven Hoover while she worked. While under Hoover's care, the child received second-degree burns to her buttocks.[1] The burns were large and covered both buttocks. The child was treated at home until a fever forced Dornhoffer and Hoover to take the child to a hospital.

In addition to the severe burns, the doctors also noted numerous areas of bruising in various stages of healing on the child's face, buttocks, legs, thighs, and forehead. The doctors noted that the bruising did not match the stories provided by Dornhoffer. The child was then transported to Arkansas Children's Hospital (ACH) for additional treatment. ACH medical records indicated that there were bruises noted in various stages of decline and that the bruises

[1]Dornhoffer indicated that Hoover had pulled the burned skin from the blisters off the child's buttocks.

had not happened at the time of the burns.

On November 10, 2009, Hoover was charged with first-degree battery, a felony, for the injuries inflicted on the child. On November 18, 2009, Dornhoffer was charged with permitting the abuse of a minor, also a felony.

On November 20, 2009, Paul and Diana Balentine, Dornhoffer's parents, filed a petition to be appointed temporary guardians of the abused child and her three-year-old brother. In the petition, the Balentines alleged that a guardianship was necessary because of the pending felony charges against Dornhoffer and Hoover and because the biological father of the children was already incarcerated on unrelated felony charges.

On November 21, 2009, Dornhoffer and Hoover wed.

On December 16, 2009, an order appointing the Balentines as temporary guardians of the children was entered.[2]

On October 26, 2010, Hoover pled guilty to first-degree battery and received a sentence of eighty-four months' probation.[3] Dornhoffer pled guilty to a lesser offense of child endangerment, a misdemeanor, and received a one year sentence in the county jail, suspended on the condition that she pay fines and costs.

On March 8, 2011, Dornhoffer filed a petition to allow her to regain custody of her two children. A Department of Human Services case on the family had been resolved and

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[2]The order provided that the Balentines were appointed as temporary guardians until further ordered by the court. This was in error as temporary guardianships, by statute, are only effective for ninety days. *See* Ark. Code Ann. § 28-65-218(a) (Repl. 2004).

[3] The presumptive sentence for this crime was 240 months in prison.

the children had been transitioned back into the home. At that point, Paula and Steven Gammill, the children's maternal aunt and uncle, intervened and requested that they be appointed guardians for the children. The children's father consented to the Gammills being appointed guardians.

At the hearing on the petitions, Dornhoffer took the stand and testified that, despite pleading guilty, she would never let anything happen to her children and that she did not believe that Hoover had hurt them. She further testified that she had done everything that DHS and the State had requested that she do to regain custody of her children. She stated that she pled guilty to the charges only because she believed she could get her kids back sooner once the criminal matters were finished. The Balentines also testified at the hearing and posited that the children should remain with Dornhoffer and Hoover.

At the close of the hearing, the trial court denied the Gammills' petition for guardianship. In doing so, the court stated:

> When I first heard this, I'll just be honest with you, I felt the same way. But based on the testimony and based on the – particularly the testimony of Mrs. Hoover's parents, who had the children for well over a year. There's no testimony to the contrary that Ms. Hoover didn't do everything that DHS told her to. And I admit it's a horrible situation. It sounds awful. I would – I don't understand why people do some of the things they do. And I'm not even going to try and rationalize it. I'm going to dismiss the guardianship.[4] I'm going to let her have these children. The children have been with her for some time. But in the order of the dismissal – whoever prepares the order of dismissal, Mr. Hoover is to never be around these children alone, period.[5]

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[4] The Court later clarified that it meant that it was denying the Gammills' petition rather than dismissing the guardianship. The initial temporary guardianship had already terminated.

[5] The Court later stated: "I don't understand, if those were my kids, they wouldn't be around this man," and directed the Balentines to immediately inform the court if they

The Gammills now appeal, alleging that the trial court erred in denying their petition for guardianship over the minor children. We review probate proceedings *de novo*, but we will not reverse the decision of the court unless it is clearly erroneous. *Hicks v. Faith*, 2011 Ark. App. 330, 384 S.W.3d 17. When reviewing probate proceedings, we give due regard to the opportunity and superior position of the circuit judge to determine the credibility of the witnesses. *Id.*

To appoint a guardian, the circuit court must be satisfied that (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 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). *See also Smith v. Thomas*, 373 Ark. 427, 431, 284 S.W.3d 476, 479 (2008). Where the incapacitated person is a minor, the key factor in determining guardianship is the best interest of the child. *Smith*, 373 Ark. at 432, 284 S.W.3d at 479. The Probate Code grants preferential status to the parents of a child, specifically providing that "[t]he parents of an unmarried minor, or either of them, if qualified and, in the opinion of the court, suitable, shall be preferred over all others for appointment as guardian of the person." Ark. Code Ann. § 28-65-204(a) (Repl. 2004). A plain reading of that section demonstrates that only a natural parent who is both qualified and, in the opinion of the circuit court, suitable, shall be preferred over all others to be the child's guardian; however, the natural-parent preference does not automatically attach to a child's natural parents. *See Blunt*, *supra*. Rather, our

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suspected any further abuse.

supreme court has clarified that this preference is but one factor in determining who will be the most suitable guardian for the child, and any inclination to appoint a parent or relative must be subservient to the principle that the child's best interest is of paramount consideration. *Fletcher v. Scorza*, 2010 Ark. 64, at 12, 359 S.W.3d 413, 420; *Freeman v. Rushton*, 360 Ark. 445, 449, 202 S.W.3d 485, 486 (2005).

Here, under the circuit court's order, the children would be required to primarily reside in the same residence with a man who pled guilty to inflicting severe burns on the younger of them, and with their mother who, at the very least, did nothing to prevent the abuse despite evidence that other instances of abuse had occurred. Reversal is further supported by the fact that, in analogous child-custody matters, the legislature has created a rebuttable presumption that it is not in the best interest of a child to be placed in the custody of an abusive parent. *See* Ark. Code Ann. § 9-13-101(c)(2) (Repl. 2009). While this statute does not apply to guardianship cases, it is clearly instructive. Given these facts, the circuit court's finding that it would be in the best interest of the children to return to the care of their mother was clearly against the preponderance of the evidence.

Nor should the mother receive any preferential status under the statute under these facts. This is especially true given the fact that, despite their guilty pleas, the mother denied at the hearing that the abuse ever occurred and does not believe her husband will hurt the children. Clearly the mother, although otherwise qualified, is not a suitable guardian for the children.

In light of our opinion that Dornhoffer is not a suitable guardian for the children, we reverse and remand for the circuit court to reconsider its denial of the Gammills' petition for guardianship.

WYNNE and BROWN, JJ., agree.