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ARKANSAS COURT OF APPEALS
DIVISION I
No. CV-21-235

IN THE MATTER OF THE
GUARDIANSHIP OF A.P.G., A MINOR

SANDRA ANDRACA

APPELLANT

V.

PATRICIA TICE

APPELLEE

Opinion Delivered September 14, 2022

APPEAL FROM THE POPE COUNTY
CIRCUIT COURT
[NO. 58PR-20-205]

HONORABLE GORDON W. “MACK”
MCCAIN, JR., JUDGE

REVERSED AND REMANDED

RITA W. GRUBER, Judge

Sandra Andraca appeals the Pope County Circuit Court’s order awarding a permanent guardianship of her ten-year-old daughter, APG, to APG’s paternal grandmother, Patricia Tice. She brings two points on appeal: (1) there was no showing that a guardianship was necessary or in APG’s best interest; and (2) the guardianship violates Andraca’s constitutional right to raise her child. Because the court failed to make the findings necessary for our review, we reverse and remand the case for further proceedings.

Andraca is APG’s biological mother. Tice’s son, Jonathan Goodin, was APG’s biological father.¹ Andraca and Goodin were never married. Andraca is from Mexico but has

¹Goodin passed away on July 28, 2020.

lived in the United States for twenty-two years as an undocumented immigrant. Goodin, Andraca, and APG lived with Tice in Tice's home in Atkins from the time APG was three years old until November 29, 2019, when Andraca left with APG and moved in with her sister.

Tice alleged in her petition for guardianship that APG was returned to Goodin three weeks after Andraca moved out after Goodin filed an emergency ex parte petition for guardianship based on his belief that APG was not being adequately cared for. Due to delays associated with the COVID-19 pandemic, a hearing was never held before the temporary emergency-guardianship order expired, and APG remained in Tice's home with Goodin. Tice alleged that when the guardianship expired, Goodin filed a custody action against Andraca, but he passed away before the case was heard. At the time of Goodin's death, APG was still in Goodin's custody and living in Tice's home. Tice filed a petition for guardianship on July 29, 2020, the day after Goodin's death, and the court entered an ex parte emergency order on July 30 awarding Tice emergency guardianship over APG.

On August 5, 2020, the court held a probable-cause hearing on the emergency order. Tice testified at the hearing that APG and her parents had lived in Tice's home for five or six years and that Goodin, with Tice's help, had done most of the caretaking for APG. Tice said that Andraca did not have a valid driver's license, but she had "no idea" if Andraca had transportation. She did not know if Andraca had gotten a house or an apartment nor did she have any knowledge about Andraca's current employment. Tice also testified that Andraca is an illegal immigrant and that she "would think" it would be "difficult for her to

obtain housing or employment” with that status. Andraca’s attorney objected, arguing that her immigrant “status” was not relevant to her ability to parent APG. The court then asked counsel whether Andraca was “subject to arrest by federal authorities at any time they deem fit to do so,” to which counsel replied he didn’t know. The court then overruled counsel’s relevance objection, reasoning that it must consider her status in terms of her employment and “also in terms of at any point in time that person could be removed from the child’s presence.”

Andraca testified that she, Goodin, and APG moved in with Tice when Goodin lost his job. She said that she paid three hundred dollars a month in rent to Tice while she lived there and purchased food and clothing for APG. She testified that she and Tice did not get along when she lived in Tice’s home, alleging that Tice yelled at her, called her a “whore,” and mistreated her. She said that Goodin did not work and that she moved out of Tice’s home in November 2019 because she could not put up with Goodin’s “mistreatment and the yelling.” She said she did not call the police about the mistreatment because Goodin told her he would call immigration and take APG away. She said she moved in with her sister, then into a safe house, and then with a friend after she left Tice’s home before renting a trailer beginning in February 2020. She said that she had seen APG only twice since she left after the emergency order placing APG in Goodin’s custody had been entered and that since March, Tice has prevented her from seeing APG due to “the virus.”

Andraca testified that she had been renting a two-bedroom trailer in Russellville for six months from her brother-in-law and that the utilities were in her brother-in-law’s name

as the owner of the property. She provided photos of the trailer, which appeared neat and clean, including two bedrooms, one bathroom, a living area, a dining area, and a kitchen. Andraca testified that she worked at a Mexican restaurant in Dardenelle and rode to work either in a taxi or with her sister. She said she had worked for her previous employer, Twin Rivers, for ten years but had been fired for “working under a false identity.” She said that she was no longer working under a false identity but was paid in cash. Andraca testified that she has sufficient income and a home, that her adult daughter and thirteen-year-old son live with her, and that she has sufficient family support living nearby. She said that her sisters and her brother are legal residents of the United States and live in Russellville. Finally, she testified that she did not have legal status but had contacted an attorney and was saving money to start the process.

The court entered a temporary order on August 28 awarding guardianship to Tice and finding Andraca “unfit” based on her “immigrant status, her short history of employment, short history of stable housing, the lack of transportation, and lack of a valid driver’s license.” The court ordered the parties to come up with a visitation schedule of approximately equal time, which they did.

A hearing regarding permanent guardianship was held via Zoom on January 14, 2021.

Tice’s counsel’s opening statement sums up her basis for requesting guardianship:

Judge, I don’t think there is much in dispute here. The bases for the guardianship continue in place. Ms. Andraca is an illegal. She doesn’t have a driver’s license, doesn’t have a social security card. Has problems with keeping employment because of her status. She is subject to being yanked up and deported pretty much at any time. Basically, she works for cash and doesn’t pay taxes on her income; doesn’t file tax

returns. And so, basically, it may not be politically correct to say it these days, but continuing illegal activity on her part subjects her to being removed from the country. And that, that is my basis.

Counsel for Andraca responded as follows in relevant part:

I would just like to just go on by saying that before a guardianship can be granted in any case there has to be a need for a guardianship. I mean, otherwise, if there is not a need for one, then no guardianship can be granted. The things that Mr. Robbins has complained of all relate to my client's status in this country as an immigrant. And the fact that she is in this country illegally has no bearing on her ability to provide, to be a good parent and to provide housing, shelter and all the other basic necessities of life that she can provide for her daughter. Is she subject to arrest? Yes, she is, because she is in this country illegally. However, she has not been arrested. So, therefore, there would be, until that event actually occurred there would not be a need for any guardianship. Even [Tice's counsel] has just stated that she has appropriate housing. She has an income of her own and she has family support to provide transportation. The things that she can't correct like getting a driver's license or a social security number or paying taxes all directly relate to her status as an immigrant in this country and she can't correct that without some type of federal government intervention[.] . . . So, whether she pays tax or not would be irrelevant to whether or not her ability to be a good parent would be compromised. She is a loving mother. She has a house that is immaculate. Plenty of food. Plenty of income. Utilities. Transportation. She has everything she needs to be a parent.

Tice testified that she has an appropriate home for APG, that APG has been living week-on week-off with the parties, and that APG "seems to be taken care of" when she is with Andraca. She said that her health-insurance policy through her employer would cover APG if she were awarded a permanent guardianship. Tice also said that she has been interacting with APG's teachers since the temporary guardianship had been in place and that APG is doing well in school. Finally, Tice testified that a "death benefit" had been filed on APG's behalf regarding Goodin, but Tice did not know the amount of the benefit.

Andraca testified that she had changed jobs since the last hearing and was working at a Mexican grocery store from 8:00 a.m. to 2:00 p.m. every day. She had been working there for four months at the time of the hearing. She took the job because it allowed her to take APG to school, pick her up after school, and spend time with her. She testified that she is paid \$380 in cash each week, which amounts to over \$1600 a month, and that her bills are \$1102 per month. These amounts are detailed on an affidavit of financial means introduced at the hearing. She said she actually has more money because her adult daughter gives her half the rent and money for food and utilities, which amounts are not included on the affidavit. She testified that her sister provides transportation to her and APG and that other family members help with transportation as needed or she uses a taxi. She said that she is still living in the trailer she rents from her sister and brother-in-law and that her twenty-three-year-old daughter and fourteen-year-old son live with her and share one of the bedrooms, which contains two beds. She said that APG sleeps with her. She said the utilities are in her brother-in-law's name. She stated that she did not have internet service in the trailer but that her sister, who lives five minutes away, does. Finally, she testified that she would not object to Tice having frequent and liberal visitation with APG because APG loves Tice.

Counsels' closing arguments reiterated their opening statements, with counsel for Tice contending that Andraca is "an illegal" who does not pay taxes, had worked under a false identity, and is unable to obtain a driver's license or housing "on her own." He compared her to someone who is "dealing methamphetamine and otherwise capable of

parenting,” that her status is a “continuing criminal enterprise,” and that she could be “yanked up at any time.” He argued that this was his basis for a permanent guardianship.

Counsel for Andraca objected to the characterization of Andraca continuing a criminal enterprise, stating that she had used an alias before but was not now and that she has sufficient income, an adequate home, and transportation to provide for APG. Counsel admitted that Andraca is subject to arrest but reminded the court that she had not been arrested and that a guardianship is not necessary for a future event that might never occur. He claimed that any parent could be arrested in the future, but this possibility does not make a guardianship necessary in the present. He argued that a guardianship is appropriate only when it is needed and that it is not needed when a mother has the resources to provide for her children and does so.

On February 1, 2021, the court entered a permanent guardianship order finding a guardianship was necessary because APG is a minor, that Andraca is “unfit,” and that Tice was “qualified to serve” and was “the fit and proper person” to serve as APG’s guardian. Despite it finding Andraca unfit, the court continued the alternating-week schedule between the parties. The court’s order explained:

Although [Andraca’s] immigration status as an undocumented immigrant is not the controlling factor, but her status causes other collateral results that impair her fitness as a parent and her ability to provide necessities for her child. She cannot obtain a driver’s license and therefore cannot provide for transportation of the minor child without depending on others, her status impairs her ability to obtain work in that she has to work for cash, she has no ability to provide utilities for her family in her name, but has to depend on others to set up utilities in their name, she is potentially subject to arrest due to her legal status. She does not have the ability to provide an internet account her child can utilize for her educational needs, but has to depend on others

for that as well. Her current housing is inadequate in that she has a two-bedroom home and her adult daughter and teenage son live there and the ward is forced to share a room with [Andraca].

Andraca filed this appeal from the court's order, arguing that there is no need for a guardianship and that imposing one on this record violates her constitutional rights to raise her child. While we are unable to decide the merits of this case for the reasons indicated herein, we set forth our standard of review to highlight the problem with our review. We review probate proceedings de novo, but we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *Mossholder v. Coker*, 2017 Ark. App. 279, at 8, 521 S.W.3d 150, 155. 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. *Id.* In every case, the court must make the appropriate findings for us to review. Although we recognize that we will presume the court made the findings necessary to support its decree in many cases where the record supports the court's judgment, *Denarvaez v. Denarvaez*, 2020 Ark. App. 550, at 12, we cannot do so where we are left to speculate or where it is unclear from the record what findings the court might have made. This is especially true where our legislature has set forth specific requirements that must be met in a particular case.

Guardianships are such a situation because they are special proceedings governed by statute. *In re Guardianship of W.L.*, 2015 Ark. 289, at 5, 467 S.W.3d 129, 132. Arkansas Code Annotated section 28-65-210 (Repl. 2012) provides:

Before appointing a guardian, the court must be satisfied that:

(1) The person for whom a guardian is prayed 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 guardian is qualified and suitable to act as such.

In this case, APG has a living parent. Therefore, the court must consider an additional statute, the statutory preference for a parent. This statute provides that the “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 (Repl. 2012).

Andraca’s first argument is that Tice failed to prove that a guardianship is necessary or in APG’s best interest. Andraca alleges that the court applied the incorrect standard in this case, arguing that the first question should be whether a guardianship is necessary or “desirable to protect the interests of the incapacitated person” and not whether the parent is fit. In addition, she claims that the court’s finding of unfitness was improperly based on her immigration status rather than on the best interest of APG.

The issue of whether a natural parent is “fit” or “unfit,” as those terms are used in child-custody cases, is not an element in an initial guardianship case. *Fletcher v. Scorza*, 2010 Ark. 64, 359 S.W.3d 413. The sole considerations in determining the parental preference in a guardianship of a child are whether the natural parent is qualified and suitable and what

is in the child's best interest.² *Id.* While we recognize our supreme court's recent cases holding that parental fitness is at the heart of termination-of-guardianship cases involving parents of minor wards, the supreme court has not overruled its cases holding that fitness is not a consideration in initial guardianship cases. See *In re Guardianship of E.M.R.*, 2019 Ark. 116, at 6–7, 571 S.W.3d 15, 19; *In re Guardianship of W.L.*, 2015 Ark. 289, 467 S.W.3d 129. We do, however, note our supreme court's reasoning in these cases, which quote *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000), with approval: “[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.”

Here, the circuit court's order does not state whether Andraca is “qualified and suitable” under Ark. Code Ann. § 28-65-204; whether a guardianship is “desirable to protect” APG's interests; and, if a guardianship is desirable, that Tice is “qualified and suitable” to act as APG's guardian. Of most concern to us is that the circuit court did not make a finding regarding APG's best interest. When the incapacitated person is a minor, the key factor in determining guardianship is the best interest of the child. *Clark v. Ark. Dep't of Hum. Servs.*, 2021 Ark. App. 190, at 4, 625 S.W.3d 362, 366.

²We recognize that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *Linder v. Linder*, 348 Ark. 322, 343, 72 S.W.3d 841, 852 (2002) (citing *Troxel v. Granville*, 530 U.S. 57, at 65–66 (2000)).

Accordingly, we express no opinion on the merits of the arguments presented, but we reverse and remand for the court to enter findings consistent with this opinion.

Reversed and remanded.

VIRDEN and BROWN, JJ., agree.

David R. Horn and *Robert S. Tschiemer*, for appellant.

Michael S. Robbins, for appellee.

Brian G. Brooks, Attorney at Law, PLLC, by: *Brian G. Brooks*, for amicus curiae Arkansas Trial Lawyers Association.

Holly Dickson and *Gary L. Sullivan*, for amicus curiae Arkansas Civil Liberties Union Foundation, Inc.