COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3096

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE PATERNITY OF NINA R.:

RONALD J.,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

LAUREL W.,

RESPONDENT-CROSS-APPELLANT,

V.

LISA R.,

RESPONDENT-APPELLANT-CROSS-RESPONDENT,

SANDRA H.,

APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order and a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 WEDEMEYER, P.J. Lisa R. and Sandra H. appeal from an order and a judgment appointing Laurel W. guardian of Nina R. Lisa (Nina's mother) and Sandra (Nina's maternal grandmother) claim that there was insufficient evidence to terminate Sandra's guardianship, that the trial court erred in transferring guardianship to Laurel (Nina's paternal grandmother), that the trial court erroneously excluded certain evidence, and that the guardian ad litem submitted facts not contained in the record. Because there was sufficient evidence to terminate Sandra's guardianship, because the trial court did not erroneously exercise its discretion when it awarded guardianship to Laurel, because the trial court's evidentiary ruling was not an erroneous exercise of discretion, and because the guardian ad litem is permitted to make recommendations, we affirm.

¶2 Laurel cross-appeals from the trial court's decision denying her request that Nina should be taken to Laurel's Sunday worship services even when Nina is at Sandra's home. Because the trial court did not erroneously exercise its discretion when it concluded that both grandmothers should be allowed to take Nina to their individual Sunday worship services, we affirm.

I. BACKGROUND

¶3 Lisa gave birth to Nina on March 8, 1996. Nina was born with a cleft palate. Lisa's mother, Sandra, helped Lisa communicate with medical personnel because Lisa has a speech handicap. At the suggestion of a health care

provider, Sandra applied for guardianship of Nina. On the application, Sandra noted that Nina's father was "unknown." The request was granted on April 9, 1997.

¶4 On December 18, 1998, Ronald J., upon learning that Nina was his daughter, filed a paternity action and requested visitation rights for the paternal grandmother, Laurel. On February 14, 1999, Ronald was found to be Nina's biological father. On May 26, 1999, Laurel filed a motion seeking visitation, which was granted. Laurel also filed a motion seeking custody of Nina.

¶5 On November 17, 1999, Nina's guardian ad litem filed a motion to modify and/or terminate the guardianship. On July 13, 2000, Laurel filed a motion to modify, vacate or dissolve the current guardianship and requested that she be awarded custody. Laurel argued that Sandra's guardianship should be terminated because Ronald was never given notice of those proceedings. A trial on these issues occurred July 27, 2000, July 28, 2000, and August 7, 2000. The trial court found reasons to terminate Sandra's guardianship, and awarded guardianship to Laurel. Lisa and Sandra appeal from this order. Laurel cross-appeals.

II. DISCUSSION

Appeal

A. Insufficient Evidence to Terminate Guardianship.

¶6 Lisa and Sandra first contend that there was insufficient evidence to terminate Sandra's guardianship and, in the alternative, if there was sufficient evidence, then Lisa, as the parent, should be awarded custody. We are not persuaded.

¶7 WISCONSIN STAT. § 880.16(2) sets forth grounds for removal of a guardian for cause: "When any guardian fails or neglects to discharge the guardian's trust the court may remove the guardian after such notice as the court shall direct to such guardian and all others interested." The trial court found four reasons which justify termination for cause under the statute: (1) Sandra committed a "quasi-fraud" upon the court when she failed to disclose in her petition for guardianship that Ronald was Nina's father; (2) Sandra abdicated her role as guardian by allowing Lisa to make the primary decisions regarding Nina's care, and by relinquishing all supervisory control over Nina's Social Security assistance; (3) Sandra failed to cooperate fully with medical providers; and (4) Sandra was overwhelmed with other responsibilities, including her own children and their children. Each of these reasons finds support in the record and, therefore, we conclude that the trial court did not erroneously exercise its discretion when it terminated Sandra's guardianship.

¶8 Lisa and Sandra emphasize that the *only* reason they sought a guardianship in the first instance was because of Lisa's speech impediment. They argue that in all other instances Lisa is able to provide for Nina's needs. Although that may have been the sole reason at the time guardianship was sought, the contested hearing brought forth a great deal of additional information pertinent to the trial court's decision, which cannot now simply be disregarded.

B. Appointing Laurel as Successor Guardian.

¶9 Lisa and Sandra contend that the trial court erroneously exercised its discretion when it appointed Laurel as successor guardian.

¶10 Lisa suggests that if there are justifiable reasons to terminate Sandra's guardianship, then the case should return to status quo; i.e., Lisa, as

Nina's mother, should retain custody. Lisa and Sandra cite ***Barstad v. Frazier***, 118 Wis. 2d 549, 348 N.W.2d 479 (1984) in support of their proposition. We do not find ***Barstad*** controlling here.

¶11 In ***Barstad***, the Wisconsin Supreme Court found that the "best interests" of the child standard is not the proper standard to use when determining a custody dispute between a third person and a *fit* parent. ***Id.*** at 553-55. Rather, the court ruled that the more stringent standards applied in termination of parental rights cases must be applied. ***Id.*** at 556. In ***Barstad***, the custody dispute was between placement in the maternal grandmother's home or placement in the mother's home. ***Id.*** at 552-53. Home studies were conducted at both residences. ***Id.*** at 553. Those studies showed that both parties were fit to have custody of the minor child. ***Id.*** ***Barstad*** is inapplicable to the facts here, because the trial court found both parents to be unfit. Further, in ***Richard D. v. Rebecca G.***, 228 Wis. 2d 658, 599 N.W.2d 90 (Ct. App. 1999), this court held that even if a parent has not been found to be unfit, the best interests of the child standard should be applied if the parent "has abdicated his or her responsibilities to care for the child." ***Id.*** at 664. Lisa abdicated her parental responsibilities when she consented to the guardianship. Accordingly, in the instant case, the trial court was correct to apply the best interests of the child standard.

¶12 Although this court is sympathetic to Lisa's position, there is evidence in the record to support the trial court's finding that it is in Nina's best interest to be placed with Laurel. Nina is an appropriate candidate for guardianship because neither parent is completely able to provide for her needs. Ronald admits that he is not fit to care for her. Although Lisa maintains that she is not unfit, when she voluntarily allowed the petition for guardianship in the first instance, she admitted that she was unable to fully care for Nina. As pointed out

by the guardian ad litem, Nina has extensive medical needs that must be addressed. Because of Lisa's speech disability, she is unable to attend to Nina's medical needs. Moreover, the trial court gave additional grounds indicating Lisa's inability to provide for Nina's needs. The trial court found that neither parent could adequately provide for the needs of Nina without supervision.

¶13 The trial court did attempt to make Laurel and Sandra co-guardians, giving Laurel the final say in the event of a dispute. However, WIS. STAT. § 880.12(1) only permits co-guardianship if the two individuals are husband and wife. Accordingly, the trial court determined that it was in Nina's best interest to have Laurel appointed as guardian with primary placement. Nina would be placed at Sandra's home every other weekend, and for the first eight weeks of the summer. The trial court reasoned that Laurel's home was "sane and quiet and nurturing, … structured," as opposed to Sandra's home, which was more chaotic. The trial court's decision is supported by both the guardian ad litem's recommendation and the court-appointed psychologist's recommendation. Even if this court would have made a different decision, we cannot reverse the trial court's decision because it constitutes a reasonable ruling based on the pertinent facts and relevant law. Accordingly, we affirm.

C. Evidentiary Ruling.

¶14 Lisa and Sandra allege that the trial court erroneously exercised its discretion when it excluded evidence pertinent to Laurel's parenting skills and problems she had with Ronald while he was growing up. We reject this argument.

¶15 Whether evidence should be admitted or excluded is left to the sound discretion of the trial court and we will not overturn the trial court's ruling unless there was an erroneous exercise of discretion. ***Erbstoeszer v. American Cas. Co.***,

169 Wis. 2d 637, 644, 486 N.W.2d 549 (Ct. App. 1992). Here, the trial court excluded the evidence that Laurel had sent Ronald to Boys Town in Nebraska for three years because of self-control problems.

¶16 The trial court excluded the evidence as irrelevant. The trial court reasoned that although *current* parenting skills and events involving Laurel's treatment of Nina would be pertinent to its consideration, events which transpired over twenty years earlier with a different child were not relevant. This decision was not an erroneous exercise of discretion.

D. Guardian ad Litem.

¶17 Finally, Lisa and Sandra claim that the guardian ad litem's report contained factual information that was not in the record, and proffered the guardian's impressions based on those facts which should not have been considered. We reject this claim.

¶18 Although the guardian ad litem is not permitted to be a fact finder, ***Hollister v. Hollister***, 173 Wis. 2d 413, 419, 496 N.W.2d 642 (Ct. App. 1992), providing the court with her impressions and recommendations is part of the job. *See* ***Guenther D.M. v. Dennis L.M.***, 198 Wis. 2d 10, 22-23, 542 N.W.2d 162 (Ct. App. 1995). The guardian's report here, which was filed ten days before the trial, is akin to an attorney's brief. ***Hollister***, 173 Wis. 2d at 420-21. As such, Lisa and Sandra were free to dispute the assertions made by the guardian in her report. ***Id.*** at 421.

Cross-Appeal

¶19 In the cross-appeal, Laurel contends that the trial court erroneously exercised its discretion when it denied her request that Nina be transported for

Sunday School classes selected by Laurel, even on the weekends that Nina spends with Sandra and Lisa. We disagree.

¶20 Decisions related to the placement and custody of a child are left to the discretion of the trial court, and will not be overturned on appeal, unless the trial court erroneously exercised its discretion. ***Barstad***, 118 Wis. 2d at 554. Here, the trial court ruled that "[e]ither party is permitted to take the minor child for Sunday worship or other religious observances during their weekend placement." Laurel objects to this because she wanted Nina to maintain religious instruction selected by Laurel, even during placements at Sandra's home. The trial court noted that before Laurel was appointed guardian, Nina attended the church that Lisa and Sandra attended. The change in primary placement significantly decreases the amount of time that Nina will be spending with her mother and maternal grandmother during the school year. Granting Laurel's request to transport Nina to Laurel's church on the alternating weekends would seriously interfere with the already limited time that Nina has with her mother. Accordingly, the trial court denied Laurel's request. The trial court's decision is reasonable and is based on the pertinent facts and applicable law. Accordingly, we will not disturb the trial court's order.

By the Court.—Order and judgment affirmed.

Not recommended for publication in the official reports.

¶21 SCHUDSON, J. (*concurring*). While joining in the majority's analysis of the appeal, I depart from the majority's brief discussion of the cross-appeal. Therefore, I write separately to explain what, I conclude, is the appropriate legal basis for affirmance on the cross-appeal.

¶22 Laurel and Ronald rely on ***James v. Roberts***, 203 Wis. 89, 233 N.W. 563 (1930), which states that "'the manner and course of the education and all its details are left to the judgment and discretion of the guardian, and the ward will be compelled to comply with his guardian's decision.'" ***Id.*** at 95 (citation omitted). Additionally, they point to WIS. STAT. § 767.001(2), which gives "any person granted legal custody of a child ... the right and responsibility to make major decisions concerning the child, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order." Under WIS. STAT. § 767.001(2m), "major decisions" include "choice of school and religion."

¶23 In response, Lisa and Sandra say little more than that this was "a discretionary decision by the court which was well founded." The majority merely echos their assertion. Also supporting the circuit court's decision, Nina's guardian ad litem refers to WIS. STAT. § 767.001(5), which provides the party with whom a child is physically placed "the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody." The GAL, however, premises her support of the circuit court's decision on the rather dubious view that "where a child goes to church on a particular Sunday" is merely one of many "minor day[-]to[-]day decisions."

¶24 More supportive of the circuit court's conclusion, however, is case law limiting the general principle that otherwise might seem to emerge from ***James*** and WIS. STAT. § 767.001(2)&(2m).

¶25 In ***Lange v. Lange***, 175 Wis. 2d 373, 502 N.W.2d 143 (Ct. App. 1993), this court concluded that a circuit court order restricting a father's visitation with his children was warranted. Elizabeth had been awarded legal custody and primary physical placement of three young children, whom she chose to raise as Lutherans. ***Id.*** at 377-78. Robert, her ex-husband, not only opposed Elizabeth's choice of religion, but berated her based on her religious choice, and attempted to impose his fundamentalist religious beliefs on the children. ***Id.***

¶26 This court affirmed the circuit court's order restricting Robert's visitation with the children in order to protect Elizabeth's decision regarding religion. We explained that "the custodial parent's exclusive right to choose the religion is meaningless without protection from subversion." ***Id.*** at 381. We concluded, therefore, that although Robert had the right to "profess his religious beliefs," he could not "engage in conduct causing his children to reject the religion Elizabeth has chosen for their children[;] ... she has the sole right under Wisconsin law to make that choice as long as she has the sole legal custody of the children." ***Id.*** at 383.

¶27 In ***Wood v. DeHahn***, 214 Wis. 2d 221, 571 N.W.2d 186 (Ct. App. 1997), this court affirmed a circuit court's denial of a parent's request for restrictions on visitation. DeHahn, a Mormon who had been awarded custody of his children, objected to his ex-wife taking their children to Catholic services on certain holidays. ***Id.*** at 222. As we observed, however:

> There is no evidence that the mother is attempting to teach her children so as to dissuade them from being practicing Mormons. There is no evidence that the children are being subverted. It is not enough that DeHahn disapproves of the children going to a church that is not of this faith.

Id. at 226. Thus, we concluded DeHahn had failed to establish that "a restrictive order is reasonably necessary in order to protect his choice of religion for the children." ***Id.*** at 226-27.

¶28 Similarly, in the instant case, Laurel and Ronald have the right to make the major decisions determining Nina's choice of religion. *See* WIS. STAT. § 767.001(2)&(2m). They may not, however, preclude Sandra and Lisa from having Nina accompany them to their church during their visitation weekends, absent a showing that such a restriction is "reasonably necessary in order to protect [their] choice of religion for the children." *See* ***Wood***, 214 Wis. 2d at 226-27. On appeal, Laurel and Ronald have not argued that having Nina accompany Sandra and Lisa to church subverts their authority to determine Nina's choice of religion. As in ***Wood***, their disapproval is insufficient to require restrictions on Sandra and Lisa's visitation.