DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DAVID M. GLOVER, Judge

CA06-123

August 30, 2006

MILDRED COCHRAN & SAMUEL COCHRAN

APPELLANTS

V.

ARKANSAS DEPARTMENT OF HUMAN SERVICES; MINOR CHILD; BRANDI KENDRICK; GREGORY KENDRICK

APPELLEES

APPEAL FROM THE POPE COUNTY CIRCUIT COURT
[J-2004-253]

HONORABLE KENNETH DAVID COKER, JR., CIRCUIT JUDGE

AFFIRMED

Appellants, Mildred and Samuel Cochran, appeal the denial of their petition for guardianship of their four-year-old granddaughter, A.K. The Cochrans present three arguments on appeal: (1) the trial court's decision denying them appointment as A.K.'s guardians is clearly erroneous; (2) it was error for the trial court to admit child hearsay concerning alleged improper touching because insufficient notice of the intent to use that evidence was provided, the prejudice outweighed the probative value, and there was insufficient proof to support the reliability of the child's out-of-court statement; (3) the permanent separation of A.K. from her two siblings and natural family violates public policy and requires reversal. We affirm the trial court's decision.

This case arose out of the removal of A.K. from her parents' home by DHS based upon environmental neglect. The Cochrans are A.K.'s maternal grandparents. At the time A.K. was removed from the home, appellants did not request that she be placed with them; in fact, Mildred Cochran testified at one point in the proceedings that she had her "hands full" taking care of A.K.'s two older siblings, who were in her custody. However, as the

case against A.K.'s parents moved toward what appeared to be the termination of their parental rights, the Cochrans filed a motion to intervene in the case, which was granted for the sole purpose of pursuing a petition for guardianship of A.K. The Cochrans then filed their petition for guardianship, which was heard in conjunction with a permanency-planning hearing for A.K. At the end of the hearing, the trial judge took both matters under advisement; he subsequently issued a letter opinion simultaneously changing the goal in the case to termination of parental rights and denying the Cochrans' petition for guardianship, finding that the Cochrans "would not be suitable guardians" and that "it would not be in the best interests of the juvenile, ..., to grant the Intervenors' Petition for Guardianship." Two orders were filed as a result of the trial judge's letter opinion – one denying the Cochrans' petition for guardianship and a permanency-planning order. It is from the order denying guardianship that the Cochrans appeal.

As a preliminary matter, DHS first argues that the order was not a final appealable order and therefore this appeal should be dismissed. We disagree. In its brief, DHS states that a permanency-planning hearing order is only appealable under certain circumstances, which are not present here. While it is true that the order the Cochrans are appealing was entered as a result of the evidence taken at the permanency-planning hearing, we hold that the guardianship petition was a separate matter. The Cochrans were granted permission to intervene in the case for the sole purpose of attempting to obtain guardianship of A.K., and for no other reason. Not one but two orders issued as a result of that hearing - first, a permanency-planning order that changed the goal of the case from reunification to termination of parental rights, and second, an order that denied the Cochrans' petition for

guardianship. The letter order ended the Cochrans' participation in the matter, and we hold that it is a final, appealable order.

DHS also argues that the circuit court correctly denied the guardianship petition because there had been no written home study performed. We decline to hold that this was a proper basis for affirming the trial court's decision. If the trial court had wanted to place A.K. with the Cochrans, it could have simply continued the matter until a home study had been performed.

At trial, Melody Mayo, a social-service aide with DHS, testified that A.K.'s visitations with Mildred Cochran and A.K.'s siblings were fine. Mayo testified that Samuel Cochran was not at A.K.'s birthday party in July 2005 because there had been a report filed regarding alleged sexual misconduct on his part with A.K., and he was not allowed to visit with A.K.

Marsha Wells, a CASA volunteer assigned to A.K.'s case, testified that she did not believe that A.K. would be safe with the Cochrans and that it was in A.K.'s best interest to remain with her foster parents, whom Wells deemed as "a very good placement." Wells stated that she would not recommend placement with the Cochrans based upon previous testimony in court from the Cochrans that they had their "hands full" with their daughter's other two children, of whom they have custody; that one of the children has ADD "really bad" and that Mildred Cochran finds it difficult at times to handle him and requires help; and that the addition of A.K., who is a fairly active four-year-old child, would add to that burden. Furthermore, Wells stated that A.K. was not comfortable with Samuel Cochran. However, Wells admitted on cross-examination that she had never met A.K.'s siblings, who were in the Cochrans' custody; that she had never spoken to the Cochrans; and that

she had never visited the Cochrans' home. Wells said that she based a statement she made about A.K. showing a great deal of anxiety when she visited the Cochrans' home on what she had been told by A.K. and DHS, and that her observations about the Cochrans were not based on direct observable evidence that she had seen. Wells said that she was aware that the Cochrans had filed a petition for guardianship, but that she had not investigated it because it had only been filed a few weeks ago and she had gone on vacation.

Kelly Braton, the DHS case worker assigned to A.K.'s case, testified that Mildred Cochran had previously testified in court that she was not able to take care of A.K. Braton said that the case had reached a point where she did not feel comfortable talking to Mildred Cochran about the case. Braton said that A.K.'s foster family was very well established and that A.K. was extremely bonded to that family; she testified that Mildred Cochran had expressed to her that she believed that A.K. was being well taken care of by her foster parents until the sexual allegation was made against her husband, and it "went downhill" at that point. Braton stated that she had no doubt that Mildred Cochran loved A.K., but that she did not think that the guardianship should be permitted based on "the history." She said that Mildred Cochran did not have a problem with the care A.K. was receiving from her foster family before the allegation of sexual misconduct on Samuel Cochran's part, and she expressed concern that A.K. had been in DHS's custody since October 2004 and the Cochrans did not file a petition for guardianship until August 2005. It was Braton's opinion from what she had seen during visitation at DHS that Mildred Cochran already had her hands full with the two children in her custody, given her age and the fact that one of the children had mild behavior issues. It was Braton's further opinion that it would be in A.K.'s best interest for her foster family to adopt her.

Autumn Keel, A.K.'s foster mother, testified that she and her husband had bonded with A.K. and that A.K. was open with her and told her things. Keel said that A.K. told her in April 2005, when Keel got her out of her grandparents' car, after A.K. had been to visitation with her grandparents, that her pee pee hurt. Keel stated that she had no reason to believe that A.K. had any motivation to make anything up; that before that day, A.K. had shown no distrust toward Samuel Cochran; and that A.K. started saying, "No grandpa, grandma." Keel said that A.K. showed no embarrassment, telling her that her pee pee hurt. Keel said that she would not lie about this incident just so that A.K. could stay with her, and she denied that she asked A.K. any questions about her grandpa. Keel said that when she picked A.K. up and A.K. told her that her pee pee hurt that she could tell that A.K. was in pain. Keel stated that when they got in the car, A.K. was whiny and started to cry; when Keel asked her what was wrong, she said that her pee pee hurt. When Keel asked her if it itched and she had been scratching it, A.K. said, "No, grandpa." When Keel asked her if she said grandma, A.K. told her, "No. I said papa." Keel said, "your grandpa?" and A.K. said "yes." Keel said that she was stunned, that she and her husband talked to A.K., and that A.K. told her husband that her pee pee hurt because her papa touched her pee pee and put two fingers in her pee pee. Keel said that A.K. had made comments occasionally since then about the incident, and that the first time she saw Samuel Cochran after that, she was very upset. Keel said that A.K. always says, "my papa touched my pee pee, my papa put two fingers in my pee pee." Keel said that the statements seemed credible and that she believed A.K. Keel said that they took A.K. to the hospital and that the doctor said that A.K. was raw and irritated and that her hymen was

broken, but the doctor was unable to say if that had happened at that time or if it had happened previously.

Mildred Cochran testified that she worked for DHS and had been verified to be of sound character because of her job. She said that she has had custody of her daughter's two older children since they were two and twenty-one months, that they were nine and six now, and that she has had no problems keeping them. Cochran said that at a previous placement hearing for A.K., she had stated that she could take care of A.K. for a while but she did not think that she could do it full time. She said that she thought that if she took A.K. into her custody, that maybe her daughter would not try as hard to get her back; she said that she was trying to get her daughter to "do right" and she did not want to take A.K. if her daughter had a chance to get her back. Cochran testified that since the placement hearing she had filed for guardianship of A.K., and that "with the help of the Lord" she could take care of A.K. Cochran said that she would hate to see the siblings separated. Cochran testified that she did not believe the sexual misconduct allegations made against her husband had ever happened, and that the only time A.K. was alone with her husband on the day A.K. made the allegations was when she took the other children into the bathroom at a grocery store. Cochran said that A.K. had not complained of any pain that day; that she had never seen A.K. show any anxiety or reluctance around her grandfather; and that she had never heard A.K. say anything bad about her grandfather. Cochran stated that she had never had any problems taking care of A.K. during visits and that she would do her best now. She said that it would be an "extreme burden" to have A.K. in her custody, but that it would be a bigger burden not to ever get to see her again. She stated that if her daughter's parental rights were going to be terminated, she wanted A.K. and her

two siblings to stay together. She said that she had a good support system, and when questioned about one of the children's behavior problems, she stated that he just needed to mature.

Cochran stated that she remembered stating at a previous hearing that she and her husband were not physically able to take care of A.K., but that she did not remember saying that they were financially unable to take care of her. She said that her husband has arthritis, and that she had sleep apnea and was required to use a breathing machine at night when she slept. Cochran said that she sometimes gets sleepy during the day, and that she ran off the road one day because of her condition.

The Cochrans first argue that the trial court's denial of Mrs. Cochran's petition[1] for guardianship of A.K. was clearly erroneous. Guardianship proceedings are reviewed *de novo*, but the appellate courts will not reverse a guardianship decision unless it is clearly erroneous, giving due regard to the trial court's opportunity and superior position to determine the credibility of the witnesses. *See Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000).

In *Moore v. Sipes*, 85 Ark. App. 15, 21, 146 S.W.3d 903, 907 (2004) (citations omitted), this court held:

> Before appointing a guardian, the court must be satisfied that: (1) the person for whom guardianship is sought is either a minor or otherwise incapacitated; (2) a guardianship is desirable to protect the interests of that person; (3) the person to be appointed guardian is qualified and suitable to act as such. Where the incapacitated person is a minor, the key factor in determining guardianship is the best interest of the child.

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[1]The guardianship petition was filed in Mildred and Samuel Cochrans' names; however, Mr. Cochran did not appear or testify at the guardianship hearing. The appellants refer to the guardianship petition in their argument solely as Mrs. Cochran's petition.

In their argument, the Cochrans assert that "the only evidence which was adverse to Mrs. Cochran's petition to be appointed guardian were unsubstantiated allegations that Mrs. Cochran's husband had in some way sexually abused A.K." However, this assertion is not entirely accurate – we do not know for sure on what bases the trial court determined that the Cochrans were not suitable guardians for A.K. because the trial judge did not specifically enumerate his reasons for denying the petition for guardianship, and the Cochrans did not request specific findings of fact as to why their petition was denied.

It is true that the allegation of Samuel Cochran's improper sexual conduct with A.K., which is discussed more fully in the Cochrans' second point of appeal, could have been one of the reasons for the denial of the guardianship. The Arkansas State Police investigated the allegation and found that the evidence did not support the allegation of child maltreatment, but the trial court was not obligated to believe that the touching did not occur when considering whether to place A.K. in the Cochrans' guardianship. In addition, the trial court could have considered that placing A.K. in an environment where improper sexual touching might have occurred was not in A.K.'s best interest.

The trial court could also have taken into consideration that the Cochrans, who were sixty-two and seventy, already had custody of A.K.'s two siblings, one of whom has some behavior disorders; that the Cochrans did not offer to take A.K. at the time she was removed from their daughter's custody, but rather waited until it appeared that the trial court was going to terminate parental rights to A.K. before intervening to request that they be appointed A.K.'s guardians; and that A.K. was bonded with her foster family, and all of the evidence indicated that she was thriving in that environment. A.K.'s foster mother also testified that she wanted to adopt A.K. if her parents' rights were terminated.

Although Marsha Wells, the CASA volunteer, did not meet the Cochrans or A.K.'s siblings before stating her opinion that it was better for A.K. to remain in foster care, Wells did state that based upon the Cochrans' prior testimony in court, they had their hands full with A.K.'s two siblings; that one of the children had ADD; that he was difficult to handle at times; and that it would not be in A.K.'s best interest to be placed in appellants' guardianship because A.K. would add to the burden of the other two children. Furthermore, the trial court could have considered that the Cochrans had some medical problems, including arthritis and sleep apnea. Given the totality of the evidence, and the fact that this court defers to the trial judge's credibility determinations, we cannot say that the denial of the Cochrans' petition for guardianship is clearly erroneous.

The Cochrans' second argument, stated in three sub-points, is that the trial court erred in admitting hearsay statements from A.K. concerning the alleged improper touching by her grandfather, appellant Samuel Cochran, due to insufficient notice of the intent to use that evidence, because the prejudice outweighed the probative value, and because there was insufficient proof to support the reliability of A.K.'s out-of-court statements. Prior to the hearing, the Cochrans' counsel made a motion in limine with regard to the hearsay statements, making the same arguments the Cochrans now make on appeal. The trial judge denied the Cochrans' motion in limine, and the statements made by A.K. regarding her grandfather's alleged inappropriately touching her were allowed into evidence, as set forth in the above-described testimony.

In *Grant v. State*, 357 Ark. 91, 93, 161 S.W.3d 785, 786 (2004) (citations omitted), our supreme court stated our well-settled standard of review regarding the admissibility of evidence:

> It is well settled that evidentiary matters regarding the admissibility of evidence are left to the sound discretion of the trial court, and rulings in this regard will not be reversed absent an abuse of discretion. Abuse of discretion is a high threshold that does not simply require error in the trial court's decision, but requires that the trial court act improvidently, thoughtlessly, or without due consideration.

Under the first subpoint of this argument, the Cochrans cite Rule 804(b)(6)(B) of the Arkansas Rules of Evidence for the proposition that "reasonable notice" is required when a party intends to offer statements as evidence. They argue that DHS failed to give them reasonable notice of the intent to use A.K.'s statements because notice was given only four days prior to the hearing. We do not find this argument to be persuasive. The Cochrans knew that an investigation had been opened regarding the statements made by A.K., and that the Arkansas State Police had found the allegations to be unsubstantiated. They were able to obtain a copy of the letter from the Arkansas State Police stating that the evidence did not support the allegation of child maltreatment, which they placed into evidence. We cannot say that they were not given reasonable notice that DHS intended to offer A.K.'s statements as evidence.

For their next sub-point, the Cochrans also argue that A.K.'s statements were more prejudicial than probative. While evidence of an allegation of improper sexual conduct is always prejudicial, we disagree with the Cochrans' assertion that this evidence was more prejudicial than it was probative. Rule 403 of the Arkansas Rules of Evidence provides that evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. This evidence was clearly probative of whether or not the Cochrans were suitable guardians with whom to place A.K., and its probative value was not substantially outweighed by the danger of unfair prejudice. Thus, it was proper for the finder of fact to consider such evidence when making a determination

as to the best interest of A.K. Furthermore, the Cochrans were able to rebut that allegation with the letter from the Arkansas State Police stating that its investigation into the matter did not support the finding of child maltreatment.

For their last sub-point, the Cochrans argue that the trial court did not comply with the requirements of Rule 804(b)(6)(A) in that the trial court did not conduct a hearing to determine whether A.K.'s statement possessed a reasonable guarantee of trustworthiness. Appellants assert that the trial court never made a conclusion on the record as to whether A.K.'s statements were sufficiently trustworthy and that that in and of itself is reversible error. Rule 804(b)(6)(A) of the Arkansas Rules of Evidence provides an exception for child hearsay when the declarant is unavailable in civil cases in which the Confrontation Clause of the Sixth Amendment of the Constitution of the United States is not applicable. This exception provides:

> A statement made by a child under the age of ten (10) years concerning any type of sexual offense, or attempted sexual offense, with, on, or against the child, provided:
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> (A) The trial court conducts a hearing outside the presence of the jury and finds that the statement offered possesses a reasonable guarantee of trustworthiness. The trial court may employ any factor it deems appropriate including, but not limited to those listed below, in deciding whether the statement is sufficiently trustworthy.
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> 1. The spontaneity of the statement.
> 2. The lack of time to fabricate.
> 3. The consistency and repetition of the statement and whether the child has recanted the statement.
> 4. The mental state of the child.
> 5. The competency of the child to testify.
> 6. The child's use of terminology unexpected of the child of similar age.
> 7. The lack of a motive by the child to fabricate the statement.
> 8. The lack of bias by the child.
> 9. Whether it is an embarrassing event the child would not normally relate.
> 10. The credibility of the person testifying to the statement.
> 11. Suggestiveness created by leading questions.
> 12. Whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into making false charges.

13. Corroboration of the statement by other evidence.
14. Corroboration of the alleged offense by other evidence.

In the present case, there was no jury, and the trial judge sat as the finder of fact. Although there was not a specific finding on the record that the trial court found that A.K.'s statements possessed a reasonable guarantee of trustworthiness, it is apparent that the trial court believed that A.K.'s statements were trustworthy because they were allowed into evidence. This rule does not require the trial court to state on the record what factors it considered when determining that a child's hearsay statement had a reasonable guarantee of trustworthiness, and the Cochrans did not ask the trial judge to set forth his findings of fact as to this matter. Autumn Keel, A.K.'s foster mother, developed how the statement came out after A.K. had been with the Cochrans for a visit; that A.K. related the incident to her rather quickly; that A.K. began to seem distrustful of Samuel Cochran; that A.K. had consistently repeated the same statement that her papa touched her pee pee and put two fingers in her pee pee; and that A.K. was not known to lie or make up stories. We cannot say that the trial court abused its discretion when it allowed A.K.'s hearsay statements of alleged improper touching by Samuel Cochran to be received into evidence.

The Cochrans' last argument is that the permanent separation of A.K. from her two siblings and natural family violates public policy. In support of their argument, appellants cite several custody cases in the context of divorce which state that it is not preferable to divide the custody of young children unless exceptional circumstances are present. However, appellants cannot rebut the fact that A.K. has not lived with her siblings for some time now; therefore, there has already been a separation. Furthermore, while keeping siblings together is a factor to be considered in the determination of a child's best

interests, it is only one factor and it is not determinative. The trial court determined that the Cochrans were not suitable guardians for A.K., and as discussed above, we hold that that finding is not clearly erroneous.

Affirmed.

PITTMAN, C.J., and GLADWIN, J., agree.