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SLIP OPINION

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA11-506

ROBIN MUNN APPELLANT V. JONATHAN HUDSON APPELLEE	Opinion Delivered December 14, 2011 APPEAL FROM THE LAWRENCE COUNTY CIRCUIT COURT [NO. PR-2010-9] HONORABLE PHILIP SMITH, JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

Robin Munn, the maternal grandmother and erstwhile temporary guardian of eight-year-old A.H., appeals from an order of the Lawrence County Probate Court dissolving the temporary guardianship and awarding custody of the minor to her natural father, Jonathan Hudson. On appeal, she argues that the trial court erred in awarding custody of the child to the child's natural father. We affirm.

While they were both in high school, Hudson married Christie Munn after she became pregnant with A.H. Hudson was seventeen years old when A.H. was born. They lived together as husband and wife until 2008, when they divorced. In February 2009, Hudson enlisted in the United States Army. In October 2009, Christie moved into Munn's home with A.H. Christie died in an automobile accident in the early morning hours of February 7, 2010.

On February 12, 2010, Munn filed a petition for an emergency ex parte temporary

guardianship over A.H. She alleged that Hudson was "not in a position to provide the stability and continuity of care that the minor child requires during this tragic time." Munn told Hudson at the time that she needed to be named guardian so that she could consent to medical care for A.H. and asked only that he allow the guardianship through the rest of the school year and summer vacation. Hudson consented to the temporary guardianship. The order establishing the temporary guardianship was entered on March 12, 2010. By its express terms, the order set a hearing date of August 9, 2010, to review the temporary guardianship.

On May 13, 2010, Hudson petitioned to terminate the temporary guardianship. In his petition, he recited that the purpose of the temporary guardianship was to "make for a smoother transition for the minor child after experiencing the tragic loss of her mother, and it would allow the minor child to finish the school year." He also stated that he was engaged to be married on June 26, 2010. Munn opposed the termination of the guardianship and petitioned to make the guardianship permanent.

Two hearings were held on the guardianship-termination petition. In the initial hearing, Hudson, who was then twenty-five years old, admitted using illegal drugs when he was twenty-one. He, however, denied a current substance-abuse problem. At that same hearing, psychiatrist Dr. Muhammad Asad Khan, who admitted that he had only spoken to Munn and had yet to meet Hudson, testified that A.H. had gone through an extremely traumatic event with the loss of her mother. He opined that the loss of her grandmother and primary support person would be traumatic to A.H. Dr. Khan, however, acknowledged the importance of the father-child bond, but stated that the most important consideration for

reuniting A.H. with her father was the "timing" of the reunion. After this testimony, the trial court noted that it was not possible to finish the case and entered an interim order. It allowed Hudson to have extended visitation with A.H.

The hearing reconvened on August 18, 2010. Hudson again testified. He stated that while he was married to Christie, he was involved in the daily care of A.H. He attributed his illegal drug use to his reaction to his marriage to Christie coming to an end. Hudson also was extensively questioned concerning his supervision of A.H. during her extended visitation with him at his home in Fort Meade, Maryland. He asserted that he lived in a "nice, safe neighborhood" and allowed his daughter to play with his stepchildren in a wooded area just behind his house. He described it as "within sight and sound" of his house. He also admitted giving A.H. half a tablet of a dietary supplement, melatonin, because he believed it would help her sleep after the long car ride from Maryland to Arkansas. Also probed was his decision to allow A.H., then seven years old, to fly back from his visitation with her as an unattended minor on a commercial airline. He noted, however, that the airline did not allow unaccompanied minors below the age of ten, so he drove A.H. to Arkansas instead. Regarding A.H.'s extended visit with him in Maryland, he asserted that A.H. interacted well with his new wife and her children. In addition to Hudson's testimony, both parties presented positive testimony regarding their suitability as custodians of A.H.

Following this hearing, the trial court terminated the temporary guardianship. It found that "the circumstances leading to the guardianship following the death of [A.H.'s] mother have ended." It further found Hudson "suitable" to have custody of his daughter and that it

was in A.H.'s best interest to live with her father.

On appeal, Munn argues that the trial court erred in awarding custody of A.H. to Hudson. Citing *Smith v. Thomas*, 373 Ark. 427, 284 S.W.3d 476 (2008), she asserts that "the overriding consideration in guardianship cases is the best interest of the minor child; all other considerations are secondary." Further, she urges this court to find analogous our recent decision in *Hicks v. Faith*, 2011 Ark. App. 330, ___ S.W.3d ___, where we affirmed a trial court's choice of maternal grandparents as guardian of a minor child over the child's natural father. She points to what she refers to as "serious judgment lapses," specifically where Hudson allowed his daughter to play in the wooded area behind his home in Fort Meade base housing; letting A.H. take her younger stepsisters, without adult supervision, to a play area near his home; gave A.H. melatonin; and planned to let A.H. travel as an unaccompanied minor on a commercial airliner, as well as his sporadic visitation with A.H. and his prior drug use, as proof of Hudson's unsuitability. In sum, Munn argues that the trial court erred in two critical respects, finding that Hudson was qualified and suitable, and in misapplying the law by failing to recognize that the proper inquiry was not whether Hudson was qualified and suitable, but rather between Hudson and Munn, who was the "most" suitable. We do not find this argument persuasive.

We review probate proceedings de novo, but we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *Devine v. Martens*, 371 Ark. 60, 263 S.W.3d 515 (2007). 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.*

When reviewing the proceedings, we give due regard to the opportunity and superior position of the probate judge to determine the credibility of the witnesses. *Id.*

Once a guardianship has been created, Arkansas Code Annotated section 28-65-401 (Repl. 2004) establishes the process for terminating that guardianship. In pertinent part, that section provides:

> (b) A guardianship may be terminated by court order after such notice as the court may require:
>
> . . .
>
> (3) If, for any other reason, the guardianship is no longer necessary or for the best interest of the ward.

We hold that the trial court did not clearly err in terminating the guardianship. We note first that the temporary guardianship was established because, immediately following the death of A.H.'s custodial parent, Hudson was "not in a position to provide the stability and continuity of care that the minor child require[d] during this tragic time." By consenting to the temporary guardianship, Hudson acknowledged that it was needed to minimize the disruption in A.H.'s life. By the time the trial court dissolved the guardianship, Hudson had remarried and was better able to take on parenting responsibilities. A.H.'s school year had ended (although a new year had begun), and nearly a year had passed since the tragic death of her mother. A.H. had established new relationships with the members of her father's new family and experienced in a positive way her new living environment.

Likewise, we find no merit in Munn's contention that the instant case was controlled by our decision in *Hicks*. We held in *Hicks* that the trial court's determination that the natural

father, who had a long history of drug abuse and sporadic gainful employment, was not a suitable custodian of his minor child was not clearly erroneous where the trial court found that his recent sobriety and employment was not "of sufficient depth, duration, and sincerity to warrant custody of the child." Unlike the case at bar, it was the appellant's unstable lifestyle that created the necessity of the guardianship in lieu of his assuming custody of the child as the natural parent. Significantly, the trial court in *Hicks* was unconvinced that the appellant's past problems with substance abuse and sporadic employment had been rectified. Conversely, there was testimony from Hudson, which the trial court obviously found credible, that his youthful indiscretions were behind him. As noted previously, we defer to the superior position of the trial court to assess the credibility of witnesses. *Devine*, *supra*. In sum, unlike *Hicks*, the trial court in the instant case did not find Hudson unfit. Accordingly, the instant case is clearly more analogous to *Devine*, where the supreme court reversed the creation of a permanent guardianship after a natural parent had "rectified" the issues that made the creation of a temporary guardianship necessary.

We are mindful of Munn's argument that Hudson's decisions to allow A.H. to "without adult supervision" take her step sisters, ages four and five, to play at a playground near his home on the Army base where he was stationed; to attempt to fly back to Arkansas as an unaccompanied minor on a commercial airline; and to take a natural food supplement, weigh against the trial court's transfer of custody to the child's natural father. However, the trial court did not find that these decisions, and the quality of Hudson's decision making that they evidenced, made continuing the guardianship necessary.

Likewise, we have considered, as did the trial court, Dr. Khan's opinion regarding the potential trauma to A.H. from the loss of her daily contact with her grandmother as she joined her father. We believe that the trial court made adequate provisions to mitigate the emotional damage by first allowing an extended visit with Hudson before dissolving the guardianship, ordering frequent visitation with Munn after transferring custody, and requiring Hudson to enroll A.H. in counseling. Under these facts, we cannot say that the trial court clearly erred in finding that the guardianship was no longer necessary.

Having affirmed on that particular statutory ground, we need not accept Munn's invitation to engage in extended best-interest-of-the-ward analysis. As the supreme court noted in *Graham v. Matheny*, 2009 Ark. 481, 346 S.W.3d 273, the statutory standard set forth in Arkansas Code Annotated section 28-65-401(b)(3) is codified in the disjunctive, and either ground is sufficient.

In conclusion, we note further that this is not a situation where the trial court would be required by statute to decide which party would make the better custodian. We acknowledge that it is conceivable in a proceeding to terminate a guardianship that the relative merits of two candidates for custody of a minor child might be fruitful inquiry. However, this analysis is not required in this case, as we have affirmed the trial court's finding that the guardianship was no longer necessary.

Affirmed.

GLOVER and MARTIN, JJ., agree.