18-P-1531 Appeals Court

GUARDIANSHIP OF TARA
(and a companion case[1]).

No. 18-P-1531.

Berkshire. September 5, 2019. - January 29, 2020.

Present: Blake, Ditkoff, & McDonough, JJ.

Practice, Civil, Guardianship proceeding, Appeal, Dismissal of appeal.

Petitions filed in the Berkshire County Division of the Juvenile Court Department on October 20, 2017.

The cases were heard by Joan M. McMenemy, J.

Madeline Weaver Blanchette for the children.
Robert J. McCarthy, Jr., for the father.
Jeremy Bayless for Department of Children and Families.

DITKOFF, J. After a trial, a Juvenile Court judge denied guardianship petitions filed by the maternal grandmother (grandmother) of two children. The judge did not exercise her authority under G. L. c. 190B, § 5-206 (c), to "make any other

[1] Guardianship of Hillel. The names are pseudonyms.

disposition of the matter that will serve the best interest of the minor," thus leaving the children in the custody of the Department of Children and Families (department), where they had been placed as the result of a care and protection action. The father and the children appealed from the denial of the guardianship petition, but the grandmother did not. We conclude that we are unable to provide any effective relief on appeal because the grandmother is not a party to the appeal. Lacking an indispensable party to the appeal, we dismiss the appeal.

1. Background. On October 5, 2017, the department assumed emergency custody of the children and filed a care and protection petition in the Juvenile Court the next day. See G. L. c. 119, § 24. On October 20, 2017, the grandmother filed petitions for guardianship of the children in the Juvenile Court.[2] The parents stipulated to their unfitness and supported the grandmother's petitions for guardianship. The Juvenile Court judge held a two-day trial on the guardianship petitions in July 2018.[3]

---

[2] Although ordinarily guardianship petitions are filed in the Probate and Family Court, a guardianship petition is properly adjudicated by a Juvenile Court judge where there is a pending care and protection case concerning the children. See G. L. c. 190B, § 1-302 (a).

[3] The guardianship and care and protection actions were not consolidated. Cf. Care & Protection of Thomasina, 75 Mass. App. Ct. 563, 574 n.19 (2009) (where department supports guardianship, matters should be consolidated). Where a

The judge found that the grandmother "is not qualified to be appointed as the guardian for [the children], and the appointment would not serve the welfare and best interests of the children." The judge issued findings two days after the end of the trial. The children filed a timely notice of appeal. Four months after the trial, the father obtained leave of a single justice of this court to file a late notice of appeal. Neither the grandmother nor the mother have appealed.

2. Absence of grandmother from the appeal. Because the grandmother is not a party to this appeal, we face the question what effective appellate relief we can provide. We cannot reverse the denial of the guardianship petition and grant guardianship over the children to the grandmother, as she has accepted the finality of the denial of her request for guardianship. We cannot force a person, even a relative, to assume guardianship over children and, indeed, G. L. c. 190B, § 5-206 (c), limits such appointment to a "qualified person [who] seeks appointment." On this record, it appears that the grandmother is no longer seeking appointment as a guardian, and thus that relief is unavailable.

---

guardianship petition is filed relating to children in the care of the department, "the matters generally should be heard together." Guardianship of Phelan, 76 Mass. App. Ct. 742, 749 (2010).

At oral argument, we requested supplemental briefing on this question, specifically asking the parties to explain what relief we could provide. In response, both the father and the children filed briefs explaining that, as interested parties,[4] they have standing to appeal from a decision in a guardianship case but providing no description of any effective relief we could provide and no authority to do so.

The department answered this question by agreeing that the father and children have standing and then merely stating that "this Court would have the authority to remand for further proceedings in the Juvenile Court." That response begs the question, however, of what further proceedings could occur in the guardianship case. Without the grandmother's involvement in the case, there is nothing for the Juvenile Court to consider on remand.

Of course, the parents and the children remain parties in the care and protection case and may continue to litigate in that context regarding the placement of the children. To the

---

[4] By statute, standing to participate in a guardianship action is granted to any parent whose parental rights have not been terminated, as well as any party awarded care or custody (in this case, the department). G. L. c. 190B, § 5-206 (b) (2), (3). Although the statute's explicit grant of party status to a child is limited to one at least fourteen years old, G. L. c. 190B, § 5-206 (b) (1), it appears that this right extends to a younger child represented by counsel or a guardian ad litem. See Matter of Angela, 445 Mass. 55, 62 (2005) (placement outside home intrudes on child's "fundamental liberty interest").

extent that they continue to disagree with the department's placement after a trial, they "may take application to the committing court and the court shall review and make an order on the matter." G. L. c. 119, § 21. See Care & Protection of Manuel, 428 Mass. 527, 531-535 (1998); Care & Protection of Isaac, 419 Mass. 602, 608-609 (1995); Adoption of Talik, 92 Mass. App. Ct. 367, 374-375 (2017). We recognize that there are limitations on the court's authority to direct the department in this regard, see Adoption of Talik, supra at 375, but these statutory limitations may not be sidestepped through litigation stratagems.

Similarly, if the care and protection case advances to a trial on the termination of parental rights, the parties will have the opportunity to litigate whether the department's permanency plan advances the best interests of the children. See, e.g., Adoption of Ulrich, 94 Mass. App. Ct. 668, 679-680 (2019); Adoption of Thea, 78 Mass. App. Ct. 818, 823 (2011). In deciding whether to terminate parental rights, the judge will be required to consider "the permanency plan proposed by the department and the parent" (and, we presume, the children). Adoption of Cadence, 81 Mass. App. Ct. 162, 167 (2012). The parties will be free to argue that the best interests of the children will not be served by a permanency plan that does not include kinship custody. See, e.g., Care & Protection of

Thomasina, 75 Mass. App. Ct. 563, 577-578 (2009); Care & Protection of Amalie, 69 Mass. App. Ct. 813, 820 n.8 (2007).

It is well established that courts do not ordinarily adjudicate cases, like this one, in which "a court can order 'no further effective relief.'" Branch v. Commonwealth Employment Relations Bd., 481 Mass. 810, 817 (2019), cert. denied, 88 U.S.L.W. 3225 (2020), quoting Lawyers' Comm. for Civ. Rights & Economic Justice v. Court Adm'r of the Trial Court, 478 Mass. 1010, 1011 (2017). We may occasionally do so "where the issue has been 'fully argued on both sides, where the question was certain, or at least very likely, to arise again in similar factual circumstances, and especially where appellate review could not be obtained before the recurring question would again be moot." Commonwealth v. Dotson, 462 Mass. 96, 98-99 (2012), quoting Lockhart v. Attorney Gen., 390 Mass. 780, 783 (1984). Accord Care & Protection of Walt, 478 Mass. 212, 219 (2017). This principle, however, is inapplicable here.

Appeal dismissed.