

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

In the Matter of the
Guardianship of N.P.

Court of Appeals No. F-10-030

Trial Court No. 20102009

DECISION AND JUDGMENT

Decided: August 5, 2011

* * * * *

Gary L. Smith, for appellants/cross-appellees.

L. Kate Mitchell and Linda Gabriele, for appellee/cross-appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal and cross-appeal from judgments of the Fulton County Court of Common Pleas, Probate Division, that dismissed appellants' application for appointment of guardianship of N.P., and denied appellee/cross-appellant's motion to dismiss the application. For the reasons that follow, the trial court's judgment dismissing

appellants' application for guardianship is found void for lack of jurisdiction and is vacated. The judgment denying appellee's motion to dismiss is reversed and remanded.

{¶ 2} Appellants/cross-appellees ("appellants") set forth the following assignments of error:

{¶ 3} "I. The trial court erred as a matter of law when stating that a potential 'name change' or future 'adoption' is an insufficient basis to appoint non-parent legal custodians as legal guardians.

{¶ 4} "II. The trial court's application of O.R.C. 2111.02(A) denies non-parent legal custodians of their constitutional right to equal protection under the law."

{¶ 5} Appellee/cross-appellant ("appellee") sets forth the following as her assignment of error:

{¶ 6} "The Fulton County Court of Common Pleas, Probate Division, erred by exercising jurisdiction of the Appellants' Application for Guardianship of the person and estate of N.P., a minor, when the Lucas County Court of Common Pleas, Juvenile Division, had original and exclusive jurisdiction over all matters regarding the custody and care of N.P."

{¶ 7} This matter originated as a dependency action in the Lucas County Court of Common Pleas, Juvenile Division, immediately upon N.P.'s birth in 2005. Appellants have been legal custodians of N.P. since that time. Appellee is N.P.'s natural mother and has had continuing contact with the child since the child was born; appellants are appellee's aunt and uncle. In June 2010, appellants filed a petition to adopt N.P. and an

application for name change in the Fulton County Court of Common Pleas, Probate Division ("probate court"). Appellee filed a motion to dismiss the petition to adopt and on July 29, 2010, the trial court granted appellee's motion.

{¶ 8} On August 6, 2010, appellants filed an application to be appointed N.P.'s legal guardians. Appellants indicated that their desire to be appointed legal guardians was for the purpose of petitioning the court in the future for a change of name and/or adoption of N.P. Appellee then filed a motion to dismiss the application for guardianship based on lack of jurisdiction. Appellee argued that the Lucas County Juvenile Court ("juvenile court") had asserted jurisdiction over the subject matter and the parties to the action, thereby preventing the probate court from taking jurisdiction over the same. By judgment entry filed September 30, 2010, the probate court denied appellee's motion to dismiss. In so doing, the probate court found that the Supreme Court of Ohio has recently emphasized "clear and strong distinctions" between a legal custodian appointed through a juvenile court and a formal placement of the same child through the probate court. *In re Adoption of J.A.S.*, 126 Ohio St.3d 145, 2010-Ohio-3270. The probate court concluded, based on the holding in *J.A.S.*, that a guardian is a separate and distinct legal appointment from a legal custodian and that a probate court retains exclusive jurisdiction for the appointment of a guardian for a minor child, regardless of a prior designation of a legal custodian of the same child by a juvenile court. Having made this ruling, the probate court then set appellants' application for guardianship for a full hearing on the merits.

{¶ 9} On October 21, 2010, a hearing was held on the petition. The probate court heard testimony from appellants, appellee and several other witnesses. The record reflects that N.P.'s natural father appeared and consented to appellants' application to be appointed the child's legal guardians. By judgment entry filed November 16, 2010, the court found that N.P.'s best interest did not necessitate the appointment of a guardian of the person and/or estate at that time. The probate court also concluded that the custodians' desire for the child's name to be changed and for future adoption was not a sufficient basis for the probate court to assume jurisdiction and appoint legal guardians. In support of its decision, the trial court cited *In re Perales* (1977), 52 Ohio St.2d 89. The probate court ordered that the application for appointment of legal guardian be dismissed. It is from that judgment that appellants appeal. Appellee cross-appeals from the probate court's September 30, 2010 denial of her motion to dismiss and from the November 16, 2010 judgment.

{¶ 10} We will first address appellee's cross-assignment of error as it is dispositive of the issues before us. In her sole cross-assignment of error, appellee asserts that the probate court erred by denying her motion to dismiss the application for guardianship because that court lacked subject matter jurisdiction. In support, appellee asserts that the Lucas County Juvenile Court properly exercised jurisdiction over N.P. when it awarded custody to appellants in March 2008 and that the court continued to exercise jurisdiction over the child when appellee filed a motion to modify parenting time in February 2010. A trial regarding parenting issues was conducted in Lucas County Juvenile Court on

June 17 and August 6, 2010. Appellee notes that appellants filed their application for guardianship in Fulton County Probate Court on August 6, 2010, the final day of the trial in Lucas County Juvenile Court. Therefore, appellee argues, at the time appellants filed their application in Fulton County, the Lucas County Juvenile Court had, and was exercising, exclusive and original jurisdiction regarding all custody and parenting issues related to N.P. Appellee asserts that, as such, the Fulton County Probate Court should not have exercised jurisdiction in this matter.

{¶ 11} Pursuant to R.C. 2101.24(A)(4), Ohio probate courts have exclusive jurisdiction over appointing and removing guardians "except as otherwise provided by law." R.C. 2101.24(A)(1). When a probate court of competent jurisdiction issues letters of guardianship over the person of a minor, the court is essentially awarding the guardian custody of the minor. "A guardian of the person shall have the custody and provide for the maintenance of the ward, and if the ward is a minor, such guardian shall also provide for the education of such ward." R.C. 2111.06. Thus, by statute, guardianship of a minor involves the custody of the minor. Ohio law indicates that a guardianship proceeding may be considered a child custody proceeding. See, also, R.C. 3127.01(B)(4); *In re Zahoransky* (1985), 22 Ohio App.3d 75.

{¶ 12} Additionally, domestic relations courts and juvenile courts also have statutorily conferred authority to exercise jurisdiction over the custody of a child. Domestic relations courts may determine issues of custody which are ancillary to a divorce action, separation or civil protection order. See R.C. 3105.21 and 3113.31(B).

Juvenile courts have exclusive original jurisdiction over any case concerning a child alleged to be abused, neglected or dependent, or to determine the custody of any child "not a ward of another court of this state." See R.C. 2151.23(A).

{¶ 13} With three distinct courts having the potential authority to determine the custody of a minor also comes the potential for conflict if more than one court attempts to exercise jurisdiction over the custody and care of the same minor. Faced with conflicts between a probate court and a domestic or juvenile court's exercise of jurisdiction on this issue, Ohio courts have held that the first court to properly exercise jurisdiction over the custody of a minor retains exclusive jurisdiction. See, e.g., *Addams v. State* (1922), 104 Ohio St. 475; *In re Pushcar*, 110 Ohio St.3d 332, 2006-Ohio-4572, citing *In re Asente* (2000), 90 Ohio St.3d 91; *In the Matter of the Guardianship of Pierce*, 4th Dist. No 03CA2712, 2003-Ohio-3997.

{¶ 14} Addressing a dispute concerning jurisdiction between a court of common pleas and a probate court, the Ohio Supreme Court in *Addams* held that where a decree of divorce containing an order regarding the custody, care and control of minor children of the divorce remains in force, a probate court cannot legally interfere with the custody either by habeas corpus or letters of guardianship. *Addams* at 479. This holding has been applied to later cases such as the one now before us wherein a juvenile court asserts original jurisdiction over the care and custody of a minor. In a published decision, the Butler County (Ohio) Probate Court found that where a juvenile court exercised original and continuing jurisdiction of a minor by placing permanent custody of the minor with

the county welfare department, the probate court did not have jurisdiction or authority to grant letters of guardianship to the child's mother. *In the Matter of Guardianship of Brinegar* (1959), 81 Ohio Law Abs. 158. Here, as in *Brinegar*, the juvenile court made a custody determination regarding the subject minor.

{¶ 15} At the time of his birth in 2005, N.P. was placed in the care of his maternal aunt and uncle, appellants herein. In January 2008, legal custody was granted to appellants by agreement of all parties through the Lucas County Court of Common Pleas, Juvenile Division. (Case No. JC-05-145740.) Between the time of the 2008 custody order in Lucas County and the filing of the petition to adopt in Fulton County in June 2010, the Lucas County Juvenile Court presided over various issues involving appellee's visitation with N.P.

{¶ 16} We therefore conclude that the juvenile court retained jurisdiction over N.P. at the time appellee filed her motion to dismiss appellants' application for guardianship in the probate court. Accordingly, the trial court lacked jurisdiction and should have granted appellee's motion to dismiss prior to proceeding with the full hearing on the guardianship issue. Appellee's cross-assignment of error is well-taken. Having made that determination, we find that, while the probate court arguably reached a correct decision by denying the application for guardianship, the probate court lacked jurisdiction to consider the matter and issue a decision. Therefore, appellants' first and second assignments of error on appeal arguing that their application for guardianship should have been granted are moot.

{¶ 17} On consideration whereof, the September 30, 2010 judgment of the Fulton County Court of Common Pleas, Probate Division, denying appellee's motion to dismiss is reversed and remanded for further proceedings consistent with this decision. The November 16, 2010 judgment of the same court is void for lack of jurisdiction and is vacated. Pursuant to App.R. 24, costs of this appeal are assessed to appellants.

JUDGMENT REVERSED, IN PART,
AND VACATED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.