COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP567 **Cir. Ct. No. 2005GN6**

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

IN THE MATTER OF THE GUARDIANSHIP OF HAILIE E. T.:

BRITNI E.,

APPELLANT,

V.

WALLACE R. T. AND ELIZABETH A. T.,

RESPONDENTS.

APPEAL from an order of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Hailie E.T. is Britini E.'s daughter. Hailie's paternal grandparents, Wallace R.T. and Elizabeth A.T., have been Hailie's guardians since February 2005. Britni appeals an order denying her motion to

terminate the guardianship. She argues the circuit court erroneously applied the best interests of the child standard in concluding that continued guardianship was appropriate. She argues the guardianship should have been terminated absent a finding that she is unfit or unable to care for Hailie or that other compelling reasons require guardianship. We agree. Accordingly, we reverse the order and remand for consideration of whether compelling reasons require continuing the guardianship.

BACKGROUND

¶2 Britni gave birth to Hailie on September 2, 2003, when Britni was sixteen years old. During the first years of her life, Hailie lived with Elizabeth and Wallace at least part of the time. On January 31, 2005, Elizabeth was appointed Hailie's temporary guardian. On February 23, 2005, Elizabeth and Wallace petitioned the court to be appointed Hailie's permanent guardians. The petition alleged guardianship was appropriate because Britni and Hailie's father were "not meeting [Hailie's] needs at this time in the area of nutrition, health and safety."

¶3 Britni initially opposed the petition. However, the court record of the May 2, 2005 hearing on the petition indicates Britni agreed to appointment of Elizabeth and Wallace as permanent guardians subject to certain conditions.[1] The subsequent order appointing Elizabeth and Wallace guardians noted that, by agreement, Britni was to have supervised visits at specified times and was to attend parent education classes.

[1] No transcript of that hearing appears in the record.

¶4 On January 11, 2006, Britni moved to terminate the guardianship. The court held a hearing on Britni's motion on January 19. At the hearing, the court heard conflicting testimony on the nature of Britni's care for Hailie and her ability as a parent. The parties disagreed over whether the standard the court was to apply was Hailie's best interests or Britni's fitness to be a parent. The circuit court held the appropriate standard was Hailie's best interests and that while Britni had made progress toward being a parent and was not an unfit parent, it was still in Hailie's best interests to continue in the care of Elizabeth and Wallace.

STANDARD OF REVIEW

¶5 What legal standard applies to a guardianship proceeding is a question of law we review without deference to the circuit court. ***Robin K. v. Lamanda M.***, 2006 WI 68, ¶12, 291 Wis. 2d 333, 718 N.W.2d 38.

DISCUSSION

¶6 A court may only appoint a guardian over a parent's objection if it finds there are "extraordinary circumstances requiring medical aid or the prevention of harm to [the child's] person or property." WIS. STAT. § 880.03;[2] ***Robin K.***, 291 Wis. 2d 333, ¶15. Britni argues a similar "compelling reasons" standard is also appropriate when a parent challenges an existing guardianship. Elizabeth and Wallace argue the "compelling reasons" standard applies only to

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. After the conclusion of the circuit court proceedings in this case, WIS. STAT. ch. 880 was repealed and replaced with WIS. STAT. ch. 54. 2005 Wis. Act 387 § 100 (effective May 25, 2006). The new chapter 54 does not have any provision that corresponds to WIS. STAT. § 880.03.

initial appointment of a guardian, and that the best interests standard applies to any subsequent changes to the guardianship. We agree with Britni.

¶7 This case is controlled by ***Howard M. v. Jean R.***, 196 Wis. 2d 16, 539 N.W.2d 104 (Ct. App. 1995). In ***Howard M.***, the child's mother, Jean R., had originally petitioned the court to appoint Howard guardian of her child. ***Id.*** at 20-21. Several years later, she again petitioned the court, this time to terminate Howard's guardianship of her child. ***Id.*** at 21. The court held that Jean was a fit parent and no compelling reasons existed to award custody to Howard, a third party. ***Id.*** Accordingly, the circuit court terminated Howard's guardianship.[3]

¶8 We affirmed, relying heavily on the constitutional rights conferred on parents in ***Barstad v. Frazier***, 118 Wis. 2d 549, 568-69, 348 N.W.2d 479 (1984). ***Barstad*** involved a custody dispute between a child's mother and grandmother. ***Barstad*** held, on both statutory and constitutional grounds, that

> a parent is entitled to custody of his or her children unless the parent is either unfit or unable to care for the children or there are compelling reasons for awarding custody to a third party. Compelling reasons include abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, or other similar extraordinary circumstances that would drastically affect the welfare of the child.

Id.

[3] The initial paragraph of the opinion in ***Howard M.*** stated its holding applied "when a guardianship is terminated and a custody contest develops between the child's parent and a third party." ***Howard M. v. Jean R.***, 196 Wis. 2d 16, 19, 539 N.W.2d 104 (Ct. App. 1995). However, the facts and the analysis in the opinion make clear that the action reviewed in ***Howard M.*** was termination of the guardianship and the resulting change in custody, not a custody contest that arose after the guardianship was terminated.

¶9 Applying this standard to the facts in ***Howard M.***, we held the constitutional concerns in ***Barstad*** mandated application of the ***Barstad*** standard in cases where a parent challenged an existing guardianship:

> The constitutional underpinning of ***Barstad*** is the reason why we reject Howard's assertion that § 767.325(1)(b), STATS., [a statute governing revision of custody orders] is applicable to guardianship proceedings where the contest is between a parent and a third party. Section 767.325(1)(b) uses a "best interest of the child" test for determining custody between parents. As we have discussed, ***Barstad*** rejects that test in cases involving third parties in favor of one which makes it more difficult to separate a child from a parent. Were we to conclude that § 767.325(1)(b) provides the proper test for termination of minor guardianship proceedings where the contest is between a parent and a third party, we would then have to conclude that § 767.325(1)(b) is unconstitutional in that setting.

Howard M., 196 Wis. 2d at 24.

¶10 In this case, Elizabeth and Wallace attempt to distinguish ***Howard M.*** on the ground that the court in that case "failed to address the distinction between the establishment of a guardianship and the termination of a guardianship, and *assumed* that ***Barstad*** applied." This point mirrors a concern expressed in the ***Howard M.*** dissent. In dissent, Judge Sundby expressed the view that the ***Barstad*** standard would give parents too much power to abruptly end their child's relationship with a guardian in situations where ending the relationship was contrary to the child's best interests. *See* ***Howard M.***, 196 Wis. 2d at 33-34 (Sundby, J., dissenting). The dissent advocated a reduced standard in view of the fact that the parent agreed to and even promoted the child's relationship with the guardian at the time the guardianship was created.

¶11 As Elizabeth and Wallace concede, however, this is an argument that ***Howard M.*** is wrongly decided, not an argument that ***Howard M.*** is

distinguishable. We are without power to overrule a published court of appeals decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Because ***Howard M.*** controls the result in this case, we reverse the order and direct that on remand the court apply the ***Barstad*** standard to the facts of this case.[4]

By the Court—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[4] In its order, the court specifically found that Britni was not an unfit parent. However, the court did not make any finding on whether other compelling reasons permitting guardianship exist.

¶12 CANE, C.J. (*concurring*). Because the issue at the trial level in this case was whether the guardianship should be terminated, I agree with the circuit court that the standard to be applied should be what is in the best interest of the child. It was not a custody contest between the child's parent and a third party, which I agree should be reviewed under the fitness standard.

¶13 Once there is a judgment establishing the guardianship under the appropriate standard, the circuit court should not have to revisit the fitness standard each time there is a motion to terminate the guardianship. The issue should be whether the termination of the guardianship is in the best interest of the child.

¶14 The opinion in ***Howard M. v. Jean R.***, 196 Wis. 2d 16, 539 N.W.2d 104 (Ct. App. 1995), initially states correctly—in my opinion—that when a guardianship is terminated and a custody contest develops between the child's parent and a third party, the fitness standard applies. However, as our opinion correctly observes in n. 3, *supra*, the actual action being reviewed in ***Howard M.*** was whether the guardianship should be terminated and the holding applied the fitness standard—wrongly, in my opinion. Only because we are bound by prior published decisions of our court, I concur. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 185-90, 560 N.W.2d 146 (1997).