

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 12, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2194

Cir. Ct. No. 2008GN16

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE MATTER OF THE GUARDIANSHIP OF BENJAMIN M. W.:

STEVEN W.,

APPELLANT,

V.

JEAN W.,

RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
JOHN D. MCKAY, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Steven W. appeals an order for guardianship that appointed a third-party corporate guardian of the person and estate for Steven's autistic then eighteen-year-old son, Benjamin M. W. Steven argues the circuit

court erred when it appointed the third-party guardian based solely on Benjamin's parents' history of disagreement over how to raise and care for Benjamin. Steven further argues the court erred by refusing to hear evidence of the parents' history of parenting decisions. We agree with Steven and reverse and remand for the circuit court to hear further evidence and employ the WIS. STAT. ch. 54 standards, including the presumption that a parent be appointed the guardian.¹

BACKGROUND

¶2 Following his parents' divorce, Benjamin lived in a split-time arrangement that alternated equal periods of residence between them. Steven and Jean W., Benjamin's mother, agreed to the custody arrangement in a stipulation and order entered in the divorce court that set forth numerous detailed conditions concerning Benjamin's care.² Among other things, the stipulation and order stated "once Ben turns seventeen, the Case Manager and the parents shall begin planning for Ben's transition at age eighteen to an appropriate group home setting." It further stated the "parties agree that a third party corporate guardian shall be appointed Ben's guardian when he turns eighteen."

¶3 A few months before Benjamin's eighteenth birthday, Jean petitioned for the appointment of Professional Guardianships, Inc., as Benjamin's corporate guardian. Steven subsequently also filed a guardianship petition, but nominated himself as the proposed guardian. A short hearing was scheduled the

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² The parties did not enter into the stipulation until late 2004, several years after their divorce.

day before Benjamin's eighteenth birthday to at least appoint a temporary guardian. At that hearing, the guardian ad litem (GAL) stated Benjamin was unable to make decisions for himself and it was absolutely necessary to appoint a temporary guardian. The GAL recommended Professional Guardianships, Inc., which it also recommended as the permanent guardian in the report submitted to the court. Both parents expressed a desire to be both the temporary and permanent guardian. The court stated it was not going to pick between the two parents or make them coguardians. It accepted the physician's report and the GAL's report in lieu of testimony and appointed Professional Guardianships, Inc. as the temporary guardian.

¶4 The parents submitted written arguments regarding the family court stipulation and also addressed the issue at the subsequent guardianship hearing. Steven's counsel elicited some testimony from both Steven and Jean regarding their history of parenting decisions. The court, however, repeatedly cut the inquiry short, stating the history was irrelevant to determining the prospective need to appoint a guardian, especially because the parents had agreed to act as joint decision-makers in the past.

¶5 The court further stated it was clear the parties had a "180-degree divergence" of parenting perspective, but that it was not the court's responsibility to choose between the two. The court interjected again during the testimony of a person who worked with Benjamin in Steven's home, stating, "There's no question that this witness ... believes that if I were choosing between these two parents, I should choose the [father]. That's not the issue here."

¶6 Finally, the GAL provided recommendations to the court: "I think both these parents clearly love this child. Both have tried to do the right thing for

Ben. But as was the case in 2004, they don't agree on what is best for Ben.” The GAL opined that, given the conflict and disagreements, the parents could not be coguardians, and it was therefore in Benjamin's best interest to appoint Professional Guardianships, Inc., as guardian.

¶7 The court allowed the parties to submit written arguments prior to its decision. The court issued a concise written decision, concluding it was not bound by the family court's order adopting the parents' stipulation. It further declared it would be inappropriate to appoint one of the parents over the other as guardian, or to appoint them both as coguardians because they could not cooperate. The court explicitly adopted the GAL's analysis and concluded that appointing a third-party guardian was the only appropriate answer.³

DISCUSSION

¶8 A circuit court's guardianship decision involves a determination of the proposed ward's best interests and is committed to the court's discretion. *Anna S. v. Diana M.*, 2004 WI App 45, ¶7, 270 Wis. 2d 411, 678 N.W.2d 285. We will affirm the decision if the court applies the proper legal standard to the relevant facts and uses a rational process to reach a reasonable result. *Id.* Whether the court applied the correct legal standard in exercising its discretion presents a question of law that we decide independently. *Id.*

³ Steven's statement of facts in his brief to this court contains extensive argument and editorializing. Such commentary is helpful to neither this court nor a party's position.

¶9 Relying in part on *Anna S.*,⁴ Steven argues the circuit court failed to properly apply WIS. STAT. § 54.15(5), which states: “If one or both of the parents of a minor or an individual with developmental disability ... are suitable and willing, the court shall appoint one or both as guardian unless the court finds that the appointment is not in the proposed ward’s best interest.” *Anna S.* observed that the statutory preference for a “suitable and willing” parent recognized “the natural love that most frequently exists between child and parent.” *Anna S.*, 270 Wis. 2d 411, ¶12 (quoting *Brezinski v. Barkholtz*, 71 Wis. 2d 317, 325-26, 237 N.W.2d 919 (1976)).

¶10 Steven further relies on *Nicholas C.L. v. Julie R.L.*, 2006 WI App 119, ¶16, 293 Wis. 2d 819, 719 N.W.2d 508 (citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000)), which held the statute’s parental preference is necessitated by the parents’ constitutional and fundamental right to “make decisions concerning the care, custody, and control of their children.” The court also observed the best interest of the child standard was not the conclusive test in guardianship proceedings. *Id.*, ¶¶11-14. Rather, it stated that when deciding between a parent and a third party, our supreme court “favors a test that makes it more difficult to separate a child from a parent.” *Id.*, ¶14 (citing *Barstad v. Frazier*, 118 Wis. 2d 549, 556, 348 N.W.2d 479 (1984)). Thus, according to *Nicholas C.L.*, unless a parent is unfit or unable to care for the child, a third party may only be appointed

⁴ Steven acknowledges *Anna S. v. Diana M.*, 2004 WI App 45, 270 Wis. 2d 411, 678 N.W.2d 285, dealt with the prior version of the guardianship statutes, which were significantly revised and renumbered by 2005 Wis. Act 387. See Betsy J. Abramson & Jane A. Raymond, Landmark Reforms Signed Into Law: Guardianships and Adult Protective Services, Wis. Lawyer, Aug. 2006, available on the State Bar of Wisconsin website at: http://www.wisbar.org/am/template.cfm?section=wisconsin_lawyer&template=/cm/contentdisplay.cfm&contentid=72988.

guardian if there are compelling reasons, such as “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.” *Nicholas C.L.*, 293 Wis. 2d 819, ¶¶14, 18 (quoting *Barstad*, 118 Wis. 2d at 568). We note, however, *Nicholas C.L.* was also decided under the old version of the guardianship statutes.⁵

¶11 Jean does not directly address whether the principles discussed in *Anna S.* and *Nicholas C.L.* are still applicable in light of the guardianship statutes’ revision.⁶ She instead asserts the cases are distinguishable on their facts and relies on the current language in WIS. STAT. § 54.15(5). Jean argues we should defer to the circuit court’s discretionary determination that it was in Benjamin’s best interest to appoint the third-party guardian.⁷

¶12 Although our supreme court has expressed concern about the constitutionality of the best interest standard in WIS. STAT. § 54.15(5), *see Robin K. v. Lamanda M.*, 2006 WI 68, ¶52 n.1, 291 Wis. 2d 333, 718 N.W.2d 38 (Prosser, J., concurring), we need not decide whether that standard is the determinative test in this case. Specifically, we do not decide whether the best interest standard in WIS. STAT. § 54.15(5) is to be read to trump parents’

⁵ In fact, the decision was filed on the same day the legislature revised the guardianship chapter. *See Robin K. v. Lamanda M.*, 2006 WI 68, ¶14 n.10, 291 Wis. 2d 333, 718 N.W.2d 38.

⁶ Jean and Benjamin’s guardian ad litem filed a joint response brief in this court.

⁷ Jean also argues Steven should be bound by his stipulation. However, as Steven noted, the circuit court did not rely on the stipulation in its determination. Therefore, we agree we need not address whether a stipulation in a family court judgment is binding in a WIS. STAT. ch. 54 proceeding. Jean concedes as much by failing to respond to Steven’s argument in her brief. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted).

constitutional rights to make decisions concerning the care, custody, and control of their children. Rather, we reverse because we conclude the circuit court erroneously applied the best interest standard, which is less stringent than the standard established in *Barstad*. Under either standard, a court must comply with WIS. STAT. § 54.10(3) before it may appoint a guardian because of a proposed ward's developmental disability.

¶13 In a guardianship proceeding based on developmental disability, a court is permitted to appoint a guardian of the person and the estate only if it first makes the requisite findings set forth in WIS. STAT. § 54.10(3)(a)1.-4., as well as the determination under para. (3)(d). Next, when appointing the guardian, a court must individually consider all of the factors listed in subds. (3)(c)1.-16. and para. (3)(e).⁸

¶14 Here, there is nothing in the record, at either the temporary or permanent guardianship hearings or in the court's written decision, demonstrating that the court made the requisite findings or considered the statutory factors. While the parties agreed Benjamin was in need of a guardian, it is inadequate for the court to merely receive and adopt the findings in the physician's and GAL's reports. Without having considered the WIS. STAT. § 54.10(3)(c) factors, a court is in no position to determine what is in the proposed ward's best interest. Benjamin's parents' disagreements may be a factor to consider, but it is not the only factor.

⁸ Before listing the factors, WIS. STAT. § 54.10(3)(c) states "the court shall consider all of the following[.]" The statute then lists fifteen factors plus a catchall, "other relevant evidence."

¶15 Further, the circuit court repeatedly referred to Benjamin’s best interest as being the sole consideration in appointing a guardian, without acknowledging the WIS. STAT. § 54.15(5) presumption that one or both parents be appointed if they are “suitable and willing.” Thus, even if the best interests standard is the determinative test, an issue we do not decide, the court failed to demonstrate it gave any weight to a significant factor in that determination. We therefore remand for the court to consider the statutory presumption in its analysis and to permit evidence relating to the WIS. STAT. § 54.10(3)(c) factors, including the proposed ward’s needs and desires and the parents’ ability to appreciate and serve them.

¶16 We also observe that in considering the parents’ inability to agree as the sole reason for choosing a corporate guardian, the court failed to consider an alternative that might have honored the statutory presumption for appointing parents. WISCONSIN STAT. § 54.10(5) permits a court to appoint coguardians, “subject to *any* conditions that the court imposes.” (Emphasis added.) Limited only by the bounds of reasonableness, this provision provides the court with a powerful tool to mitigate the potential for harm to Benjamin’s best interest due to future disputes. Indeed, the family court stipulation and order contained pages of conditions regarding Benjamin’s care, and the parents were able to manage under that arrangement for years.

¶17 Additionally, we note another problem with the circuit court’s appointment of the guardian. Steven argues there is no evidence in the record indicating whether Professional Guardianships, Inc., is a suitable guardian. WISCONSIN STAT. § 54.15(7) states a “private nonprofit corporation ... may be appointed as guardian ... if ... the department ... finds the corporation ... to be a suitable agency to perform such duties.” Given the GAL’s recommendation, we

could probably infer Professional Guardianships, Inc., is an approved corporation. However, the statute only permits the appointment of such a corporation “if no suitable individual is available as guardian...” *Id.* The court did not find either of Benjamin’s parents unsuitable as guardians.

¶18 Finally, we reject Steven’s suggestion that the circuit court should have appointed him as guardian because he was the only parent specifically nominated by either of the petitioning documents. We are aware of no supporting authority and to so hold would both usurp the circuit court’s role and conflict with the parental preference set forth in WIS. STAT. § 54.15(5). It is unreasonable for Steven to suggest he should benefit by Jean’s initial compliance with their stipulation to nominate a corporate guardian.

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

This case will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

