COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 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. 2008AP1597

Cir. Ct. No. 2007GN37

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN THE MATTER OF THE GUARDIANSHIP OF NATASHA J. D.:

TERRANCE D.,

APPELLANT,

V.

TONIA D.,

RESPONDENT.

APPEAL from an order of the circuit court for Oneida County: PATRICK F. O'MELIA, Judge. *Affirmed.*

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

¶1 PER CURIAM. Terrance D. appeals from an order for guardianship, arguing the circuit court erred by appointing his daughter, Tonia D., as guardian of his other daughter Natasha J. D., who was born with Down

syndrome. He also argues the court's appointment of Tonia as guardian interferes with his constitutional right to parent his child. We disagree and affirm.

¶2 Natasha was approximately twenty-three years old at the time of the guardianship hearing, but has been developmentally disabled since birth. She functions mentally at the level of a third grader. There is no dispute Natasha requires a guardian, and the only issue at the guardianship hearing was who should serve as guardian, her father or her sister.

¶3 Natasha lived with her father and mother until her mother's death in 2003. Natasha's mother was her primary caregiver during her lifetime. Following their mother's death, Tonia purchased a home with approximately 106 acres near Rhinelander and invited Terrance and Natasha to live with her. Tonia is employed as a nurse anesthetist with an income of $180,000 to $190,000 annually. Tonia's employment permitted her to support herself as well as Terrance and Natasha, and also hire nannies and in-home care. At some point in 2006, Tonia and Terrance had a falling out and Terrance and Natasha moved out of the home. In November 2007, Natasha again began living with Tonia.

¶4 Tonia was appointed temporary guardian on November 28, 2007. Tonia petitioned for permanent guardianship and the circuit court granted Tonia's petition over Terrance's objection. Terrance now appeals the order for permanent guardianship.

¶5 A circuit court's guardianship decision 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.***

¶6 Terrance argues WIS. STAT. § 54.15(5)[1] requires the court to appoint the parent of a developmentally disabled individual as guardian unless there is a finding the parent is unfit to serve. Terrance principally relies upon ***Robin K. v. Lamanda M.***, 2006 WI 68, 291 Wis. 2d 333, 718 N.W.2d 38. Terrance also insists the court improperly ignored the statutory presumption that a parent be appointed guardian of a person with developmental disabilities.

¶7 As Tonia correctly points out, however, ***Robin K.*** dealt with the prior version of the guardianship statutes. Those statutes were significantly revised and renumbered by 2005 Wis. Act 387.[2] In ***Robin K.***, the court concluded former WIS. STAT. § 880.03 authorized appointment of a guardian where there were "extraordinary circumstances" affecting the health or safety of persons subject to a guardianship. *See* ***Robin K.***, 291 Wis. 2d at 344-49.[3] The current version of the statutes, § 54.15(5), does not require such a finding, and provides as follows:

> **(5)** PARENT OF A PROPOSED WARD. If one or both of the parents of a minor or an individual with developmental disabilities or with serious and persistent mental illness are suitable and willing, the court shall appoint one or both as

[1] References to Wisconsin Statutes are to the 2007-08 version.

[2] Terrance does not refute in his reply brief that WIS. STAT. ch. 880 is now replaced by WIS. STAT. ch. 54. Terrance's arguments based upon the old statutes are therefore misplaced.

[3] The court also noted there may be similarities between the statutory requirement in WIS. STAT. § 880.03 of "extraordinary circumstances" and the "compelling reasons" requirement in ***Barstad v. Frazier***, 118 Wis. 2d 549, 568, 348 N.W.2d 479 (1984). The court declined to reach the issue of whether the statutory requirements concerning "extraordinary circumstances" are essentially the same as "compelling reasons." *See* ***Robin K.***, 291 Wis. 2d at 337-38 n.3.

> guardian *unless the court finds that the appointment is not in the proposed ward's best interest*. The court shall consider a proposed ward's objection to the appointment of his or her parent. (Emphasis added.)

¶8 Here, the circuit court specifically found Natasha's best interest would not be served by appointing Terrance as guardian. Sufficient evidence supports the court's findings. The court emphasized Terrance's isolation of Natasha within the home, as well as his rigidity and inflexibility in failing to keep up with changes in society regarding the treatment and attitudes toward individuals with disabilities. The court concluded Terrance's actions toward Tonia were not in Natasha's best interest. For instance, Tonia testified that Terrance refused Tonia access to Natasha because Terrance disapproved of Tonia dating a divorced man. The court stated, "That's why you kind of scratch your head and say why are we here. We're primarily here because he didn't want [Tonia] to get involved with this divorced man. And that's unreasonable."

¶9 The circuit court contrasted Terrance's desire to cloister Natasha, and limit her social contact and development potential, with the opportunities Tonia provided. The court concluded Tonia provided the expanded social environment and stimulation Natasha required, including enrollment of Natasha in programs at Headwaters, Inc., a local facility with a longstanding history of excellence and enrichment for the developmentally disabled. Tonia also utilized multiple caregivers and tutors who provided diversified experiences for Natasha. By all accounts, Natasha was thriving, well adjusted, and had made friends in her current active social environment. The court also found more credible Tonia's testimony with regard to whether Terrance was being denied access to Natasha. The court stated, "He on occasion would say, oh, you – okay. You got her now. Then you take her. She's your responsibility. Well, that's not unusual for

somebody to respond that way, but it's not reasonable and it's done out of anger and hurt…."

¶10 Contrary to Terrance's perception, the circuit court did not contravene the presumption in the statute that a parent be appointed guardian of a developmentally disabled individual. In fact, the court specifically referenced the parental preference in WIS. STAT. § 54.15(5):

> In other words, this is not the same as the best interest standard in family court with respect to custody where both parties go in equally positioned and there is – in the ordinary situation at least coming in the first time there isn't any preference given. Here there's a clear preference given by the statute. And, let's face it, it's an appropriate preference that the statute gives….

¶11 Terrance also argues the appointment of Tonia as guardian interfered with his constitutional right to parent his child,[4] relying upon ***Barstad v. Frazier***, 118 Wis. 2d 549, 568, 348 N.W.2d 479 (1984). Terrance contends:

> By focusing on the best interest of the child standard, in this contest between a third party and a natural parent for an award of guardianship, the trial court failed to follow the clear precedent established in ***Barstad*** and applied in ***Howard M. v. Jean R.***, 196 Wis. 2d 16, 539 N.W.2d 104 (Ct. App. 1995), which held that application of the "best interests of the child" test was unconstitutional in a case involving a guardianship determination between a parent and a third party.

¶12 Terrance fails to provide citation to the record on appeal demonstrating he raised this issue to the circuit court; we will not address it here. *See* ***State v. Marshall***, 113 Wis. 2d 643, 653, 335 N.W.2d 612 (1983) (stating that

[4] Terrance states in his reply brief, "Terrance is not in fact attacking the 'unconstitutionality' of the Wisconsin Statutes, instead Terrance is attacking how the Statute Section is applied to these specific facts."

even the claim of a constitutional right is deemed waived if not timely raised in the trial court). Moreover, Terrance misrepresents the holdings of ***Barstad*** and ***Howard M***. These cases were again decided under the old version of the guardianship statutes. Thus, they could not have "held that application of the 'best interests of the child' test was unconstitutional" under the new statute, WIS. STAT. § 54.15(5).[5]

¶13 We conclude the circuit court applied the correct legal standard and its findings are not clearly erroneous. WIS. STAT. § 805.17(2). In reviewing discretionary decisions, our task is to determine whether a court could reasonably come to the conclusion it reached. The court's decision, as a whole, incorporates appropriate considerations and is not an erroneous exercise of discretion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.32(1)(b)5.

[5] We note ***Barstad*** arose under child custody provisions of the family code, when a grandmother commenced an action under WIS. STAT. § 767.02(1)(c) (1979-80), to have a minor child's custody transferred from the mother to her. *See* ***Barstad***, 118 Wis. 2d at 551-52. The present case does not involve a minor. Terrance fails to provide legal authority to support the suggestion that the constitutionally protected relationship between a parent and a child applies to an adult with disabilities. *See* ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286 (We will not reach arguments unsupported by legal authority.). However, we note it is clear a parent's right to the care, custody and control of a minor child is not absolute. For example, our legislature and supreme court have made clear that "the best interest of the child is the polestar of all determinations under [WIS. STAT.] ch. 48." *See* ***David S. v. Laura S.***, 179 Wis. 2d 114, 149, 507 N.W.2d 94 (1993) (involving proceedings under WIS. STAT. § 48.837 (1991-92), for termination of parental rights and a child's placement with non-relatives for adoption). *See also*, cases and commentary cited in the dissent in ***Barstad***, discussing how the test to be applied even in child custody cases vacillated in Wisconsin prior to the repeal and amendment by the legislature of WIS. STAT. ch. 880 and the "extraordinary circumstances" standard. The dissent advanced the need to give "real credence" to the best interest rule. *See* ***Barstad***, 118 Wis. 2d at 581-86 (Steinmetz, J., dissenting).