

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 11, 2004

Cornelia G. Clark
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. 04-0767
STATE OF WISCONSIN**

Cir. Ct. No. 03JG000033

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE GUARDIANSHIP OF
JAMES D.K.:**

ROBIN K.,

APPELLANT,

V.

LAMANDA M.,

RESPONDENT.

APPEAL from an order of the circuit court for Sauk County:
JAMES EVENSON, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Robin K. appeals an order denying her guardianship petition. The subject of the petition was a three-year-old child, James D.K. The mother of James, Lamanda M., opposed the petition. The issue

on appeal concerns the applicable standard used to award guardianship of a child over a parent's objection. Robin contends the court should have used the best interest of the child standard. However, we conclude that courts must apply the much stricter standard of parental unfitness set forth in *Barstad v. Frazier*, 118 Wis. 2d 549, 568, 348 N.W.2d 479 (1984). Because Robin does not contend that Lamanda was an unfit mother under the *Barstad* standard, we affirm.

¶2 Robin is James' great aunt and the person who cared for him much of his life until she commenced this proceeding. At the hearing on her petition she presented evidence that she could provide better care for James than Lamanda could, given various unresolved problems and instability in Lamanda's life. That evidence was sufficient to convince the guardian ad litem that the guardianship was in James' best interest. However, the trial court denied Robin's petition, despite what it acknowledged were troubling aspects of Lamanda's life.

¶3 WISCONSIN STAT. ch. 880 (2001-02)¹ sets forth no guidelines or standards for awarding guardianship to a non-parent over a parent's objection. However, in a custody dispute between a parent and a non-parent, *Barstad* holds that a parent has a constitutional right to the care, custody and control of his or her child

... 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.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Barstad, 118 Wis. 2d at 568. This standard is incorporated into WIS. STAT. § 767.24(3) which provides that the court may transfer legal custody of a child to an agency or to a relative “[i]f the interest of [the] child demands it, and if the court finds that neither parent is able to care for the child adequately or that neither parent is fit and proper to have the care and custody of the child” Robin’s guardianship petition is an attempt to remove James from Lamanda’s care, custody and control; therefore, Robin should have filed an action for custody under ch. 767 rather than a petition under ch. 880. In any event, because Robin does not contend that Lamanda met the *Barstad* standard of unfitness, the trial court properly denied the petition.

¶4 We note Robin’s argument that this court has previously established the best interest of the child as the proper standard in guardianship proceedings, as opposed to the *Barstad* standard. However, the case that so holds, *Anna S. v. Diana M.*, 2004 WI App 45, 270 Wis. 2d 411, 678 N.W.2d 285, deals with an entirely different situation. In that case, there was no parental objection to the guardianship; rather, the dispute was over the choice of guardian. *Id.*, ¶¶2-3. Consequently, the constitutional right of the parent to the care and custody of her child was not implicated. Therefore, *Anna S.* does not apply under the facts of this case.

By the Court.—Order affirmed.

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

