COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 03-0859, 03-0860 **Cir. Ct. Nos. 01-GN-86, 01-GN-87**

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

NO. 03-0859

IN THE MATTER OF THE GUARDIANSHIP OF CADE E. R.:

MICHAEL H. AND JACKIE H.,

APPELLANTS,

V.

JEFFREY G. N. AND PAULA M. N.,

RESPONDENTS.

NO. 03-0860

IN THE MATTER OF THE GUARDIANSHIP OF MADELINE R.:

MICHAEL H. AND JACKIE H.,

APPELLANTS,

V.

JEFFREY G. N. AND PAULA M. N.,

RESPONDENTS.

APPEALS from orders of the circuit court for Outagamie County: MICHAEL GAGE, Judge. *Affirmed*.

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

¶1 PER CURIAM. Michael H. and Jackie H. appeal orders removing them as guardians and appointing successor guardians for Cade E. R. and Madeline R. They claim that the trial court misinterpreted WIS. STAT. § 880.16(2),[1] governing the removal of a guardian. They further argue that the trial court erroneously exercised its discretion when it failed to address the doctrines of judicial estoppel and equitable estoppel. Because the court correctly applied the law and its decision to deny equitable relief reflects a reasonable exercise of discretion, we affirm the orders.

¶2 This case arises out of the tragic deaths of the parents of Madeline R., born January 3, 1997, and Cade E. R., born August 30, 2000. The parents were killed in a traffic accident in August 2001. Michael H. and Jackie H. were appointed to serve as the children's guardians. In January 2002, Michael and Jackie sought to resign as guardians for Madeline. Their resignation papers each stated: "Because I care for my own three children, in addition to acting as guardian for the ward's one and one half year old brother, I am unable to dedicate the necessary amount of time to meet Madeline's needs."

---

[1] All statutory references are to the 2001-02 version unless otherwise noted.

¶3 Jeffrey G. N. and Paula M. N. were appointed as successor guardians for Madeline in April 2002. In May, Jeffrey and Paula sought to be appointed guardians for Cade as well. Following a trial to the court over several days, the court appointed Jeffrey and Paula as successor guardians for Cade.[2]

¶4 The court's lengthy opinion from the bench reveals its struggle in considering the competing factors in this guardianship proceeding. The court concluded that case law established that "the best interest of the wards are of paramount consideration" with due regard to the guardian's discretion. The court referred to the unanimous expert opinion at trial that separating the siblings, particularly after the death of their parents, was psychologically harmful. The court found that the greater long-term best interests of the children would be served by restoring the sibling relationship. In addition, the court agreed with expert testimony stating that because of age and developmental factors, it would be less harmful for Cade to move to another household than it would be for Madeline.

¶5 The court specifically found that "the long-term gain of reestablishing and preserving the sibling relationship will in the course of Cade's lifetime outweigh the cost of terminating the attachments within the [H.] household." The court attached weight to Dr. Allen Hauer's testimony, finding that "he articulated clearly and persuasively a rationale applicable to the case, giving decisive weight to the value of establishing and preserving the sibling unity in a single household." The court weighed the advantages and disadvantages

[2] The record citations Michael and Jackie provide are frequently inaccurate and therefore not of assistance to the court. *See* WIS. STAT. RULE 809.19(1).

presented in each household and found that it was in the children's best interest to appoint Jeffrey and Paula to be Cade's successor guardians. The court found, under WIS. STAT. § 880.16, no grounds to remove Jeffrey and Paula as Madeline's guardians, but that grounds had been established to remove Michael and Jackie as Cade's guardians.

¶6 Michael and Jackie appeal. They argue that the trial court misinterpreted WIS. STAT. § 880.16(2)[3] by applying a "best interest" standard not found in the statute. They further argue the term "trust" refers to a fiduciary relationship and there is no evidence that Michael and Jackie breached a fiduciary responsibility. They point to expert testimony showing no harm to Cade resulting from their guardianship. In addition, they contend guardianship law does not contain a best interest test for removal of a guardian. We are unpersuaded.

¶7 Although the phrase "best interest" is not used in WIS. STAT. § 880.16(2), we are satisfied that the trial court did not err when it referred to the best interest of the child. In construing a statute, we are to give effect to legislative intent by looking first to the statutory language. ***Kerkvliet v. Kerkvliet***, 166 Wis. 2d 930, 939, 480 N.W.2d 823 (Ct. App. 1992). The entire section of a statute and related sections are to be considered in its construction or interpretation; we do not read statutes out of context. In determining the meaning of any single phrase or word in a statute, it is necessary to look at it in light of the

[3] WISCONSIN STAT. § 880.16, entitled "When a guardian may be removed," provides in part:

> (2) REMOVAL FOR CAUSE. When any guardian fails or neglects to discharge the guardian's trust the court may remove the guardian after such notice as the court shall direct to such guardian and all others interested.

whole statute and related sections. ***Id.*** "The cardinal rule in interpreting statutes is that the purpose of the whole act is to be sought and is favored over a construction which will defeat the manifest object of the act." ***Id.***

¶8 "[T]he overriding concern in a guardianship proceeding is the best interests of the ward." ***In re Tina Marie***, 215 Wis. 2d 523, 528, 573 N.W.2d 207 (Ct. App. 1997); *see also* WIS. STAT. § 880.33. "[T]he trial court must be vigilant in assuring that a guardian properly protects the ward's interests." ***Tina Marie***, 215 Wis. 2d at 528.

¶9 The promotion of the child's welfare is of paramount concern, and the courts have a superintending control, "but will not interfere with the guardian's control unless there is a failure in some particular showing a purpose to serve a selfish interest, an inclination to be indifferent to the interests of the ward, or some act detrimental to the ward's welfare." ***In re Bagley***, 203 Wis. 89, 95, 233 N.W. 563 (1930). A general guardian of the person of an infant has responsibilities relating to the care, training, education, and general upbringing of the ward. He stands in loco parentis. "No person has a legal right to serve as a guardian. Rather, guardianship status is a privilege, with a concomitant duty, conferred upon the guardian by the trial court in the exercise of its discretion." ***Tina Marie***, 215 Wis. 2d at 528-29.

¶10 We reject Michael and Jackie's contention that the term "trust" refers solely to a fiduciary relationship. WEBSTER'S THIRD NEW INT'L DICTIONARY 2456 (unabr. 1998) defines trust: "[5.c.] CARE, CUSTODY <a child committed to his ~>." Consequently, there is no need for the court to find a breach of a fiduciary relationship to remove a guardian of a person. Because case law establishes that the "overriding concern" of guardianships is the "best

interests" of the ward, ***Tina Marie***, 215 Wis. 2d at 528, and "[t]he promotion of the welfare of the child is of paramount concern," ***Bagley***, 203 Wis. at 95, we conclude the court was entitled to consider the child's best interest. Accordingly, we conclude the court properly applied WIS. STAT. § 880.16(2).

¶11 Michael and Jackie argue, in effect that under the law as stated in ***Bagley***, 203 Wis. 2d at 95, the court should not "interfere with the guardian's control unless there is a failure in some particular showing a purpose to serve a selfish interest, an inclination to be indifferent to the interests of the ward, or some act detrimental to the ward's welfare."[4] The court acknowledged this legal

[4] They further argue that the following language in ***In re Bagley***, 203 Wis. 89, 95-96, 233 N.W. 563 (1930), supports their contentions:

> Merely because the judge of the county court, if acting as guardian, might have followed a different course does not warrant the removal of a guardian, the changing of a well-worked-out plan, or the transfer of the custody of the ward from the place selected by the guardian.
>
> A comparison of the plan adopted by the guardian with the one preferred by the court, both being based fairly on advantages to the ward, cannot warrant the court's interference. If the court, without substantial reason, at its will and pleasure, or upon motion of any relative, is permitted to vacate, set aside, reverse, or modify the guardian's proper directions and arrangements, there will be uncertainty and suspense resulting in a lack of sustained authority which is supposed and intended to be a substitute for the stabilizing influence of parental control. This would create a condition somewhat chaotic and intolerable, defeating the purpose for which the relation of guardian and ward exists. A guardian having been appointed, the further jurisdiction of the court concerning the ward is ordinarily exercised by supervising. … To justify interference with a guardian's control, there must be some positive misbehavior, want of integrity or negligence affecting the ward's welfare. (Citations omitted.)

requirement when it found that the separation of the siblings was detrimental to their welfare. The record supports the court's finding.

¶12 Michael and Jackie further argue that expert testimony established no harm resulting to Cade from their guardianship. This argument is based upon their interpretation of the evidence, a matter to be determined by the trier of fact whose determination will not be disturbed where more than one reasonable inference can be drawn from credible evidence. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979). Here, the court found that despite the capable care and diligence Michael and Jackie demonstrated, the anticipated harm to Cade due to separation from Madeline outweighed the advantages of Michael and Jackie's guardianship. We conclude that it was not error for the court to consider the harm anticipated to Cade due to separation from Madeline.

¶13 Next, Michael and Jackie contend that the trial court erroneously failed to apply and address the doctrine of judicial estoppel. They argue that Jeffrey and Paula took inconsistent positions in the successor guardianship proceedings involving Madeline and Cade. They point to testimony that they would not have agreed to change guardianship of Madeline if they could not remain Cade's guardians.[5]

[5] They further claim that the elements of equitable estoppel are established. Michael and Jackie concede that equitable estoppel was not raised in the trial court but argue that a related concept, issue preclusion, was raised. We conclude that the equitable estoppel issue has not been adequately preserved for appeal.

(continued)

¶14 The record supports the trial court's discretionary decision. As an equitable remedy, the application of judicial estoppel is addressed to trial court discretion. ***State v. Fleming***, 181 Wis. 2d 546, 558, 510 N.W.2d 837 (Ct. App. 1993). A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). "It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning." ***Id.***

¶15 We conclude the doctrine of judicial estoppel is inapplicable because the two guardianships involve different facts. *See* ***State v. Johnson***, 224 Wis. 2d 164, 628 N.W.2d 431 (Ct. App. 2000). The guardianships were commenced at different times, for different reasons involving different children. Therefore, the court correctly rejected the doctrine.

A party who appeals has the burden to establish "by reference to the record, that the issue was raised before the circuit court." ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (citation omitted). As a general rule, this court will not decide issues that have not first been raised in the trial court. ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). This precept serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for an appeal. ***State v. Huebner***, 2000 WI 59, ¶12, 235 Wis. 2d 486, 611 N.W.2d 727. It also gives the parties and the circuit court notice of the issue and a fair opportunity to address the objection. ***Id.*** "Finally, the rule prevents attorneys from "sandbagging" errors or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." ***Id.*** (citations omitted).

¶16 In addition, the trial court made lengthy findings of fact, none of which is expressly challenged on appeal. The court determined that the overriding consideration was the child's best interest. This is a correct statement of law. The court carefully considered the testimony and analyzed the issues. The court balanced the competing consideration and arrived at a reasoned conclusion. Because the record reveals a rational basis for the court's discretionary determination, we do not disturb it on appeal.

By the Court.—Orders affirmed.

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