COLE V. GARCIA

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MARY C. COLE,
Petitioner-Appellee,
v.
ANNA GARCIA,
Respondent-Appellant.
and concerning
J.C.G.,
Child,

No. 33,058

COURT OF APPEALS OF NEW MEXICO

December 1, 2015

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY, David P. Reeb, Jr., District Judge

COUNSEL

Whittenburg, Strange & Walker, P. C., Angelina Baca, Clovis, NM, for Appellee

Eric D. Dixon. P. A., Portales, NM, for Appellant

JUDGES

MICHAEL E. VIGIL, Chief Judge. WE CONCUR: JAMES J. WECHSLER, Judge, RODERICK T. KENNEDY, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Chief Judge.

{1} This unusual case started as a temporary guardianship case, and when it was determined that there was no statutory basis for appointing a temporary guardianship,

the district court converted it into a custody case. For the reasons that follow, we affirm the district court order granting custody to Grandmother with custody being returned to Mother if certain conditions are satisfied. Because this is a memorandum opinion and the parties are familiar with the facts, we do not reiterate all of them herein.

BACKGROUND

{2} On January 3, 2012, Grandmother filed a verified petition for order appointing temporary guardianship together with a verified ex parte motion for temporary custody. In material part, Grandmother alleged that since the birth of Child on April 4, 2009, Mother has been living from house-to-house with various relatives, friends, and boyfriends and unable to provide a stable home for Child; and that Father was currently incarcerated pending various charges, including a probation violation.

{3} In addition, Grandmother alleged that: (1) on December 21, 2011, while at Father's home, child complained to Father's girlfriend of pain in her vaginal area, graphically opening her legs, and pulling her panties to the side saying it hurts; (2) on December 29, 2011, when Father picked up child from Mother, Child showed signs of being slapped in the face and that upon information and belief, Child was routinely being slapped in the face as a way of discipline; (3) in October 2011, Child was taken into the custody of the Children, Youth and Families Department (CYFD) when Mother was arrested on charges of contributing to the delinquency of a minor and receiving stolen property, and refused to give the arresting officers the name of Father; (4) upon information and belief, both parents used marijuana and other illegal drugs; (5) as of the date the pleading was filed, Mother had an arrest warrant for failing to appear in court on her current pending charges; (6) Mother was unemployed and had not worked since the date of birth of Child; (7) Mother has been the primary caretaker of Child; (8) Grandmother took care of Child in her home for approximately five weeks because Mother did not have a place to stay, and Child was running a fever and required medical attention; (9) when Mother found out Child was going to have a specialist look at her to check for possible sexual abuse, Mother immediately picked up Child; and (10) when Grandmother went to see Child in March 2011, Mother's face was visibly swollen and she was laying on a mattress on the floor. There was no food in the refrigerator and there was no stove to cook on.

{4} Grandmother's petition alleged her belief that if Child remained in the custody of Mother "irreparable physical, emotional and mental harm will come" to Child. Grandmother asked that the court grant her immediate ex parte temporary physical custody so that Child "can be protected from any further abuse occurring" in Mother's custody. That same day, the district court filed its ex parte order for temporary custody ordering that Child be immediately placed in the custody of Petitioner, and a hearing was set for January 11, 2012.

{5} On January 3, 2012, Mother was served with a copy of the verified ex parte motion for temporary custody, the attorney's affidavit in support of the motion, and the ex parte order. Mother was then served with a summons and copy of the petition on

January 5, 2012. An amended petition was filed on January 5, 2012, which corrected the date of Child's birth date to March 4, 2009 and Mother's address, but was otherwise identical. Also on January 5, 2012, Father filed his consent to granting the ex parte motion for temporary custody as well as the petition.

{6} At the hearing on January 11, 2012, Mother represented herself. When asked if she had any objection to Grandmother having custody of Child for at least six months until she could get on her feet, get a job and a place to live, Mother answered, "I kinda don't have issues with it, but then also, I kinda do." The only objection voiced by Mother was the suggestion of sexual abuse on the basis that such an allegation was previously made and when CYFD investigated, the charge was not sustained.

{7} After hearing testimony from Father's girlfriend, Mother, and Grandmother, the district court entered its order appointing temporary guardian and conservator on January 12, 2012. Therein, the district court ordered that Grandmother be appointed temporary guardian and conservator of Child with reasonable visitation granted to Mother and Father at the discretion of Grandmother. In addition, the district court ordered: (1) that Child be enrolled in child therapeutic counseling; (2) that Child see a speech therapist; (3) that Child see an orthodontist regarding her dental health; and (4) that Mother make herself available for a urine analysis exam at Grandmother's request and expense. In addition, the district court stated it would not consider changing custody until Mother: (1) was employed for at least four months; (2) obtained her GED; (3) completed an extensive parenting skills course; and (4) tested negative for illegal drugs in her system. Finally, the district court set the matter to be reviewed in six months.

{8} Importantly, no statutory basis is cited in any of the pleadings seeking the relief or in the district court orders granting the relief. The significance of this omission will become more apparent below.

{9} A status conference was scheduled to be held on July 9, 2012. On July 6, 2012, the parties agreed to vacate the hearing scheduled for July 9, 2012, and to reschedule the hearing for a later date convenient to the parties. On January 9, 2013, approximately one year from the date of the order for temporary guardian and conservator, counsel entered his appearance in the district court on behalf of Mother.

{10} On January 30, 2013, Mother's attorney filed a motion to review the order appointing temporary guardian and conservator alleging that the order should be dissolved because there were no grounds under the Kinship Guardianship Act, NMSA 1978, §§ 40-10B-1 to -15 (2001, as amended through 2015) (the KGA) to continue the order in effect.

{11} On February 13, 2013, Mother's attorney also filed a motion to dismiss the petition under the KGA on grounds that: (1) the court had failed to set a hearing on the petition as required by Section 40-10B-6(A) ("The court shall set a date for hearing on the [KGA] petition, which date shall be no less than thirty and no more than ninety days from the date of filing the petition."); (2) there was no proof that prior to the filing of the

petition that Child had resided with Grandmother for a period of ninety days or more as required by Section 40-10B-8(B)(3) (stating that one of the exclusive grounds on which a guardian may be appointed pursuant to the KGA requires that the child had resided with the petitioner without the parent for a period of ninety days or more immediately preceding the date the petition was filed); and (3) the temporary guardianship, filed on January 12, 2012, had expired as a matter of law under Section 40-10B-7 (stating; "the court may appoint a temporary guardian [under the KGA] to serve for not more than one hundred eighty days or until the case is decided on the merits, whichever occurs first" Section 40-10B-7(A)).

{12} A hearing on the merits was held on June 3, 2013, and after presenting evidence, the parties filed their respective requested findings of fact and conclusions of law. On June 18, 2013, the district court filed its findings of fact and conclusions of law and its final order on the amended petition and the motion to dismiss. In its findings of fact and conclusions of law, incorporated into the final order by reference, the district court ordered that the motion to dismiss the amended petition be granted for three separate reasons: (1) because Child was not living with Petitioner for ninety consecutive days before the Petition was filed; (2) because a final hearing was not obtained within ninety days of the filing of the Petition; and (3) because the temporary guardianship expired on or about July 12, 2012, as no merits hearing was set, and six months had elapsed since Petitioner was appointed temporary guardian. As set forth above in our recitation of Mother's motion to dismiss, each reason relied upon for the dismissal constituted a separate violation of the KGA.

{13} Having dismissed the petition, thus leaving no pleading requesting any relief, the district court nevertheless awarded custody to Grandmother. The district court first reasoned that a guardianship and custody are two separate matters and that custody may be awarded to a third party without a guardianship. In its findings of fact and conclusions of law, the district court ruled that Mother is "unfit" to exercise custody, that "extraordinary circumstances" exist to divest Mother of custody and that it is in the best interests of Child to remain in the custody of Grandmother, with custody being reviewed in six months. The final order further rules that Mother is "unfit" under the KGA, and custody of Child should remain with Grandmother because Mother is unable to provide adequate care and maintenance for Child. In retaining custody of Child with Grandmother under these circumstances, the district court relied on *In re Guardianship of Ashleigh R.*, 2002-NMCA-103, 132 N.M. 772, 55 P.3d 984.The final order adds that Mother failed to comply with the requirements imposed by the temporary order, and that custody will be reviewed in six months at which time the district court will consider changing custody to Mother provided she complies with conditions specified in the order. Mother appeals.

DISCUSSION

{14} We are presented here with a situation in which the district court ruled on June 18, 2013 that the pleadings on which custody was awarded were fatally flawed, and the amended petition was dismissed. However, the district court nevertheless ruled that

Child should remain in Grandmother's custody. The result is that Child has been in Grandmother's continued custody from the time that Child was about two years and nine months old, to the present time, a period of about forty-six months. Child is now about six and one-half years old (seventy-eight months), and for about forty-six of those months, well over one-half of her life, Child has been in Grandmother's continued custody.

{15} Moreover, we take note of two additional matters. When we assigned this case to the general calendar, we specifically informed the parties and the district court that the pendency of the appeal did not deprive the district court of its continuing jurisdiction to revisit the custody matters presented by the case. The district court stated its intention in its final order on July 12, 2013; that it would review the matter of custody in six months. A check of the case under Odyssey shows that no additional hearings have been held in this case in the district court. Thus, what began as a temporary change of custody has become what is in effect a new status quo due to the passage of time and inaction. *Cf. Peregoy v. Peregoy*, 817 A.2d 381, 395 (N.J. Super. Ct. App. Div. 2003) (warning that one of the considerations to keep in mind when one parent seeks emergency relief on the ground that the child will be endangered by being returned to the custody of the other parent, is that "a temporary decision to change custody can take on a life of its own, creating a new status quo").

Due Process

{16} Mother contends that her right to due process was violated because she has a fundamental constitutional right to raise her child, she had physical custody of her child, and she is not unfit as a parent. To be sure, Mother has a fundamental constitutional right to custody of Child protected by the Fourteenth Amendment. *See Oldfield v. Benavidez*, 1994-NMSC-006, ¶ 14, 116 N.M. 785, 867 P.2d 1167; *Ridenour v. Ridenour*, 1995-NMCA-072, ¶ 7, 120 N.M. 352, 901 P.2d 770. However, Mother's constitutional right is not absolute or unqualified, and the State's parens patriae power to act in the best interests of children includes those relations between a child and other family members. *See*; *Oldfield*, 1994-NMSC-006, ¶¶ 15-16; *Ridenour*, 1995-NMCA-072, ¶¶ 8-11. Thus, Mother's constitutional right to familial integrity involves weighing Mother's rights against the interests of Child and the State. *Oldfield*, 1994-NMSC-006, ¶ 15. Whether Mother's constitutional right has been violated depends on a balancing of these competing rights. *Id.*

{17} We have established how those rights are to be balanced. In *Shorty v. Scott*, 1975-NMSC-030, 87 N.M. 490, 535 P.2d 1341, our Supreme Court specifically held that in a custody dispute between a natural parent and a grandparent or other person having no permanent or legal right to custody of the minor child, "the 'parental right' doctrine is to be given prominent, though not controlling, consideration." *Id.* ¶ 10. The parental preference doctrine means that "[a] parent who is able to care for his children and desires to do so, and who has not been found to be an unfit person to have their custody in an action or proceeding where that question is an issue, is entitled to custody as against grandparents or others who have no permanent or legal right to custody." *Id.*

¶ 8 n.1 (internal quotation marks and citation omitted). Thus, *Shorty* adopted the following balancing test to be followed in custody disputes such as the one before here:

> As against a third person, a natural parent would be entitled as a matter of law to custody of the minor child unless there has been established on the parent's part neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish the child with needed care, or unless it has been established that such custody otherwise would not be in the best welfare and interest of the child.

Id. ¶ 11 (alterations, internal quotation marks, footnotes, and citation omitted).

{18} In *In re Guardianship of Sabrina Mae D.*, 1992-NMCA-050, ¶ 23, 114 N.M. 133, 835 P.2d 849, we stated that the *Shorty* test is to be followed in a custody dispute between grandparents and a parent. When the test is properly applied and supported by substantial evidence, due process is not violated. We now proceed to determine whether the test was properly followed.

Application of *Ashleigh R.*

{19} Mother argues that the district court erred as a matter of law in relying on *Ashleigh R.*, 2002-NMCA-103 instead of the KGA because *Ashleigh R.* was decided before the effective date of the KGA. We reject Mother's argument. The amended petition was dismissed because the KGA was not complied with. This left the district court to decide whether Grandmother or Mother was to have custody of Child when custody of Child had been with Grandmother for the immediate past year. *Ashleigh R.* provides guidance for a district court to follow in just such a situation. This is not a unique situation. *See Burris-Awalt v. Knowles*, 2010-NMCA-083, ¶¶ 19-21, 148 N.M. 616, 241 P.3d 617 (concluding that while the ex parte order appointing the grandmother as guardian was set aside, this did not necessarily mandate a return of custody to the father, and on remand, the district court was to consider appropriate interim custody arrangements); *In re Samantha D.*, 1987-NMCA-082, ¶ 23, 106 N.M. 184, 740 P.2d 1168 (stating that notwithstanding that the consent signed by the parent for the adoption of her child was invalid, "in keeping with the best interests of the child, the trial court retains the power to determine custody in the absence of a legally valid consent, and it was within the authority of the trial court to continue [the child] in the custody of the [foster family]"); *In re Santillanes*, 1943-NMSC-011, ¶ 10, 47 N.M. 140, 138 P.2d 503 ("No one disputes . . . that under any proceeding the district court, sitting as a court of equity, has broad inherent power concerning the custody and control of minors.").

{20} In *Ashleigh R.,* the mother appealed from a judgment appointing a grandmother and her husband as guardians of the mother's two minor daughters under the Probate Code. *Ashleigh R.*, 2002-NMCA-103, ¶ 1. In concluding that the district court erred in appointing guardians pursuant to the Probate Code, we also stated this error did not necessarily mandate a return of custody to the mother. "The appointment of guardians and determination of custody are two separate matters. The court may award or

continue custody in third parties without issuing letters of guardianship. Legal custody is a status created by court order and vests in a person the right to determine where and with whom a child will live." *Id.* ¶ 13 (alterations, internal quotation marks, and citations omitted). Thus, we were required to decide whether we could affirm the district court award of custody to the grandparents although the order naming the grandparents as guardians had to be reversed. *Id.*

Finding of Parental Unfitness

{21} *Ashleigh R.* reiterated that under the parental preference doctrine, where there is a custody dispute between a parent and a non-parent, the parent should generally prevail unless he or she is found unfit. Under these circumstances, the district court "must ordinarily make an express finding that the parent is unfit before denying the parent custody." *Id.* ¶ 14.

{22} Here, the district court concluded that Mother is unfit. "A parent is unfit when he or she is unable to care for the child. A parent's unfitness can be shown through evidence demonstrating parental inadequacy or conduct detrimental to the child, including but not limited to abuse, neglect, or abandonment. A finding of unfitness must be based on current evidence, not on prior acts alone." *Id.* ¶ 19 (internal quotation marks and citation omitted). We have carefully reviewed the recorded testimony of both hearings held in the case, and the evidence supports the findings of fact made by the district court to conclude that Mother was unfit. We do not set forth the evidence of findings of fact herein, as this is a memorandum opinion, and the parties are familiar with the facts and procedural history of the case. While we note Mother's argument that some of the evidence related to matters occurred before the petition was filed on January 3, 2012, we reject her argument that none of this evidence was relevant to the district court's determination that Mother was unfit. Instead, we conclude that *all* of the evidence admitted without objection, taken together, fully supports the district court finding that Mother was unfit. Our task is to review the evidence in the light most favorable to the findings made by the district court, not to determine if evidence is contradicted or to otherwise weigh the evidence. *See Benavidez v. Benavidez*, 2006-NMCA-138, ¶ 21, 140 N.M. 637, 145 P.3d 117 (stating on appeal we are deferential to facts found by the district court); *Padilla v. City of Santa Fe*, 1988-NMCA-025, ¶ 14, 107 N.M. 107, 753 P.2d 353 (stating that on appeal, we are bound by the district court's findings of fact "unless they are demonstrated to be clearly erroneous or not supported by substantial evidence").

{23} With the finding of parental unfitness, the district court was able to determine what custody arrangement was in the comparative best interest of Child. *Ashleigh R.*, 2002-NMCA-103, ¶ 16. "The comparative best interest of the child standard essentially compares the merit of the prospective custodians, and awards custody to the better of the two." *Id.* (internal quotation marks and citation omitted). Here, the district court's final order makes an express finding, based on the evidence, that the best interests of Child warranted placing custody of Child with Grandmother.

{24} Because we have concluded that the evidence amply supports a finding that Mother is unfit and that the best interests of Child warrant placing custody of Child with Grandmother, it is not necessary for us to address whether extraordinary circumstances exist.

{25} We add one final word; although the district court stated its intent to review the matter in six months after the hearing on June 3, 2013, no such hearing was held. Nevertheless, we add that even when a parent has "reformed" and seeks to regain custody, that right is to "be balanced against the child's needs for stability and attachment to the third-party caregiver." *Id.* ¶ 27. "Among the factors to be considered are (1) the length of time the child has been away from the biological parent, (2) the age of the child when care was assumed by the third party, (3) the possible emotional effect on the child of a change of custody, (4) the period of time which elapsed before the parent sought to reclaim the child, (5) the nature and strength of the ties between the child and the third party custodian, (6) the intensity and genuineness of the parent's desire to have the child, and (7) the stability and certainty as to the child's future in the custody of the parent." *Id.*

{26} In child custody matters, "even when the court must protect the rights of the parent, the court has equitable power to fashion a remedy that protects the best interest of the [child] as well." *Id.* ¶ 34. Thus, even if it is demonstrated that the mother is fit and the child can make a transition to her custody without suffering permanent psychological damage, the court "should use its equitable powers to transition custody to [the mother] in a way that is least detrimental to the [child]." *Id.* ¶ 36.

CONCLUSION

{27} For the reasons set forth herein, the order of the district court is affirmed.

{28} IT IS SO ORDERED.

MICHAEL E. VIGIL, Chief Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

RODERICK T. KENNEDY, Judge