

IN THE SUPREME COURT OF GUAM

IN THE INTEREST OF J.L.L.P.,
Minor

DAVID PEREZ,
Respondent-Appellant.

Supreme Court Case Number: CVA02-014
Juvenile Special Proceedings Case No: JP0566-97

OPINION

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Appeal from the Superior Court of Guam
Argued and Submitted April 22, 2003
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; PETER C. SIGUENZA, JR., Justice *Pro Tempore*¹.

TYDINGCO-GATEWOOD, J.:

[1] Respondent David Perez (“Perez”) appeals from a trial court order permitting his minor daughter’s permanent guardian to relocate off-island with his daughter (“J.L.L.P.”). Perez raises four issues in this appeal: (1) whether permitting the guardian to remove J.L.L.P. from Guam amounted to a de facto termination of Perez’s parental rights; (2) whether the trial court erred in giving the permanent guardian unlimited discretion over visitation; (3) whether a minor who cannot be placed with a natural parent should be placed with a family member rather than with an unrelated guardian; and (4) whether statutes in derogation of a parent’s traditional common law rights should be construed and applied narrowly. We affirm the decision of the trial court to allow the permanent guardian to relocate with the minor.

I.

[2] In March of 1995, J.L.L.P. was born to Perez, who has cognitive and physical disabilities, and to Cathy Lizama (“Lizama”), who is confined to a wheelchair and has cognitive disabilities. Perez and Lizama are clients of Guma’ Mami². The Department of Public Health & Social Services’ Child Protective Services (“CPS”) became involved with J.L.L.P. shortly before her birth. CPS placed J.L.L.P. with various relatives and with a shelter before finally granting permanent guardianship over her to Connie Castro (“Castro”), then an employee of Guma’ Mami. The placements with relatives were problematic for reasons including alleged marijuana use in the household, sanitation concerns, and disagreements between the custodial relatives and Perez concerning visitation. By 1999, CPS determined that it could not locate any suitable relatives to care for J.L.L.P.

[3] On March 17, 1999, CPS filed a motion for an order establishing a permanency plan for J.L.L.P. In its motion, CPS sought to terminate Perez and Lizama’s parental rights so that J.L.L.P. could be

¹ Pursuant to Title 7 GCA § 6108(a), Justice *Pro Tempore* Benjamin J.F. Cruz became ineligible to sit as a member of this panel. Justice *Pro Tempore* Peter C. Siguenza, Jr., was appointed to sit on the panel pursuant to Title 7 GCA § 6115 (as amended by P.L. 27-31).

² Guma’ Mami was incorporated in 1980 to assist persons with cognitive and other developmental disabilities. It began providing housing and support services to these individuals in 1983.

adopted. CPS asserted that Perez and Lizama were unable to provide J.L.L.P. with a safe home, and that it was not reasonably foreseeable that they would become able to do so within a reasonable period of time. CPS further noted that Perez sometimes had outbursts during supervised visitation with J.L.L.P. although he did not direct these outbursts at her.³

[4] CPS acknowledged that: (1) Perez appeared to have the cognitive ability to learn how to care for his child; (2) J.L.L.P. would interact with Perez during visits and would at times appear to bond with him; (3) Perez successfully completed the Effective Discipline Course offered by the Superior Court;⁴ (4) Perez received ongoing services from Guma' Mami; and (5) Perez had genuinely loved and had concern for J.L.L.P.

[5] On November 10, 1999, the trial court approved a settlement set forth in a stipulation. Pursuant to the settlement, the trial court granted Castro permanent guardianship over the person and estate of J.L.L.P., inclusive of legal and physical custody, with visitation to the parents at Castro's discretion after a 90-day transition period. The stipulation provided that neither Perez nor Lizama was able to provide J.L.L.P. with a safe home, even with CPS supervision, and that it was not reasonably foreseeable that they would be able to provide her with a safe home within a reasonable period of time. The stipulation further provided that the permanency plan submitted with the March 17, 1999 motion was amended so as to be in accord with the stipulation. The stipulation was signed by, among others, Perez, his counsel, and his guardian ad litem.

[6] After the transition period, Perez had occasional visits with J.L.L.P. Periodic written and oral reports from CPS and J.L.L.P.'s guardian ad litem indicated that J.L.L.P.'s placement with Castro was going well, although Castro asserted that J.L.L.P. sometimes acted inappropriately after visits with Perez.

[7] In a court hearing on March 27, 2002, Perez informed the court that his sister, Mary Parker of San Bernardino, California, wished to adopt J.L.L.P. and raise her in California with Perez's consent. Ms. Parker has not appeared in this action and had not previously had custody of J.L.L.P. or been proposed

³ For example, the family friend who supervised visits informed CPS that Perez threw things and knocked over a television during a visit in May of 1999.

⁴ The requirement for successful completion of this course is attendance at four out of six sessions. The instructor asserted that at times Perez's responses were inappropriate and did not make any recommendations concerning Perez's competency to care for J.L.L.P.

as a placement. In the same court hearing, Castro informed the court that she planned to move to Oregon and requested leave to take J.L.L.P. with her.

[8] On May 16, 2002, the trial court orally granted Castro's request for permission to relocate to Oregon with J.L.L.P. over Perez's opposition. The trial court issued a written decision and order on June 12, 2002. Perez appealed on June 26, 2002. On July 1, 2002, the trial court denied a motion to stay the order that allowed Castro to move from Guam with J.L.L.P. Perez then filed a motion to stay the Superior Court order in this court, which was denied on July 17, 2002.

[9] On July 18, 2002, Castro moved from Guam to Oregon with J.L.L.P. They have since relocated to Nevada.

II.

[10] This court has jurisdiction over appeals from child custody orders. *See Flores v. Cruz*, 1998 Guam 30 ¶ 8.

III.

[11] Perez appeals on four grounds: (1) permitting the guardian to relocate from Guam with J.L.L.P. amounted to a de facto termination of Perez's parental rights; (2) the trial court erred in giving the permanent guardian unlimited discretion over visitation; (3) J.L.L.P. should have been placed with a family member rather than with an unrelated guardian; and (4) statutes in derogation of a parent's traditional common law rights should be construed and applied narrowly, permitting Perez to retain control over J.L.L.P.

A. De Facto Termination of Parental Rights

[12] Perez first argues that allowing Castro to move off-island with J.L.L.P. resulted in the de facto termination of his parental rights, rather than the "reasonable alternative" to termination originally contemplated in the stipulation, because Perez can no longer visit with J.L.L.P. or otherwise be involved in her upbringing. The issue presented is whether the trial court's order resulted in the de facto termination of Perez's parental rights.

[13] Courts have consistently held that permitting a guardian to relocate with a minor does not result in the de facto termination of parental rights. *See In re Interest of Amber G.*, 554 N.W.2d 142, 150 (Neb. 1996); *In re Jessica M.*, 527 A.2d 766 (Md. Ct. Spec. App. 1987). “A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights.” *In re Interest of Amber G.*, 554 N.W.2d at 150. Parental rights are not terminated where the parents “have not lost ‘the entire bundle’ of parental rights” *In re P.F.*, 638 N.E.2d 716, 723 (Ill. App. Ct. 1994). “[W]here the father retains his visitation rights and there has been no authority given to consent to adoption, it is clear that all of the father’s parental rights regarding his children have not been severed.” *In re Interest of Amber G.*, 554 N.W.2d at 150.

[14] Here, the stipulation creating the permanent guardianship expressly provided that Perez would retain residual parental rights. Moreover, the order allowing Castro to relocate with J.L.L.P. provided that Castro would keep Perez informed of J.L.L.P.’s progress by sending photographs and allowing telephone conversations between J.L.L.P. and Perez. The trial court further provided that visitation would resume when it becomes financially feasible. Nothing in the relocation order extinguished Perez’s residual parental rights that were preserved in the stipulation. Thus, allowing Castro to leave Guam with J.L.L.P. did not terminate Perez’s parental rights.

B. Guardian’s Discretion Over Visitation

[15] Perez argues that notwithstanding the parties’ stipulation that Castro would have unlimited discretion over visitation, the trial court erred in giving Castro sole discretion over visitation because the court cannot delegate its authority over visitation matters.

[16] Guam law provides that a parent who does not have custody over his child is entitled to visitation at the court’s discretion. *See* Title 19 GCA § 13321(c) (1994). The court cannot wholly delegate its authority over visitation to a separate entity. *See Stefan v. Stefan*, 465 S.E.2d 734, 736 (S.C. Ct. App. 1995) (“In the final analysis it is the family court which is charged with the authority and responsibility for protecting the interest of minors involved in litigation, not the guardian or any other person *whom* the court may appoint to assist it.”). A court must be especially careful to refrain from delegating the right to visitation to a single individual who cannot be held accountable in the same manner as a government agency and who is likely to have interests adverse to the parent’s. *See In re Randalynne G.*, 118 Cal. Rptr. 2d 880, 887

(Cal. Ct. App. 2002); *Hardy v. Gunter*, 577 S.E.2d 231, 236 (S.C. Ct. App. 2003); *Stefan*, 465 S.E.2d at 736 (agreeing with the parent that a lower court “abused its discretion by delegating judicial authority to the parenting specialist and the guardian, and by authorizing the guardian to recommend the time for the resumption of visitation, and modification of visitation”).

[17] The court, however, does not improperly delegate its authority over visitation by permitting the guardian to determine the time and manner in which visitation will take place. *In re Moriah T.*, 28 Cal. Rptr. 2d 705 (Cal. Ct. App. 1994). The court must determine *whether* visitation takes place, but may delegate “the responsibility to manage the details of visitation, including time, place and manner thereof.” *Id.*

[18] The trial court in the present case retained control over visitation, issuing orders when appropriate to ensure that visitation continued. In addition, Castro never acted as if she had complete control over visitation. Castro’s understanding that her role was limited to setting the time and place of visitation and did not extend to determining whether visitation could take place at all is evidenced by her request for permission from the court to relocate, despite the lack of any restriction on relocation in the stipulation.

[19] The final order that Perez appeals from “ask[s] that the Guardian allow the child to return to Guam and visit her family as frequently as she is able to do” if funds become available. Appellant’s Excerpts of Record, p. 32 (Order) (emphasis added). This order arguably delegates complete discretion over visitation to Castro. However, the order further provides that Castro “is to keep the parents informed by giving photographs and opportunities to engage in telephonic conversations between the child and her parents and visual conferences between the parties, if possible to arrange.” Appellant’s Excerpts of Record, p. 32 (Order). Thus, the trial court directed the continuation of Perez’s involvement with J.L.L.P. and did not improperly give unlimited discretion to Castro to determine visitation.

[20] Moreover, “the right of visitation is subordinated to the best interests of the child. . . . Thus, if the trial court finds that visitation might endanger the child's physical health or significantly impair his or her emotional development, visitation may be denied or restricted.” *Hanson v. Spolnik*, 685 N.E.2d 71, 79 (Ind. Ct. App. 1997) (citations omitted). In the present case, the trial court determined that although allowing Castro to remove J.L.L.P. from Guam would severely limit Perez’s opportunity to visit with J.L.L.P., the relocation was nonetheless in J.L.L.P.’s best interests. Perez does not argue that the relocation

is not in J.L.L.P.'s best interests. Thus, the trial did not err in allowing the relocation, even if the move resulted in more limited visitation than the parties had contemplated when they entered into the stipulation.

C. Placement With a Non-Relative

[21] Perez argues that the court should place J.L.L.P. with Perez's sister instead of with Castro, who is not related to J.L.L.P. Generally, placement with a family member is preferable to placement with a non-relative. Title 19 GCA § 9108(c) (1993). Section 9108 applies when "awarding the custody of a minor, or in appointing a general guardian." Title 19 GCA § 9108. In the present situation, however, Perez is seeking to remove J.L.L.P. from what has been her home for over three years and place her with someone she has never seen. The concerns involved in removing a child from a person's custody are inherently different from those involved in an initial award of custody. *See In re Adoption of A.K.S.R.*, 71 S.W.3d 715, 719-20 (Tenn. Ct. App. 2001) (holding that the best interests of the children were not served by adoption by family members when the children had been in the foster home of a non-relative for over a year).

[22] In determining the appropriate foster placement of a child, the child's best interests are the court's primary concern. *See* Title 19 GCA §§ 13320(d) (1994), 13324(a) (1994). Where a parent is not attempting to gain custody himself, "the preference to which any other applicant for appointment may be entitled must yield to the paramount consideration – the interest and welfare of the child." *In re Guardianship of Aviles*, 284 P.2d 176, 178-79 (Cal. Dist. Ct. App. 1955). Here, the trial court determined that it is in J.L.L.P.'s best interests to continue to remain with Castro. The trial court further noted that no evidence was presented to change that finding. In the absence of any evidence that the continued placement of J.L.L.P. with Castro is not in J.L.L.P.'s best interests, the trial court did not abuse its discretion in denying Perez's motion to place J.L.L.P. with his sister.

D. Traditional Rights of a Parent

[23] Finally, Perez argues that statutes that make the best interests of a child a consideration even when those interests conflict with a parent's common law rights must be construed and applied narrowly. Perez further argues that this court's opinion *In re J.L.L.P.*, 2002 Guam 21, can be construed as supporting Perez's position that when balanced against the rights of the disabled and family ties, the court should give the best interests of a child limited weight.

[24] Because we hold that Perez's parental rights have not been terminated, we need not reach this issue. We do note, however, that the law does not require balancing the interests of the parent with those of the child. If the court finds that a parent cannot provide a safe home for the child within a reasonable amount of time, then "the court must consider whether the proposed permanent plan is in the child's best interest." *Coffey v. Government of Guam*, 1997 Guam 14, ¶ 28. Perez stipulated to his inability to provide J.L.L.P. with a safe family home, even with the supervision of CPS. More importantly, Perez does not dispute that the trial court acted in the best interest of J.L.L.P. Accordingly, the trial court's order continuing J.L.L.P.'s placement with Castro and permitting their relocation was not in error.

IV.

[25] The trial court's order allowing Castro to relocate with J.L.L.P. did not result in the de facto termination of Perez's parental rights. On the contrary, the order expressly directed Castro to keep Perez informed of J.L.L.P.'s development. The order also did not improperly delegate sole responsibility over visitation to Castro. Instead, the trial court provided for continuing visitation despite Perez's stipulation purporting to give Castro complete discretion over visitation. Finally, the trial court acted in J.L.L.P.'s best interests in providing that Castro would continue as J.L.L.P.'s guardian rather than removing J.L.L.P. and placing her with Perez's sister. Although J.L.L.P.'s continued placement with Castro is not in accordance with Perez's preference, the trial court did not abuse its discretion in considering the best interests of the child above Perez's parental rights. Thus, we **AFFIRM** the trial court's orders permitting Castro to relocate with J.L.L.P. and allowing Castro to continue as J.L.L.P.'s permanent guardian.