

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF WAYNE

In the matter of KENNETH ELAM,
a minor

2003-664984-GM
Hon. Milton L. Mack, Jr.

OPINION

INTRODUCTION

This matter is before the court on the emergency motion of Juanita Elam (Juanita), the mother of Kenneth Elam (Kenneth) to enforce this court's visitation order of July 26, 2007. Juanita is in prison and is not expected to be released until long after her son is an adult. On July 26, 2007, the court had entered an order that Charles Elam (Charles), the uncle of Kenneth, have visitation with Kenneth every other weekend. The guardian, Patricia Finley (Patricia), had refused to permit visitation by Charles that had been scheduled for the week-end of February 8, 2008. Juanita filed her motion on February 21, 2008.

FINDINGS OF FACT

Kenneth was born October 7, 2002. According to the report from the Family Independence Agency for Monroe County dated July 28, 2003,¹ Juanita had been a protective services client since October 8, 2002. It was reported that Kenneth and Juanita had cocaine, opiates, Benzodiazepines and marijuana in their systems when Kenneth was born. Kenneth was placed with Herman Elam (Herman), the maternal grandfather. It was agreed that that arrangement would continue until Juanita completed drug screens and any necessary drug treatment and Kenneth was taken off his heart monitor. Juanita failed to work with protective services and instead was keeping company with Leo Andrews who had served time in prison for dealing drugs. Juanita had admitted that she had been beaten by Leo Andrews. The Children's Protective Services Worker requested the Wayne County Probate Court to grant guardianship to Herman and/or Cheryl Obarr, the maternal grandmother, or a neglect petition would need to be filed to assure protection of Kenneth.

Herman Elam and Cheryl Obarr filed a petition for guardianship of Kenneth on June 13, 2003. Because paternity had not been acknowledged, notice of the hearing on the guardianship petition was not provided to the alleged father. Michigan's court rules

¹ The court reviewed and relied on the reports of the Department of Human Services and Orchard's Children's Services pursuant to MCR 5.404(D)(1).

explicitly provide that the father of a child born out of wedlock need not be served with notice of proceedings in which the child's parents are interested parties unless the child's paternity has been determined in a manner provided by law.² The petition was granted at a hearing on July 31, 2003.

A Report for Court Review of Minor Guardianship by the Department of Human Services (DHS)³, dated October 21, 2004, stated that the mother was incarcerated and the father unknown. It was reported that Kenneth was clearly bonded with his grandfather and Patricia. Herman stated that he would like to adopt Kenneth.

On July 21, 2005, Cheryl Obarr, the maternal grandmother, filed a petition to modify the guardianship asking that she be permitted to resign and that Patricia replace her as co-guardian because Patricia "has cared for the minor child exclusively since the minor child's birth." That petition was heard and granted on September 22, 2005.

The second Report for Court Review of Minor Guardianship by DHS, dated November 29, 2005, stated that the child enjoyed a close and loving bond with the grandfather and recommended that the guardianship be continued.

The third Report for Court Review of Minor Guardianship by DHS, dated September 26, 2006, stated that the child had lived with the co-guardians (Herman and Patricia) since birth and that there were plans to proceed with adoption in the next year. Herman reported that he was receiving cancer treatment.

On October 17, 2006, Herman Elam died.

On April 16, 2007, Charles filed a petition to modify the guardianship. The petition indicated that Herman had died and requested that Charles be added to the guardianship as a co-guardian. A hearing was held on May 17, 2007. Juanita testified from prison that her earliest release date was 2034. She stated that she wanted her son to be placed with Charles. Patricia reported that Charles had the opportunity to have visitation on weekends. Charles did not claim that visitation was an issue. The court ordered an investigation by DHS of the homes of the petitioner and the guardian.

On June 8, 2007, Charles went to Patricia's home. Following an angry, loud argument, Patricia terminated further visitation. In the DHS report, dated July 25, 2007, Charles stated that the guardian had stopped his visits since early June, 2007, because she objected to him permitting Kenneth to talk on the phone with his incarcerated mother. The worker reported that Patricia felt Charles should have talked with her before making

² MCR 5.125(B)(4). By statute and case law, putative fathers receive notice in adoption and juvenile matters. Adoption and juvenile proceedings may result in the termination of parental rights while the appointment of a guardian under the Estates and Protected Individuals Code merely results in the temporary suspension of parental rights. In any event, this issue is personal to the putative father who did testify in this matter but has not attempted to contest the guardianship.

³ The Department of Human Services is required to file an annual report in all minor guardianships if the minor is under 6 years of age. MCL 700.5207.

that call. At the hearings in this matter, it appeared that the argument also involved the desire of Charles to take Kenneth to his maternal grandmother's home, something that Patricia objected to, based on Herman's wishes. Patricia testified that during the course of the argument, Charles said he did not want Kenneth; he just wanted control of Kenneth.

The DHS report dated July 25, 2007, also stated that Kenneth often referred to Patricia as "Mommy." At the adjourned hearing on July 26, 2007, the court ordered a home study of the homes of the guardian and the petitioner. The court also referred the parties to mediation and ordered visitation.

On August 6, 2007, Patricia received a 30-day notice to quit from Charles terminating her tenancy in the house she and Kenneth had lived in since Kenneth's birth. The house had been owned by Herman and was not owned by Herman's children. At the evidentiary hearing on March 14, 2008, a neighbor, Karen Sharpe, testified that she had signed as a witness on a document for Herman after he had become ill with cancer. She testified that Herman told her that he wanted the house to go to Kenneth and Patricia. She said the document was placed in a box and put under the bed. The fate of that document is not known.

After Herman's death, Patricia, with help from her mother, paid half the expenses of the house to Charles. Patricia's Annual Report of Guardian on Condition of Minor stated that she moved from the home on September 4, 2007, because she had received a "notice to quit due to selling of home". The court hearing was not scheduled until October 27, 2007. On December 20, 2007, Charles testified in response to the question: "How is it she was evicted?" that: "We sold the house. Actually we were going to sell the house, but then she called Inkster on us." At the hearing on March 14, 2008, Charles claimed he proceeded with the eviction because they could not maintain the house without Patricia paying her 50%. The house was not sold. Instead, Charles' sister, April, is living in the house. Charles' testimony was not credible. The court believes the eviction was motivated by a desire to gain control.

Despite the pending eviction from the home Kenneth grew up in, Patricia went ahead with mediation on August 21, 2007, and entered into an agreement as to visitation and information exchange. However, an agreement was not reached on appointing Charles as co-guardian.

The report from Orchards Children Services, filed September 24, 2007, stated that Charles now wanted to replace Patricia as guardian. Charles reported that he visited Kenneth every other weekend before his father died. However, during the evidentiary hearing in this matter, Charles claimed that he visited Kenneth on a daily basis during his father's lifetime. Charles' testimony, in light of the report from Orchards Children Services (Orchards), was not credible on this point.

The fourth Report for Court Review of Minor Guardianship, dated October 31, 2007, stated that it would be in the child's best interests to remain with the guardian. Adoption by Patricia was recommended by Orchards and DHS. A petition for authority to commence adoption proceedings was filed by the guardian on September 22, 2007

Orchards filed a follow-up report with the court on November 5, 2007. The guardian stated that there was considerably less conflict now that they went to a drop off location in the community for visitation. She reported that Kenneth enjoyed visits with his "Uncle Charlie". However, Patricia reported that Children's Protective Services (CPS) had recently come out to her house based on a referral that she was neglecting Kenneth and her biological son was on drugs and living in her home. The Orchards worker spoke with the CPS worker who said she had no reason to believe Ms. Finley was neglecting Kenneth. Further, based on the space in the home and the belongings, it did not appear that anyone besides Patricia, her mother and Kenneth were residing in the home.

Patricia filed a motion for summary disposition of Charles' petition to modify the guardianship. On December 17, 2007, the court heard the motion for summary disposition and the petition for authority to adopt. The court entered an order granting summary disposition, except as to visitation and denied the petition to adopt without prejudice. The court ordered the parties to cooperate in visitation pursuant to the court's order of July 26, 2007. The hearing was then adjourned to December 20, 2007, to address visitation issues.

At the subsequent hearing on December 20, 2007, the court, finding it necessary to establish permanency for Kenneth, vacated the order denying the petition for authority to adopt and scheduled the petition to be heard on January 17, 2008. On January 16, 2008, Juanita filed a petition to modify the guardianship as well as objections to the petition for authority to adopt. She wanted Kenneth to be adopted by the Elam family. A hearing was held on January 29, 2008. At that hearing, Leo Andrews appeared and claimed to be the father. He had recently signed an affidavit of parentage. He admitted that he had not seen Kenneth since 2002 and had provided no support. The court denied Juanita's petition to modify the guardianship and granted the petition for authority to adopt.

On February 21, 2008, Juanita filed an emergency motion to enforce the court's visitation order of July 26, 2007. She claimed that following the hearing on January 29, 2008, the guardian had refused visitation the weekend of February 8, 2008. Patricia testified that the sudden appearance of Leo Andrews caused her to cancel visitation. She did not want additional confusion for Kenneth.

The court scheduled an evidentiary hearing on the issue of visitation. Testimony was taken on March 14, 2008, April 2, 2008 and April 30, 2008. Following the hearing on March 14, 2008, the court ordered visitation by Charles and Amanda Elam (Amanda),

his wife, for the week-end of March 28, 2008. The court ordered that Orchards perform a follow-up visit with Kenneth after the week-end visitation.

Orchards reported that Kenneth enjoyed his visit, but, said that Amanda made him sad because she wants him to live with her and he does not want to. Orchards reported that any changes in Kenneth's behaviors were attributable "to the stress he is experiencing from being exposed to adult conflict through the visitation, the interactions between the adults, and the comments/statements that he is hearing." Orchards recommended that Kenneth remain in his current guardianship while adoption is being pursued and that he have visitation one weekend per month with Charles and Amanda.

At the hearing, Patricia testified that she thought it in Kenneth's best interest to have visitation with Charles and Amanda, provided there was no turmoil. Her testimony was very credible on this issue. The court was impressed that Patricia was able to put aside the eviction, the call to protective services, the unsupported allegations as to her fitness and the sudden appearance of Leo Andrews, and place Kenneth's interests first. Patricia is still willing to permit visitation; however, she is not willing to permit any ongoing, escalating conflict to harm Kenneth.

CONCLUSIONS OF LAW

The Estates and Protected Individuals Code (EPIC), provides that a minor's guardian has all the powers and responsibilities of a parent.⁴ This includes making day-to-day decisions about visitation. The court may order reasonable parenting time with the ward's parents.⁵ However, while EPIC does not make specific provision for ordering visitation or parenting time for any other person, EPIC does provide that "a person interested in a ward's welfare...may petition for...another order that would serve the child's welfare."⁶

The question for the court is whether ordering visitation by Charles and Amanda would serve Kenneth's welfare. The court finds that Patricia's decision to suspend visitation was reasonable. It is apparent to the court that Patricia was, and is, trying to protect Kenneth from turmoil. Orchards reports that the Elams have limited insight into the bonding that has occurred between Kenneth and Patricia. This lack of insight, coupled with the Elams' attempting to bring Leo Andrews into Kenneth's life, show a serious disregard for Kenneth's best interests. Leo Andrews, according to DHS, had beaten the mother and had served time in prison for dealing drugs. There was testimony at trial that he was a pimp who provided escort services. Furthermore, he had not even seen Kenneth since 2002; and he has never provided support of any kind for his child.

⁴ MCL 700.5215

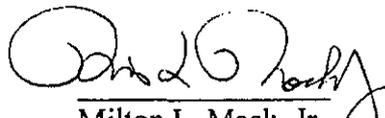
⁵ MCL 700.5204(5)

⁶ MCL 700.5219

Given these facts, the court is not convinced that it would serve Kenneth's welfare to order the guardian to permit visitation with the Elams at this time. The court is satisfied that Kenneth's guardian, Patricia, is best suited to make visitation decisions. Accordingly, the court vacates its order for visitation dated July 26, 2007.

Patricia recognizes that Kenneth is close to Charles' son, Charles Elam, Jr.; and she has indicated that she would like to encourage that relationship. She has invited the Elam's to bring him to her home. They have declined to take advantage of that opportunity. The court would encourage Charles to take advantage of that opportunity and use it as a bridge to repair his relationship with Patricia.

The emergency petition for visitation is denied.



Milton L. Mack, Jr.
Chief Judge of Probate

Dated: MAY 6 2008