In the Court of Appeals of Maryland

January 11, 2019
Petition Docket No. COA-PET-0471-2018

IN THE MATTER OF: W. E-R.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS

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Petitioner respectfully asks this Court to issue a writ of certiorari to the Court of Special Appeals to review that court's unreported decision in *In the Matter of: W. E-R.,* No. 1442, September Term, 2017 (Dec. 21, 2018).[1] Further, due to the nature of the relief sought, and the minor child turning twenty-one (21) years old on October 12, 2019, Petitioner respectfully requests that any action taken on this Petition be taken prior to such date to avoid irreparable harm to the child.

This case began in the Circuit Court for Frederick County as a Petition for the Guardianship of a Minor which was filed in conjunction with a Motion for Special Immigrant Juvenile Status. The case was titled *In the Matter of: W. E-R.,* Case No. 10-C-17-000785, and was decided by the Honorable Julia A. Martz-Fisher. [2]

In short, both the Circuit Court for Frederick County, and the Court of Special Appeals of Maryland, denied the petition for guardianship on the basis that the Circuit Court lacked jurisdiction under E.T. § 13-702 to appoint a guardian of a minor when the minor's parents were still alive. In their decisions, both courts relied on *In re Zealand W.*, 220 Md. App. 66 (2014), a case which Petitioner argues erroneously interpreted E.T. § 13-702, as limiting the *circuit court's* power to appoint a guardian of a minor child solely to situations in which neither parent is alive and no testamentary appointment has been made.

QUESTIONS PRESENTED

1. Did the Court of Special Appeals err in holding that circuit courts lack authority to appoint a guardian for a child when the child's parent is still alive?
2. Should *In re Zealand W.* be reconsidered?

ADJUDICATION OF CLAIMS IN THE LOWER COURTS

The judgment of the circuit court has adjudicated all claims in this action in their entirety, and the rights and liabilities of all parties to the action. Further, with regards to the issues and questions now being presented before this Court, the Court of Special Appeals simply held:

[1] A copy of the Court of Special Appeals' opinion is attached to this petition.
[2] A copy of the circuit court docket entries are also attached to this petition.

> "In essence, Brother [Petitioner] asks us to reconsider our opinion in *In re Zealand*, which we decline to do…we hold that circuit courts lack authority to appoint a guardian for a child when the child's parent is alive."
>
> *See attached,* op. at 8 (Berger, J.).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The central statutory provisions in this case are E.T. § 13-702 and F.L. §1-201(a) and (b)(10). E.T. § 13-702 reads in relevant part, that:

> "If neither parent is *serving* as guardian of the person and no testamentary appointment has been made, on petition by any person interested in the welfare of the minor, and after notice and hearing, the court may appoint a guardian of the person of an unmarried minor."
>
> *See* E.T. § 13-702(a)(1)[3]

It is important to note, that the statute itself states "if neither parent is *serving*." The statute does not read, "if neither parent is *alive*." Petitioner argues this was done intentionally, in order to allow circuit courts to consider on a case-by-case basis whether or not a parent is "serving" as guardian, and whether to appoint a guardian of a minor child, even in circumstances in which the parents are alive. Petitioner argues that the restrictive requirement that neither parent be alive in order to appoint a guardian of a minor, which was developed through a combination of case law and secondary sources, was intended to limit the *Orphans'* Court power to appoint guardians of minors. It was never intended however to limit the Circuit Court's power to appoint guardians in other situations.

REASONS FOR GRANTING THE WRIT

This Court has consistently held in the past that circuit courts possess the inherent and equitable authority to appoint third-party guardians in situations in which parents may

[3] E.T. § 13-702 goes on to read that: "If the minor has attained his 14th birthday, and if the person otherwise is qualified, the court *shall* appoint a person designated by the minor, unless the decision is not in the best interests of the minor." *See* E.T. § 13-702(a)(2). The minor in this case designated her Brother (Petitioner) to be appointed as guardian.

still be alive. *See In re Adoption/Guardianship of Tracy K.*, 434 Md. 198 (2013); *See also Wentzel v. Montgomery General Hospital*, 293 Md. 685 (1983). Nevertheless, the Court of Special Appeals has recently misinterpreted these holdings, unnecessarily limiting the circuit courts' authority to appoint guardians of minor children where parents are still alive, and creating confusion and conflict within this area of the law.

Review of these issues by the Court of Appeals is desirable and in the public interest, because it would clarify that the circuit courts of this state do in fact have the authority and ability to appoint third-party guardians of minor children in circumstances in which parents may still be alive, but have abandoned, neglected, or abused the minor child, or are otherwise temporarily or permanently incapable or unwilling to continue serving as the minor child's guardian, and consent to the appointment.[4]

Further, an absolute grant of custody (which is often the only alternative to appointing a guardian) may not always be in the best interests of the child, and allows for lengthier time periods for responses to be filed before a hearing can be scheduled, often causing undue delay particularly in situations where surviving parents have abandoned or neglected the child. Grants of custody can also completely and more permanently strip the rights of a surviving parent. Thus, appointing a guardian provides circuit courts with an alternative, and often preferred legal remedy in these situations. This is because contrary to custody cases, the Maryland Rules (*See Maryland Rules 10-101 and 10-201 et. al.)* impose on guardianships additional safeguards which protect both the minor and the rights of the parent. For example, the Maryland Rules require appointed guardians to submit periodic reports concerning the welfare of the child (*see* Md. Rule 10-206), and keeps the appointment under the watchful eye of the court.

[4] Additionally, there are situations when a surviving parent (although by operation of law is automatically the guardian of the child) may need a court order appointing them as guardian of the person or property, because a deceased parent has left property to the minor child without a will (i.e. a life insurance policy) and the minor child is therefore unable to access the property immediately without a court order.

The rules also require that surviving parents be notified prior to an appointment, require parents to provide consent in order to appoint a third-party guardian, and allow parents to withdraw that consent at any time. (*see* Md. Rules 10-202 and 10-203). These rules alleviate any concern that appointing a third-party guardian interferes with the inherent rights of the parents, while still keeping in mind the best interests of the child. Further, it would seem that refusing to appoint a guardian of a minor child, when the surviving parent herself has consented to the appointment, would more severely interfere with the surviving parent's parental rights.

More importantly, if the Court of Special Appeals' interpretation of E.T. § 13-702 were correct, why then would Md. Rules 10-202 and 10-203 require that parents be notified and/or give consent before a guardian of a minor child may be appointed by the circuit court? To wit, Maryland circuit court forms continue to be circulated to this day to aid parents in providing such consent. *See form* CC-GN-007 (Rev. 11/2017). If guardians can only be appointed when both parents are deceased or when their parental rights have been terminated, why then do the rules require they provide consent and why are these forms needed? Review by this Court would clarify this paradox.

Finally, friends and relatives of a minor child in need of protection may be willing to fulfill the role of appointed guardian, which comes with the assistance and guidance of the circuit court who is the ultimate guardian, but may not be willing to assume the more daunting responsibility of being a full time custodian for the minor child, without continuing court assistance and supervision.

STATEMENT OF FACTS

The minor in this case, W.E-R, was born on October 12, 1998, in San Alejo, La Union, El Salvador, to her biological parents R.R (mother) and E.G (father). W.E-R's parents were never married and never resided together, and W.E-R's father never recognized her as his daughter. As a result, W.E-R was raised solely by her mother, with her father being completely absent from W.E-R's life.

In El Salvador, W.E-R's relationship with her mother was strained. From age 13-17, W.E-R was abused by her mother, who would often beat W.E-R with a stick. On one

occasion, W.E-R's mother hit her on the head with a ceramic plate, cutting open a gash on W.E-R's head and leaving a permanent scar. Additionally, there were many times growing up where W.E-R did not have enough food to eat and would go hungry.

At age seventeen (17), W.E-R obtained full-time employment in El Salvador, and at the same time, enrolled in night school in San Miguel, El Salvador. On one occasion, W.E-R was leaving school one night on her motorcycle which she used for transportation, when members of a gang surrounded W.E-R with knives, demanding she give them her motorcycle, and threatened her by saying that "it would end up badly for her" if she didn't.

Following this incident, and unable to withstand any further abuse at the hands of her mother, W.E-R dropped out of night school, and fled El Salvador in April 2016 to come to the United States to live with her brother, the Petitioner.

Upon entering the United States, W.E-R was apprehended by immigration authorities, and ultimately released to the custody of the Petitioner, in Frederick, Maryland. The Petitioner subsequently filed the Petition for Guardianship of the person W.E-R. and Motion for Special Immigrant Juvenile Status Findings, which is the subject of this appeal.

ARGUMENT

A. The Circuit Court Has Jurisdiction and the Inherent Authority to Appoint a Third-Party Guardian Outside of the Circumstances Prescribed in Estates & Trusts Article § 13-702.

The Court of Special Appeals' holding in *In re Zealand W.* needs to be corrected as applied to the *circuit* court's power to appoint a guardian under the Estates & Trusts Article. While the court in *Zealand* was correct to hold that the circuit court should not have appointed a guardian of the minors without the mother's consent, it was wrong to hold that the circuit court could never do so unless both parents were deceased.

1. *In re Adoption/Guardianship of Tracy K.*, 434 Md. 198 (2013), and the Inherent Power of the *Circuit Court* Over Minors Pursuant to the Doctrine of *Parenspatriae*

The principles of law discussed in *In re Zealand W.* in reaching its holding, should only apply to limit the Orphan's Court's power to appoint guardians of the person of minors. They should not however apply limit the Circuit Court's power to do the same.

In deciding *In re Zealand W.*, the Court of Special Appeals looked to this Court's holding in *In re Adoption/Guardianship of Tracy K.*, 434 Md. 198, to determine that the *circuit* court lacked authority under Estates & Trusts Article § 13-702, to appoint a guardian of the person of a minor child where (1) a parent is still living, (2) no testamentary appointment has been made, and (3) parental rights have not been terminated. However, *Tracy K.* and other past opinions of this Court, do not support applying this holding to the power of the *circuit* court. To wit, this Court in *Tracy K.* made great efforts to make clear that only the *Orphans'* court's power would be limited under ET 13-702 in those situations. As this Court in *Tracy K.* held:

> "At first blush, ET § 13-105 (a) seems to expand the Orphans' Court's jurisdiction with respect to guardians of the person to that concurrent with the Circuit Court. This interpretation would be incorrect. ET § 13-105 (a) must be analyzed in conjunction with ET § 13-702 (a), and in the context of the broader legislative purpose. ET § 13-702 (a) limits the *Orphans'* Court's jurisdiction over guardianship of the person petitions only to situations in which neither parent is a guardian and there is no testamentary grant of guardianship. **The Circuit Court retains jurisdiction over this particular situation *and all other guardianship of the person cases*. Most likely the facts required by ET § 13-702 (a) would arise in the context of probate and, thus, it also fits the larger purpose of the Orphans' Court."**

In re Adoption/Guardianship of Tracy K., 434 Md. 198, 207-208 (2013)(Emphasis added)

It was only *after* this clear limitation, that this Court in *Tracy K.* recited the language cited by the Court of Special Appeals in *In re Zealand*, rejecting the petitioner's interpretation that the phrase, "neither parent is serving as a guardian," included circumstances where the parents are not deceased and their parental rights have not been terminated. While *Tracy K.* rejected that interpretation, this Court was clear that it was only

doing so as it relates to the power of the Orphans' court. This distinction was again made clear towards the end of the *Tracy K.* opinion with this Court holding that, "The present case is not within the express grant of the [orphan] court's power because the guardianship petition is not incidental to administering probate." This language is indicative that this Court was only referring to the orphans' court power, and as such, the court in *In re Zealand* should not have extended that principle as it relates to the power of the circuit court.

To further demonstrate the distinction in jurisdiction and power, it is instructive to look at the 1992 Maryland Attorney General opinion, analyzing the orphan's court's jurisdiction to decide petitions for Guardianship of minor persons. 77 Md. Op. Atty. Gen. 41 (1992). This opinion is also referred to in both *Tracy K.* and *Zealand* and while not binding, it may be considered when the legislative intent is unclear. *Potomac Valley Orthopaedic Assocs. v. Md. State Bd. of Physicians*, 417 Md. 622, 637 (2011).

Focusing on the statutory language and comparing the circuit court's jurisdiction, the attorney general's opinion concluded that the *orphan's* court has jurisdiction to hear petitions for guardianship of the minor's person *only* under the circumstances of ET § 13-702(a): the parents are deceased or are no longer serving as legal guardians. It did not however limit the circuit court's power to the same circumstances. To the contrary, the opinion discusses at length the inherent power of the circuit court over this scenario (i.e. both parents deceased or no longer serving as legal guardians), *and all other* guardianship scenarios, and discusses in detail the doctrine of *parenspatriae* which is reserved for the circuit courts. The opinion discusses the doctrine citing *Wentzel v. Montgomery General Hospital*, 293 Md. 685 (1983). In *Wentzel*, this Court explained the origins of the doctrine of *parenspatriae* as established in Maryland, and stated the following**:**

> "The parenspatriae jurisdiction of the *circuit* court in this State is well established. The words "parenspatriae," meaning "father of the country," refer to the State's sovereign power of guardianship over minors and other persons under disability. . . . It is a fundamental common law concept that the jurisdiction of courts of equity over such persons is plenary so as to afford whatever relief may be necessary to protect the individual's best interest."

293 Md. at 702. (emphasis added).

The AG opinion summarized the distinction in jurisdiction and power as follows:

> "In summary, it is our opinion that *orphans'* courts have jurisdiction to appoint a guardian of the person of a minor only in those instances when neither parent is serving as guardian and no testamentary appointment has been made. **Orphans' courts may not in effect invoke the doctrine of parenspatriae, reserved to the circuit courts, to appoint guardians *in other circumstances*.** Likewise, to the extent any doubt may exist concerning the jurisdiction of the *orphans'* courts to appoint a guardian of the person of a minor, that doubt must be resolved in favor of denying jurisdiction, because under ET § 13-106(b) the *orphans'* courts may only exercise jurisdiction "expressly conferred by law."

77 Op. Atty Gen. Md. 41 (emphasis added).

Although a custody case, the 1986 case of *Taylor v. Taylor*, 306 Md. 290 (1986) decided by this Court, also supports the notion that circuit courts in Maryland have full power to determine who shall have the custody, control, and guardianship of minor children. The case also directly discusses the issue of blind adherence to the Natural Guardianship provisions of the family law article, and reminds us that promoting the best interest of the children should be the equity court's paramount purpose. In discussing the history of the Maryland Code and past versions of the family law article, this Court in *Taylor* held the following with regards to what is now codified as FL § 1-201:

> "From this language it will be seen that courts of equity in this state have full power, and it is their duty, to determine who shall have the custody, control **and guardianship of minor children**, and who shall be charged with their maintenance and support, when applied to by any of the persons mentioned in the statute; and this without regard to the question of whether or not the parents of said child or children have been divorced or are living apart. This section is declaratory of the inherent power of courts of equity over minors, and in the exercise thereof it should be exercised with the paramount purpose in

> view of securing the welfare and promoting the best interest of the children."
>
> *Taylor v. Taylor*, 306 Md. 290, 300 (1986).

This Court in *Taylor* went on to discuss a prior version of what is now FL § 5-203 regarding natural guardianships, which sheds light on the legislative history of the provision, and on the very important fact that the natural guardianship provisions were never meant to be blindly adhered to, as they were in *Zealand*, if such adherence would result in the child's best interests being adversely affected by remaining under the natural guardianship of his/her parent or parents. The natural guardianship provisions as they existed when *Taylor* was decided, read as follows:

> "The father and mother are the joint natural guardians of their child under eighteen years of age and are jointly and severally charged with its support, care, nurture, welfare and education…***Provided: The provisions of this article shall not be deemed to affect the existing law relative to the appointment of a third person as guardian of the person of the minor where the parents are unsuitable, or the child's interests would be adversely affected by remaining under the natural guardianship of its parent or parents.***"
>
> Maryland Code (1957, 1983 Repl. Vol.) Art. 72A, § 1 (Now re-codified as §5-203 of the Family Law Article) (Emphasis Added)

In short, a look at *Tracy K., Wentzel, Taylor,* and other past opinions of this Court, shows that the holding in *Zealand* was wrong in that it should have never limited the authority of the *circuit court* to go beyond the situations described in E.T. 13-702.

2. Before *In re Zealand*, Maryland circuit courts have historically appointed third-party guardians pursuant to E.T. 13-702 despite parents of the minor being alive, and this Court has supported those appointments as being within the inherent power of the circuit court.[5]

[5] Even as recently as January 4, 2019, this Court granted a Petition for Writ of Certiorari and ordered the Circuit Court for Prince George's County to enter findings of Special

In *In re Adoption/Guardianship No. 10935*, 342 Md. 615 (1996), this Court took no issue with the circuit court appointing a third-party guardian pursuant to ET 13-702, despite the fact both parents of the minor children were also alive in that case. In discussing the circuit court's power, this Court in *In re Adoption/Guardianship No. 10935* also looked to the *Wentzel* opinion in outlining the broad powers of the circuit court, and reiterated that the legislature intended that circuit courts would exercise their inherent equitable jurisdiction over guardianship matters pertaining to minors, adopting standards with respect thereto as would be consistent with and in furtherance of the incompetent ward's best interests:

> "In *Wentzel v. Montgomery Gen. Hosp., supra*, 293 Md. at 701-702, 447 A.2d at 1252, Chief Judge Murphy for the Court explained the legislative purpose underlying § 13-702 as follows:
>
> "In enacting § 13-702, expressly recognizing the authority of circuit courts to appoint a guardian of the person of a minor, but without delineating the guardian's powers and duties, the legislature intended that circuit courts would exercise their inherent equitable jurisdiction over guardianship matters pertaining to minors, adopting standards with respect thereto as would be consistent with and in furtherance of the incompetent ward's best interests.…**It is a fundamental common law concept that the jurisdiction of courts of equity over such persons is plenary so as to afford whatever relief may be necessary to protect the [minor's] best interests**… Thus, with respect to the many issues which may come before a court in connection with a guardianship under § 13-702, the general overall standard guiding the court is the best interests of the minor. *See also, e.g., Sudler v. Sudler*, 121 Md. 46, 56, 88 A. 26, 30 (1913) ("the best interests of [the] ward" is the governing standard); *Compton v. Compton*, 2 Gill 241 (1844) ("interests . . . of the infant" guide a court in appointing a guardian)."

Immigrant Juvenile Status eligibility. That case, like the present case, involved the filing of an unopposed Petition for Guardianship with the parents of the minor still alive.

In re Adoption/Guardianship No. 10935, 342 Md. 615, 624-625 (1996)(quoting *Wentzel*)

With that said, SIJS cases scream for the application of the *parenspatriae* doctrine, in order to protect vulnerable *immigrant* children who do not otherwise have access to a suitable caretaker, or knowledge of how to obtain protection from the Department of Social Services or other state agencies through a CINA petition, local adoption, or otherwise, and need an intervening court to guard their best interests and protect them. Further, allowing third-party guardians to be appointed in these situations, prevents the unnecessary need for DSS and other state agencies to intervene in order to protect and act for these children, which creates a bigger burden on society.

In sum, the Court of Special Appeals' decision in *In re: Zealand W.* should be revisited because Maryland case law has historically demonstrated, and continues to demonstrate, that the circuit court *does* have the ability to appoint third-party guardians of the person of minors, despite the minor's parents being alive, and if the parents consent. Further, the appointment of guardians in these situations is in the best interests of the child, and better serves the public interest, while still safeguarding the rights of any surviving parents who may withdraw consent at any time.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Honorable Court grant this petition and order appropriate relief in this case prior to the minor child's twenty-first birthday on October 12, 2019.

Respectfully submitted,

Date: January 11, 2019

/S/

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CERTIFICATE OF SERVICE

I certify that on January 11, 2019, one copy of this Petition for Writ of Certiorari was mailed postage pre-paid to the following persons:

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