

STATEMENT OF THE CASE

John Smith (“Father”) and Pia Smith (“Mother”) (collectively “the Smiths”) appeal from the trial court’s order establishing the permanent guardianship of Richard Gillette (“Richard”) and Lisbeth Skaalerud-Gillette (“Lisbeth”) (collectively “the Gillettes”) over the Smiths’ three minor children. The Smiths present two issues for our review:

1. Whether the trial court abused its discretion when it granted the Gillettes’ request that the regular judge preside over this matter.
2. Whether the trial court abused its discretion when it granted the Gillettes’ petition for permanent guardianship.

We affirm.

FACTS AND PROCEDURAL HISTORY

The Smiths are the parents of three minor children: Jo.S., S.S., and Ja.S. Lisbeth is Mother’s sister. In approximately November 2005, Father telephoned Lisbeth and asked for help with the children. Mother had been incapacitated with health problems, and Father was finding it difficult to run the household without her assistance. Accordingly, the Gillettes, who live in Texas, traveled to the Smiths’ home in Indiana and offered to take the children back to Texas with them until Mother was feeling better. Mother signed a consent form acknowledging her desire that the Gillettes have a temporary guardianship over the children, but Father initially refused to sign a consent form. Ultimately, following an agreed entry submitted by the parties, including Father’s consent, the trial court granted a temporary guardianship on December 9, 2005.

On February 14, 2006, the trial court conducted a hearing on the Gillettes' petition for a permanent guardianship over the children. Senior Judge George Pancol, serving as Master Commissioner, presided over that hearing. Ann Bang, mother of both Pia and Lisbeth, testified that in her opinion the Gillettes should be granted a permanent guardianship over the children. Bang described the differences in the children's lives between living with Mother and Father and living with the Gillettes. Bang concluded that the children should continue living with the Gillettes. The children's godmother, Jacquelyn Collin, also testified that the Gillettes should be granted a permanent guardianship over the children. After taking the matter under advisement, the trial court issued an order on February 21, 2006, granting the permanent guardianship. Master Commissioner Pancol signed that order, and Judge Thomas Newman, Jr. approved it.

However, on February 28, 2006, the trial court set aside that order and set the matter for another hearing on March 15, 2006.¹ At that hearing, Detective David Callahan with the Madison County Sheriff's Department testified that he was investigating a claim of child molest against Father. After taking the matter under advisement, the trial court denied the permanent guardianship on April 28. On May 10, 2006, the Gillettes filed a "Motion to Re-Open the Evidence and Motion to Set Aside Order of April 28th, 2006 Until Further Hearing." In particular, the Gillettes asked the trial court to consider testimony given by the children's therapist, Kimberly Abernethy. The trial court granted the Gillettes' motion,² setting aside its April 28th Order and "re-

¹ Again, Master Commissioner Pancol signed that order, and Judge Newman approved it.

² Master Commissioner Pancol signed that order as "Senior Judge," and Judge Newman did not approve the order. Appellants' App. at 68.

opening” the evidence in the matter. Appellants’ App. at 67. However, the trial court also ordered that the Gillettes were to “return the children to Anderson/Madison County, Indiana no more than one week after the end of their school year.” Id.

On May 23, 2006, the Gillettes filed a “Motion for Regular Judge to Review Order of May 18th[,] 2006[,], and Request for Immediate Order and Hearing.” The Smiths objected to that Motion, but the Smiths stated that should Judge Newman review Master Commissioner Pancol’s findings, they requested that “the Court review all of the evidence of [the] one and one half day trial prior to making any determination.” Id. at 72. On June 16, 2006, the trial court held a hearing on the Gillettes’ Motion, and Judge Newman presided. In addition to the evidence the parties presented at the hearing, Judge Newman interviewed the children in his chambers. After taking the matter under advisement, on June 20, 2006, Judge Newman issued an order granting the permanent guardianship. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Regular Judge

The Smiths first contend that the trial court abused its discretion when it granted the Gillettes’ motion for the regular judge to preside over the matter. In particular, the Smiths maintain that Judge Newman did not have the authority to “review” Senior Judge Pancol’s April 28, 2006, order denying the permanent guardianship.³ But the Smiths’

³ Senior Judge Pancol had signed all of the previous orders as Master Commissioner, with Judge Newman approving those orders. It is well-settled that where a party requests an elected judge to preside over a proceeding instead of a master commissioner, that request shall be granted. See Ind. Code § 33-33-49-32(d); Capehart v. Capehart, 771 N.E.2d 657, 662-63 (Ind. Ct. App. 2002). But the April 28 order

argument ignores the fact that on May 18, Senior Judge Pancol set aside his April 28 order.⁴ And the fact that Senior Judge Pancol issued previous orders in this matter did not divest Judge Newman of the authority to conduct the hearing and rule on the evidence after Senior Judge Pancol had set aside his April 28 order.⁵ See Thompson v. State, 728 N.E.2d 155, 163 (Ind. 2000) (where Senior Judge presided over first trial, which ended in a mistrial, the Regular Judge had authority to hear subsequent trial). As such, Judge Newman properly presided over the June 16, 2006 hearing and issued the ensuing order.

Issue Two: Permanent Guardianship

The Smiths also contend that the trial court's order granting the permanent guardianship is "unsupported by the evidence." Brief of Appellants at 13. A third party seeking guardianship over a minor must overcome the strong presumption that a child's best interests are served by remaining with the natural parent with clear and convincing evidence showing that the child's best interests are substantially and significantly served by placement with the third party. Hinkley v. Chapman, 817 N.E.2d 1288, 1293 (Ind. Ct. App. 2004). This determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review. Id.

was signed "Senior Judge Pancol," so it is unclear whether that statute applies under the circumstances presented in this appeal.

⁴ The Smiths' reliance on Indiana Trial Rule 63(A) in support of their contention on this issue is misplaced. There was no issue of Senior Judge Pancol's disability or unavailability. Instead, as we explain below, Judge Newman had the authority to hear evidence and rule on the petition for permanent guardianship after Senior Judge Pancol set aside his April 28 order.

⁵ Further, Senior Judge Pancol's order that the children be returned to the Smiths pending additional evidence was moot once Judge Newman granted the permanent guardianship in favor of the Gillettes.

We will reverse the trial court's judgment when there is no evidence to support the findings or the findings do not support the judgment. Id. Upon appeal, we consider only the evidence favorable to the judgment. Id. An appellate court may not impose its own view as to whether the evidence is clear and convincing but must determine, by considering only the probative evidence and reasonable inferences supporting the judgment and without weighing evidence or assessing witness credibility, whether a reasonable trier of fact could conclude that the judgment was established by clear and convincing evidence. Id.

Here, the trial court found and concluded in relevant part as follows:

2. A guardianship was established with the consent of the natural parents. The children have lived with the guardians for the last six months in Texas.
3. The guardians are the maternal aunt and uncle of the children.
4. The children have been neglected educationally by the natural parents as evidenced by the fact that in the 2004-2005 school year [S.S.], one of natural parents['] children, was absent for 50 days and during the Fall 2005 school term was absent 31 days. [Ja.S.], another child of the natural parents was absent 65 ½ days during the 2004-2005 school year and 30 days during the Fall 2005 school term.
5. The natural parents failed to provide the children with proper dental care. [S.S.] and [Jo.S.] both had eight cavities at the commencement of the guardianship.
6. [Ja.S.]'s, youngest of the natural parents['] children, immunizations were 1 ½ years behind at the commencement of the guardianship.
7. The respondent, Pia Smith, has a long history of drug abuse.
8. The children have reported to their Texas therapist that they have experienced physical and sexual abuse. [Ja.S.] reported he was molested by respondent, John Smith. [S.S.] and [Jo.S.] reported

physical abuse by John Smith and reported that John Smith manipulated the children in not telling authorities about the abuse.

9. The children were not properly cared for when they were in the custody of the natural parents.
10. The natural parents, when speaking with the children, use inappropriate language and make disparaging remarks about the guardians.
11. The natural parents have attempted to manipulate the children by withholding gifts, promising the children they could have their gifts when they return to Indiana.
12. The Texas therapist believes that it would be harmful to return the children to the natural parents.
13. The children are thriving in Texas with the guardians.
14. In [an] interview with the Judge, the children [testified] that their future, their education, their emotional and physical well being would be best served if allowed to remain in the custody of the guardians.
15. To remove the children from the guardians would seriously endanger the children's future happiness, safety and well being.

* * *

19. A guardianship is necessary because of the unfitness of the natural parents.
20. It is in the best interest of the children that the guardianship be made permanent and the temporary guardianship is hereby made permanent.

Appellants' App. at 167-68.

The Smiths had requested that Judge Newman consider the evidence presented to Master Commissioner Pancol prior to the June 16, 2006, hearing. And, in his June 20 order, Judge Newman states that he reviewed "previously submitted evidence." Id. at

167. Thus, the Smiths' contention that Judge Newman did not consider the evidence submitted to Master Commissioner Pancol is without merit.

Further, the Smiths' challenges to the findings and conclusions amount to a request that we reweigh the evidence, which we will not do. Based upon the evidence, the trial court concluded that the Gillettes had met their burden. Without reweighing the evidence or judging witness credibility, we conclude that the trial court could have concluded that the judgment was established by clear and convincing evidence. Therefore, the trial court did not abuse its discretion in appointing the Gillettes as guardians

Affirmed.

RILEY, J., and BARNES, J., concur.