NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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December 2, 2020

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Respondent

Re: *In Re:* [redacted], Case No. CL-2020-0011723

Dear Counsel and Mr. Krämer:

Family dynamics are complicated. While the General Assembly cannot predict every unique familial situation, it has provided numerous avenues for parents and interested parties to address custodial disputes. Within those avenues, courts are free to administer solutions to further the best interests of the child while protecting other parties' rights. However, the Court cannot ignore the limits of its statutory authority by inventing unauthorized solutions, even when parties agree, and difficult familial circumstances arise.

This matter is before the Court on a Verified Petition for Appointment of Guardians of a Minor. David S. Elmo and Petra Anne Elmo (Petitioners) filed the petition August 10, 2020, requesting that this Court appoint them the guardians for their minor grandchild. At issue is:

> Whether this Court has authority to appoint maternal grandparents as guardians over their minor grandchild while the child's father is living and retains legal custody of the child?

OPINION LETTER

After considering the pleadings and oral arguments presented by Counsel, the Court finds that it does not have the authority to grant the Petitioners' request for guardianship over the minor child. Instead, the Parties can avail themselves of a custody proceeding in the appropriate Juvenile and Domestic Relations District Court.

I. BACKGROUND

Petitioners are the maternal grandparents of 15-year-old [redacted]. In 2012, [redacted]'s mother passed away. For the past eight years, [redacted] has lived with her Father, Dirk R.K. Krämer, (Respondent) in Germany. Petitioners are not unknown to [redacted], as they have frequently cared for her while they worked in Germany. When Petitioners returned to the United States, the parties ultimately decided that, due to Respondent's demanding work schedule, [redacted] should move to the United States so Petitioners could continue to care for her.

For whatever reason, the parties declined to transfer custody to the Petitioners or share custody between themselves. Instead, almost as soon as [redacted] arrived in the United States, Petitioners petitioned this Court to approve a Consent Order for Appointment of Guardian for Minor Child, executed by the Petitioners, Respondent, and [redacted]. The Petitioners seek guardianship under a statute designed to provide authority for testamentary guardians so that they can help [redacted] get a social security number, driver's license, and add her to their health insurance, among other things.

This Court heard Petitioners' Verified Petition for Appointment of Guardians of a Minor on September 18, 2020, took the matter under advisement, and, at the request of Petitioners' counsel, permitted supplemental briefing on the issue. Petitioners filed a supplemental brief on October 5, 2020.

II. ARGUMENTS

Petitioners rely on several statutes designed for testamentary guardians. Va. Code Ann. §§ 64.2-1700 *et seq*. They assert that it allows a living parent to appoint a guardian for his or her minor child without giving up custody of the child. Relying on Sections 64.2-1700-1702, 64.2-1800, and 64.2-1805, Petitioners contend that four types of guardians exist: natural guardians (parents), testamentary guardians, guardians appointed by a living parent, and guardians appointed by the circuit court or a circuit court clerk. Specifically, Petitioners rest their statutory argument on Sections 64.2-1701 and 64.2-1801 for the proposition that a minor can have a guardian of their person and a living parent who retains legal custody of the child concurrently. As argued, this arrangement is permissible so long as the parent consents, it is not for a fraudulent purpose, and it serves the best interests of the child, although Petitioners do not provide any other statutory support for this standard.

Moreover, Petitioners argue that if a circuit court cannot appoint a guardian under this statute while a parent is living, Virginia law provides no remedy for parties bringing a child from out-of-state into Virginia for at least six months. According to Virginia's Uniform Child Custody

Jurisdiction and Enforcement Act (UCCJEA), Virginia courts do not have jurisdiction to make custody determinations until the child has resided in Virginia for six months, unless the child's home state has declined jurisdiction and all courts having jurisdiction have declined to exercise it or Virginia's temporary emergency jurisdiction under the UCCJEA applies. This arrangement would leave parties powerless to make medical, educational, and other important decisions for the child's care for a substantial period. Petitioners' aver that parents should not have to forfeit legal custody to appoint a guardian of their child's person.

Lastly, Petitioners contend that the limited caselaw on the testamentary guardianship statute favors a reading of the statute to permit guardianship appointments while the parent(s) are still living. Petitioners' lean on *In re O'Neil* heavily because the court allowed a consensual transfer of guardianship that was unopposed by the child's natural guardian and occurred subsequent to or contemporaneously with a custody transfer. 18 Va. App. 674, 681 (1994). Petitioners distinguish *Hayes v. Strauss*, which noted that grandparents are not natural guardians, from their current situation because the child in *Hayes* was born out of wedlock, the mother had left specific instructions to give the child to the natural father, and the grandmother attempted to obtain custody over the father's objection. 151 Va. 136 (1928). Finally, Petitioners' counsel has obtained similar consent orders appointing guardians for minor children in other circuit courts around the state.

III. ANALYSIS

As a threshold matter, "[a] court's authority to exercise its subject matter jurisdiction over a case. . .may be restricted by a failure to comply with statutory requirements that are mandatory in nature and, thus, are prerequisite to a court's lawful exercise of [its] jurisdiction." *Fredericksburg Dep't of Soc. Servs. v. Brown*, 33 Va. App. 313, 319 (2000) (citing *Moore v. Commonwealth*, 259 Va. 405, 409 (2000)) (internal quotation marks omitted).

The Petitioners' reliance on Code of Virginia Sections 64.2-1700 *et seq*. and their predecessor statutes is misplaced. Examining the statutes' structure, history, and applicable caselaw leads this Court to conclude that the statutes were intended to address issues of testamentary guardianship. Instead, a custody petition in the appropriate court is the proper avenue authorized by the General Assembly.

A. Statutory Analysis

When interpreting individual statutes, courts must look to the statutory language, and if clear, give the statute its plain meaning. *Loudoun County Dep't of Soc. Servs. v. Etzold*, 245 Va. 80, 85 (1993). However, in construing a statute, "statutes which relate to the same subject matter should be read, construed and applied together so that the legislature's intention can be gathered from the whole of the enactments." *Moreno v. Moreno*, 24 Va. App. 190, 197-98 (1997) (citing *Alger v. Commonwealth*, 19 Va. App. 252, 256 (1994)) (internal quotation marks omitted).

Chapter 64.2 of the Virginia Code provides several sections on the appointments of guardians. The most frequently used section is Code of Virginia 64.2-2000 *et seq.*, which provides a statutory framework for the appointment of guardians for incapacitated adults. It outlines a process for notice, hearing, and appointment of a guardian ad litem. It contemplates the need for an investigation and a hearing while providing procedural protections for the respondent's rights. On the other hand, the guardianship chapter Petitioners suggest applies (Va. Code Ann. §§ 64.2-1700 – 64.2-1806) exists apart from that guardianship section. Unlike Sections 64.2-2000 *et seq.*, Sections 64.2-1700 *et seq.* do not provide the same rigorous statutory protections for the appointment of a guardian. If read as a guardianship mechanism outside the testamentary context, these sections would give courts the power to modify fundamental rights of both parents and children with little to no procedural safeguards. Rather, this section provides a simple procedure to accomplish the final wishes of a decedent set forth in his will.

Chapter 17 of 64.2 focuses on the appointment of a minor child's guardian in the event of her parents' death. Consistent with the general principles of family law, the first section of the chapter defines parents as joint natural guardians of the person of their child. Va. Code Ann. § 64.2-1700 (2017). If either parent dies or abandons the family, the other is still the child's natural guardian. *Id.* Section 64.2-1701 discusses testamentary guardians, noting that a parent may appoint both a guardian of a minor's estate and/or person. Additionally, the testamentary guardian section reads:

> A guardian of the person of a minor *other than a parent* is not entitled to custody of the person of the minor so long as either of the minor's parents is living and such parent is *a fit and proper person* to have custody of the minor.

Va. Code. Ann. § 64.2-1701(A) (2017) (emphasis added).

By its plain meaning, this statute allows the parents to appoint a guardian for their minor child by will in the event both parents are dead, or the surviving parent is unfit to have custody. The testamentary guardian statute does not authorize the testamentary guardian to act as a guardian until the passing or unfitness of both parents. Petitioners rely on the statute's language to support the proposition that a minor child can have a guardian of her person appointed while a natural parent remains living. However, this interpretation unnaturally rips the language from its context in the testamentary guardian section. A testamentary guardian cannot be a testamentary guardian until a will appointing that guardian goes into effect, namely when the natural guardians die, and the will becomes enforceable. Thus, a testamentary guardian is not entitled to custody of the person of a minor until the need for a testamentary guardian arises.

The very next section, Section 64.2-1702, states that "[t]he circuit court or the circuit court clerk. . .may appoint a guardian for the estate of the minor and may appoint a guardian for the person of the minor unless a guardian has been appointed for the minor pursuant to [the testamentary guardian statute]." Va. Code Ann. § 64.2-1702 (2017). Thus, when read in conjunction with the other statutes, Section 64.2-1702 grants the circuit court or circuit court clerk the authority to appoint a guardian in the absence of a natural or testamentary guardian. But

this provision cannot be read to give courts wholesale authority to appoint a guardian in the place of an otherwise fit and proper natural or testamentary guardian.

Section 64.2-1703 bolsters this interpretation. Subsection B states that "in no case shall any person not related to the minor be appointed guardian until 30 days have elapsed *since the death or disqualification of any natural or testamentary guardians* and the minor's next of kin have had an opportunity to petition the court for appointment." Va. Code Ann. § 64.2-1703(B) (2017) (emphasis added). In plain text, the General Assembly appears to have contemplated that guardian appointments by circuit courts or circuit court clerks would only occur if the natural or testamentary guardians died or were disqualified.

Petitioners make much of Sections 64.2-1800 and 64.2-1805, which note in part the ways in which a guardian is appointed ("by a parent, the circuit court, or the circuit court clerk"). However, Section 1800 provides for the custody of a minor who has a guardian of his estate but not of his person, while Section 1805 appears to emphasize that a guardian, regardless of the manner of appointment, has particular powers. Thus, these statutes either provide for the custody of a minor without a guardian of their person or simply demonstrate that guardians, however appointed, legally stand on equal footing.

Petitioners also rely on Section 64.2-1801 to argue that a minor child can have a natural guardian and a court-appointed guardian of their person. Section 1801 states in part: "a guardian of a minor's estate shall not make any distribution of income or corpus of the minor's estate to or for the benefit of a ward who has a living parent, whether or not the guardian is such parent," except as authorized by the instrument from which the estate is derived or by court authorization. Va. Code Ann. § 64.2-1801(A) (2017). This provision acknowledges that a minor may have both a living parent and a guardian of his/her *estate* but nowhere in this or the surrounding sections does it state that a minor child may have both a living parent and a guardian of his/her *person*. In fact, as explained above, Section 64.2-1701 refutes this proposition. Moreover, Chapter 18 provides for the termination of a guardian of the estate of a minor, but no similar provision exists for the termination of guardianship of a person of a minor. Va. Code Ann. § 64.2-1803 (2017). One can infer that the General Assembly did not provide for the termination of a guardian of a minor's person because the minor's parents are usually the guardians until the parents die or abandon the minor or the minor emancipates. Va. Code Ann. § 64.2-1700 (2017). Only once the parents die or are determined unfit does the testamentary guardian become the minor's guardian. Va. Code Ann. § 64.2-1701 (2017). And only in the absence of a testamentary guardian or legal custodian does the court or clerk appoint another guardian. Va. Code. Ann. § 64.2-1702 (2017).

In sum, the General Assembly set up a well-ordered framework to address guardianship appointments for minors who have lost both natural guardians. Chapter 17 identifies the stages of guardianship of a minor's person, from parents as the natural guardians, to testamentary guardians if both parents are dead or unfit, and lastly, to guardians appointed by the courts or court clerks in the absence of a testamentary guardian. Chapter 18 deals with the distinct and different issue of guardianships of a minor's estate and its structure reflects as much. Additionally, this reading of the statute is further augmented by the caselaw.

B. Caselaw

A review of caselaw reveals that there are very few cases that discuss guardianship petitions for children. Moreover, the unique facts presented by this case further distinguish it from that caselaw. The few cases raised by Petitioners warrant a discussion of their applicability, specifically *In re O'Neil*, 18 Va. App. 674 (1994) [hereinafter *O'Neil*] and *Hayes v. Strauss*, 151 Va. 136 (1928).

In *O'Neil*, maternal grandparents sought guardianship of the person of their minor grandchild after obtaining legal custody of the child so that they could include her on their medical insurance. 18 Va. App. at 676-77. A chancellor denied the petition, in part, because the child's mother, as her natural guardian, was not under any disability and because the chancellor thought it was inappropriate "for the court to interfere with the parental right of guardianship in order to 'relieve someone of financial difficulty.'" *Id.* at 677. The Court of Appeals vacated the chancellor's denial and remanded the case, concluding that the chancellor should have applied the best interests of the child test. *Id.* at 681-82. In making its decision, the Court of Appeals expressly stated that "[b]ecause the O'Neils had legal custody of the child, we hold that the chancellor's consideration of such a petition is limited to a determination of whether the transfer is in the best interests of the child. . ." *Id.* at 680. Further, it reasoned that the chancellor should award the transfer of guardianship unless "it appears that the parties are attempting to accomplish some fraud or abuse of the power of guardianship" or where the court "deem[s] the [potential guardian] to be incompetent to discharge the duties of that office." *Id.*

While some similarities exist between the present case and *O'Neil*, one key distinction precludes its application in this case. In *O'Neil*, a juvenile and domestic relations district court had already awarded the maternal grandparents legal custody before they asked for guardianship of the minor. *Id.* at 676, 680. At the time of their petition, no party had a greater legal claim to custody of the child. This is not inconsistent with a later Court of Appeals decision. *Turner v. Spinner*, Record No. 1559-96-4, 1997 WL 147456, at *1-2 (Va. Ct. App. Apr. 1 1997) (reciting, but not deciding on the merits, the trial court's decision to appoint a guardian of the person of a minor over the mother's objection when the child's mother was not the child's legal and physical custodian, the child's legal and physical custodian had died, and no one currently had legal custody of the child). In further support of this reading of *O'Neil*, the Court of Appeals noted that Virginia differed from other jurisdictions in that custody, rather than guardianship, "is the preferred status for an individual authorizing medical procedures, enrolling the child in public school, or seeking eligibility for public assistance for the child." 18 Va. App. at 679 n.2.

The other related guardianship case is *Hayes v. Strauss*, 151 Va. 136 (1928). In that case, the mother of a child born out of wedlock died. *Id.* at 138. The child's maternal grandmother attempted to regain custody of the child from the child's paternal grandparents after agreeing to temporarily give them the child, but her warrant was dismissed. *Id.* Yet, despite the lack of pending legal proceedings, the lower court ordered the paternal grandparents to return the child to the maternal grandmother. *Id.* Within a month, the court had appointed the grandmother as guardian. *Id.* at 138-39. The Supreme Court of Appeals of Virginia noted that the grandmother

did not obtain a custody award and that her only rights to the child came from the guardianship statute. *Id.* at 139. The Court emphasized that the express language of the statute gave "superior" rights of guardianship to the parents and did not extend to grandparents. *Id.* Yet, the Court also noted that while the parents' statutory rights must be respected, parents and/or guardians' rights are subordinate to advancing the child's interests. *Id.* at 139, 142. Lastly, the Court stated that it "always has the power in a proper case to remove one guardian and appoint another. . ." *Id.* at 142.

Some selected quotes from *Hayes* and *O'Neil* provide artificial support for Petitioners' request for guardianship of [redacted]. However, certain factual distinctions belie that result. First, part of the *Hayes* Court's determination seems to arise out of the fact that the child was born out of wedlock and legally unrelated to the father. *Id.* at 141-42. Additionally, the minor's custody, and not just his guardianship, was in question because after his mother died, he had no legal father and both the maternal and paternal grandparents had had physical custody of the child at various times. *Id.* at 138.

Supporting this Court's interpretations of both *O'Neil* and *Hayes* is the Virginia Supreme Court interpretation of early predecessor statutes to chapter 17. The Court specifically noted that the courts had authority to appoint a guardian if the minor did not have a testamentary guardian. *Ham v. Ham*, 56 Va. (15 Gratt.) 74, 81 (1859) ("[A]s we have seen, after giving to the father the right to appoint a guardian for his child by his will, [the law] vests the Circuit and County courts with full power to appoint guardians for all minors who have not testamentary guardians.")

Lastly, this Court finds two circuit court cases that interpreted the predecessor statute to Section 64.2-1702 (Va. Code Ann. § 31-4 (1950)), unpersuasive. *Commonwealth v. Douglas*, 54 Va. Cir. 447 (2001); *Commonwealth v. Stewart*, 53 Va. Cir. 372 (2000). Those cases interpreted Section 31-4, which conferred jurisdiction to circuit courts and circuit court clerks to appoint guardians, to mean that circuit courts "may appoint a guardian upon a petition if not contested by the natural guardians." *Douglas*, 54 Va. Cir. at 449; *Stewart*, 53 Va. Cir. at 375. However, those decisions overlook the statutory context of Section 31-4 and the limits on courts' authority to appoint a guardian while a natural or testamentary guardian is living. *See* Va. Code Ann. §§ 64.2-1700, 64.2-1703 (2017).

Petitioners overstate that they are without remedy under the UCCJEA if the guardianship statutes do not apply in this circumstance. First, there is arguably jurisdiction under Code of Virginia Section 20-146.12 (2016). Even if no jurisdiction exists, Petitioners can wait the requisite six months and file a petition for custody as interested parties pursuant to Code of Virginia Section 20-124.2(B) (2016 & Supp. 2020). Under that section, Petitioners and Respondent could petition for and be awarded joint custody of [redacted] upon a showing of clear and convincing evidence that her best interests would be served. Va. Code Ann. § 20-124.2(B). Parties have likely already met that standard as demonstrated by the parties' and [redacted]'s consent. Lastly, this Court presumes there is another legal avenue for petitioners to pursue: a custody or guardianship determination in Germany.

IV. CONCLUSION

This Court is sympathetic to the Petitioners' plight. But sympathy and authority are not coterminous. Moreover, an available and appropriate legal avenue exists for Petitioners in the Juvenile and Domestic Relations District Court in the form of a petition for joint custody with the Respondent.

For the foregoing reasons, the Court finds that it does not have the authority to appoint a guardian of a minor's person while the natural guardian is still living. Petitioners' Verified Petition for Appointment of Guardians of a Minor is DENIED without prejudice to parties to petition for custody in the appropriate Juvenile and Domestic Relations Court.

Sincerely,

[redacted]

Daniel E. Ortiz
Circuit Court Judge

OPINION LETTER

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE: [redacted]	)	
A/K/A [redacted]	)	
	)	
DAVID S. ELMO and	)	
PETRA ANNE ELMO	)	
Petitioners,	)	
	)	**Case No. CL-2020-11723**
v.	)	
	)	
DIRK R.K. KRAEMER	)	
DIRK R.K. KRÄMER	)	
	)	
Respondent.	)	

ORDER

THIS CAUSE came to be heard on September 18, 2020, on Petitioners' Verified Petition for Appointment of Guardians of a Minor. A supplemental brief was submitted on October 5, 2020.

IT APPEARING that for the reasons set forth in the Court's Opinion Letter dated December 2, 2020, the Court does not have the authority to appoint a testamentary guardian in this case; it is therefore

ORDERED that the Petition is denied, and the case is dismissed without prejudice to Petitioners filing an appropriate custody petition in a court with proper jurisdiction.

ENTERED this 2 day of Dec, 2020.

[redacted]
Judge Daniel E. Ortiz

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF