IN THE APPELLATE COURT OF THE CHOCTAW NATION

IN RE THE GUARDIANSHIP OF:

K.C., a Minor Child,

Natural Father,

Appellant,

vs.

Maternal Grandmother,

Appellee.

NO. AC-24-1

District Court No. PGM-23-22

Author: Judge Jones

FILED
CHOCTAW NATION OF OKLAHOMA
APPELLATE COURT CLERK

JAN 07 2025

COURT CLERK
BY

OPINION

Appellant, **Father** appeals an Order Appointing Guardian entered by the Honorable Judge Mark Morrison, Judge of the Choctaw Nation District Court, dated January 10, 2024, in which Judge Morrison sustained the Appellee's **Grandmother** Petition for Guardianship of K.C., a Minor Child., and appointed Appellee as Guardian of the Person and Estate of K.C. and further Ordered Appellant to pay child support and further suspended Appellant's visitation until he complies with certain requirements and restrictions.

We, the Choctaw Nation Court of Appeals, hereby AFFIRMS the decision of of the Honorable Judge Mark Morrison.

I. BACKGROUND AND PROCEDURAL HISTORY

The proposed Ward / Minor Child in this matter is K.C. The Appellee, **Grandmother**, is the maternal grandmother of the minor child. The Appellant, **Father**, is the legal and biological father of the minor child. The child's mother is **Mother**, hereafter referred to as "mother".

From the child's birth until 2012, the child resided with her mother and the Appellee. In 2012, when the child was approximately three (3) years old, the Appellant / Father was awarded custody of the child and the child began residing with Appellant and Appellant's father (Paternal Grandfather). Mother was awarded standard visitation. Some time after Appellant was awarded custody, the Paternal

Grandfather was convicted of child molestation for other children, not the minor child herein, and sentenced to prison in California.

On March 1, 2023, Appellee filed a Petition for Guardianship and a Motion for Emergency Temporary Guardianship seeking custody and Guardianship of the minor child. The child was fourteen (14) years old when the Petition was filed. The Court granted the Petition for Emergency Temporary Guardianship on March 1, 2023.

On December 20, 2023, the trial Court held a final trial on the merits on the Appellee's Petition for Guardianship. Appellee and Appellant appeared with counsel. Mother appeared, pro-se, although she had an attorney of record that did not appear. The minor child's Guardian Ad Litem, Jacqueline Jo Perrin, also appeared on behalf of the child. The Court consolidated the Guardianship case, which is being appealed herein, with a Motion to Modify in a separate case between the Appellant and the mother. At said trial, the Mother entered her consent to the Appellee's Petition for Guardianship. Father objected and requested that the Court restore custody of the child back to him.

Upon hearing the evidence, the Court took the matter under advisement and issued a Final Order Appointing Guardian on January 10, 2024. Pursuant to said Order, the trial Judge sustained the Appellee's Petition for Guardianship and awarded her custody of the minor child over the objection of Appellant, her natural father. In relevant part, the court made the following findings:

> Specifically, the Court finds that the Minor Child upon attaining the age of fourteen years, executed her unequivocal nomination of the Petitioner as her Guardian as filed on June 20, 2023. The [Choctaw] Code at Section 2-103 provides as follows:
>
> "Nomination and Appointment of Minor – Age of Minor. If the minor is under the age of fourteen (14) years, the court may name and appoint his guardian. If the minor has attained the age of fourteen years, the minor may nominate his own guardian, who, if approved by the court, **must** (emphasis added) be appointed accordingly."
>
> There are no appellate decisions of the Choctaw Nation construing the cited statute and therefore the Court interprets the same by the plain language doctrine. Therefore, the court **must** appoint a guardian nominated by a ward who has attained the age of fourteen years **if** the guardian is approved by the Court.
>
> ...

The Court is mindful of the law of the State of Oklahoma Guardianship Code references custody provisions of its Divorce Code sometimes called the Order of Custody Preference Statute. The Oklahoma law incorporates the concept of parental unfitness.

The CNO [Choctaw Nation] Code has no such provision. The Court finds that Oklahoma law is not determinative of this Court's decision. The Court may choose to consider Oklahoma law as a matter of persuasion. However, given the plain language of the CNO code as cited above, the Court finds it unnecessary to consider Oklahoma law and must determine this case based on the plain language of the CNO statute.

Alternatively, if the Court on appeal determines that parental unfitness is the appropriate legal standard to be applied in this case irrespective of the plain language of the statute cited above that permits the fourteen year old minor in this case to nominate her guarain, the Court makes the following further findings:

a. Concerning the Biological Mother, as set forth above, she has consented to the Petitioner being appointed as Guardian and the issue of unfitness is not relevant as to the Mother.

b. Concerning the Biological Father [Appellant], the Court finds that his testimony is not credible and, in fact, wholly unbelievable by this Court. The unrefuted evidence is that the Minor child has had anal warts and an associated disease since she was at least Three (3) years old and, that the occurrence of same began when the Child was in the sole custody of the Father. The evidence is further undisputed that the paternal grandfather is a convicted sex offender serving a lengthy sentence in California for abusing other minor children. The father testified that the paternal grandfather had no unsupervised access to the Child. The Court took judicial notice of the previous guardianship file in this Court involving the Minor Child, being case number PG-2011-12. The Court further finds that the former file contains exhibits considered by the former judge of this Court wherein a CNO day care log reflects at least nineteen times that the paternal grandfather picked up the Minor Child from the daycare. Of equal concern is that the unrefuted evidence shows that the Father allowed the paternal grandfather to send letters to the child from prison on numerous occasions. The father exhibited to the Guardian Ad Litem during the report interview process and to the

Court during the hearing and extremely cavalier attitude on the issue. Accordingly, the Court finds the Father to be affirmatively unfit to be the legal custodian of the Minor Child and his request to retain legal and physical custody of the Minor Child is **DENIED**.

II. STANDARD OF REVIEW

Pursuant to the the Choctaw Code, the Scope of Review on Certiorari to the Choctaw Court of Appeals shall be prescribed by the Court of Appeals. When an appeal raises a purely legal issue, such as a question of statutory interpretation or the constitutionality of a law, the appellate court reviews the issue *de novo*, meaning they review it independently without deferring to the lower court's conclusions.

Rulings made by the trial court during trial, such as evidentiary decisions and awards of custody, including a the trial court's decision of whether or not to sustain a Petition for Guardianship, are reviewed under an "abuse of discretion" standard and the appellate court will only overturn these decisions if it finds that the trial court made a decision that was arbitrary, unreasonable, based on an erroneous conclusion of law, or if the decision has no rational basis on the evidence produced at trial.

III. DISCUSSION

In his first proposition of error, Appellant argues that Section 2-103 of the Choctaw Nation Tribal Guardianship and Conservatorship Act is unconstitutional. In his second proposition of error, Appellant agues that the trial Court committed error in not requiring a showing of affirmative unfitness on the part of the Appellant / Father. In his third proposition of error, Appellant argues that the trial Court committed error in not granting Guardianship of the child to the Appellant / Father. The Court will address these issues in Order.

A. Whether the Choctaw Nation Tribal Guardianship and Conservatorship Act is unconstitutional.

In the case at bar, the trial Court ruled that the plain language of Section 2-103 of the Choctaw Code grants a minor child, over the age of fourteen years, the right to nominate his or her own guardian and that said guardian must be appointed if approved by the Court. We respectfully disagree with this portion of the Trial Court's ruling.

Pursuant to Section 2-101.A. of the Choctaw Code, "[t]he court, when it appears necessary or convenient, may appoint guardians for the persons and property, or either, or both of them, of minors." Pursuant to Section 2-103 of the Choctaw Code, "[i]f the minor is under the age of fourteen (14) years, the court may name and appoint his guardian. If the minor has attained the age of fourteen (14) years, the minor may nominate his own guardian, who, if approved by the court, must be appointed accordingly."

However, these statutes do not grant the Court authority to remove a child from an otherwise fit parent simply because a child, over the age of fourteen (14), wishes to nominate another person as their Guardian without first determining the necessity of the Guardianship. In making its decision herein, the Court failed to consider Section 112.5 of the Choctaw Nation Marriage Act, which states as follows:

> A. Custody or ***guardianship*** of a child may be awarded to:
>
> 1. A parent or to both parents jointly;
> 2. A grandparent;
> 3. A person who was indicated by the wishes of a deceased parent;
> 4. A relative of either parent;
> 5. The person in whose home the child has been living in a wholesome and stable environment including but not limited to a foster parent; or
> 6. Any other person deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.
>
> B. In applying subsection A of this section, a ***court shall award custody or guardianship of a child to a parent, unless a nonparent proves by clear and convincing evidence*** that:
>
> 1. For a period of at least twelve (12) months out of the last fourteen (14) months immediately preceding the commencement of the custody or guardianship proceeding, the parent has willfully failed, refused, or neglected to contribute to the support of the child:
>
> a. in substantial compliance with a support provision or an order entered by a court of competent jurisdiction adjudicating the duty, amount, and manner of support, or

b. according to the financial ability of the parent to contribute to the support of the child if no provision for support is entered by a court of competent jurisdiction, or an order of modification subsequent thereto.
For purposes of this paragraph, incidental or token financial contributions shall not be considered in establishing whether a parent has satisfied his or her obligation under subparagraphs a and b of this paragraph; or

2. a. the child has been left in the physical custody of a nonparent by a parent or parents of the child for one (1) year or more, excluding parents on active duty in the military, and
b. the parent or parents have not maintained regular visitation or communication with the child.
For purposes of this paragraph, incidental or token visits or communications shall not be considered in determining whether a parent or parents have regularly maintained visitation or communication.

C. ***In applying subsection A of this section, a court shall award custody or guardianship of a child to a parent, unless the court finds that the parent is affirmatively unfit.***

Emphasis Added.

Parents also have a fundamental right, protected by the United States Constitution, to raise their children under their custody and control and to make decisions regarding their children's care, custody and control. This fundamental right can only be abridged to prevent harm or potential harm to the child. See *Troxel v. Grandville*, 530 U.S. 57 (2000) and *Stanley v. Illinois*, 405 U.S. 645 (1972). The Choctaw Nation Constitution mandates that the Choctaw Nation Courts protect the fundamental rights guaranteed by the U.S. Constitution. See *Choctaw Nation of Oklahoma v. Morrison*, Case No. CC-2023-02 (2023).

The correct interpretation of these statutes, in conjunction with the fundamental rights discussed above, requires that it first be proven, by clear and convincing evidence, that a parent is affirmatively unfit to care for the child before the child can be removed from a parent's custody and control and placed in the custody of a Guardian, who is not a parent of the child, and that it is in the best interests of the child that a Guardian be appointed. Unfitness on the part of the child's parent must be positive and not comparative. The mere fact that a child

might be better off with another person is not sufficient to deprive a parent of the fundamental right to custody and control of his or her own child.

Only after proving by clear and convincing evidence that the parent is affirmatively unfit, may the minor child, fourteen (14) years of age or older, nominate his or her own Guardian, subject to court approval. Simply put, the mere desire of a child, over the age of fourteen (14), to have a person other than his or her parent appointed as his or her guardian does not make a Guardianship "necessary or convenient."

Therefore, this Court holds that the Choctaw Nation Guardianship and Conservatorship Act is ***not*** unconstitutional when correctly applied with the provisions set forth in Section 112.5 of the Choctaw Nation Marriage Act. Furthermore, a reading of the marriage act and the guardianship act renders any constitutional challenge of the guardianship act not well taken. The Court of Appeals makes a specific finding that that the Choctaw Code shall be construed and interpreted in conjunction with all of the guardianship and marriage provisions within the code when adjudicating a case of this nature.

B. Whether the Trial Court committed error in not requiring a showing of affirmative unfitness on the part of Appellant / Father.

For the reasons set forth in Section A. above, we further hold that the trial court incorrectly ruled that "the court **must** appoint a guardian nominated by a ward who has attained the age of fourteen years **if** the guardian is approved by the Court" without first finding that the parent(s) are affirmatively unfit.

However, the trial Court did cover its bases and made specific findings in the event that this Court holds that clear and convincing evidence that the Appellant was affirmative unfit. The trial court's findings of unfitness, on the part of the Appellant, are supported by the evidence offered at trial. If the trial court failed to make an affirmative finding of unfitness, then this Court would have been forced to remand the issue back for a finding. Further, the Court hereby specifically states that when parents are involved in guardianships of their minor children, the issue of unfitness must be addressed by the Court. Therefore, we decline to find that said findings were an abuse of the Court's discretion. Because the Court made these findings of affirmative unfitness on the party of the Appellant, we further hold that the Court's ruling that the child may nominate a guardian, regardless of any proof that the parent was affirmatively unfit, is harmless error.

C. Whether the Trial Court committed error in not granting Guardianship of the child to the Appellant / Father.

As stated in Section B, above, we held that the trial Court covered its bases and did not abuse its discretion in finding that the Appellant / Father is affirmatively unfit to care for the child herein based on the evidence offered at trial. The trial Court correctly applied Section 2-105 of the Choctaw Nation Guardianship and Conservatorship Act by allowing the child to nominate her own Guardian. We further hold that the trial Court did not abuse its discretion in finding that it was in the best interests of the child to appoint the Appellee as the child's Guardian.

IV. CONCLUSION

For the reasons stated above, the Court finds no reversible error on the part of the trial Court. Therefore, the Choctaw Nation District Court Order is hereby AFFIRMED.

PER CURIAM

CERTIFICATE OF DELIVERY

I hereby certify that on the 7th day of January 2025, a true and correct copy of the above pleading was emailed to:

Jeremy Elliott @ elliottattorney@yahoo.com

Linque Gillett @ Linque.gillett@lhglawoffice.com

Jackie Jo Perrin @ jjp@jackiejoperrin.com

Sandy Stroud, Appellate Court Clerk