IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Submitted on Briefs, September 15, 2003

IN THE MATTER OF THE ADOPTION OF DPM by DONNA RAE MICKLES, and husband, PAUL ED MICKLES, v. BRENDA SUE JOHNSON, and husband, STEVE JOHNSON, and CHADWICK EARL SCHUBERT

Direct Appeal from the Chancery Court for Knox County
No. 143198-1 Hon. John Weaver, Judge

FILED OCTOBER 23, 2003

No. E2002-02809-COA-R3-CV

The Trial Court ordered appellants incarcerated for violation of the Court's orders, and refused to remove the Guardian ad Litem for the minor child. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, J. delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

John S. Anderson, Rogersville, Tennessee, for Appellants.

D. Vance Martin, Knoxville, Tennessee, for Appellees.

Wayne Decatur Wykoff, Knoxville, Tennessee, Guardian Ad Litem for DPM.

OPINION

This case involves an ongoing dispute between appellants, maternal grandparents, who were allowed to adopt DPM and paternal grandparents, who also sought to adopt the child and were granted substantial visitation time with the child, with appellants' consent, in the Final

Judgment of Adoption.[1] In the Final Judgment, the Court held appellants in contempt for denying visitation to appellees, and sentenced appellants to 7 days' jail time each, but held the sentences in abeyance "pending further orders of the court and continuing compliance with the court orders - if further court orders are violated, then those sentences shall be served and other punishment will be addressed". *Id.* The Court further ordered that the appellees could also be subject to contempt if the Court found they failed to strictly comply with the Court's orders. *Id.*

Appellants appealed to this Court, seeking to have the appellees' visitation rights removed due to the fact that their son's parental rights had been terminated. This Court affirmed the Trial Court's Judgment. (*In re: The Adoption of DPM*, No. E2001-00958-COA-R3-CV, July 3, 2002.)

Upon remand, appellees filed a Petition for Contempt, alleging that they were still being denied their visitation time with the child. The parties entered into an Agreed Order, wherein appellants were again held in contempt of court and sentenced to ten days' jail time each, to be held in abeyance on the condition that they strictly comply with the court's orders. The Court further ordered that if appellants violated any court order, the 17 days of jail time being held in abeyance would be served.

Appellants filed a Motion to have the guardian ad litem removed, asserting that he was biased in favor of the appellees. The guardian ad litem then filed a Motion for Contempt, alleging that appellants had yet again failed to turn the child over for visitation with appellees. Appellees filed a Motion seeking to have their visitation time restored.

Meanwhile, appellants filed a Petition in the Juvenile Court seeking to have the appellees' visitation rights suspended, and appellees filed yet another Motion for Contempt, and the guardian ad litem filed a Motion for Contempt seeking to have the Final Judgment of Adoption set aside for fraud.

The Trial Court conducted a hearing on September 9, 2002, and dismissed appellants' Motion to remove the guardian ad litem, finding that "the proof does not sustain the removal of the Guardian ad litem." The Court found appellants in contempt by "clear and convincing evidence and beyond a reasonable doubt" on several counts, and ordered them to serve the jail sentences previously set. The Court ordered that the appellees would have custody of the child during the appellants' incarceration. Appellants have appealed the Court's Judgment.

On appeal, appellants raise a somewhat novel issue, arguing they should not be incarcerated for refusing to allow the ordered visitation, because the orders allowing such visitation were agreed, and thus in the nature of a contract and the remedy for breach of same would be a civil penalty only. However, they fail to recognize that those provisions were set forth in the Final Judgment of Adoption, which was entered with their consent. Appellants will not be relieved of a

[1]The biological parents' parental rights have been terminated.

provision in an agreed judgment which they assented to explicitly. *See In Re: Adoption of DPM*, (prior opinion of this Court). Moreover, this Court has previously ruled that any agreement which is merged into a court's order becomes a disposition by the court, and said "agreement or stipulation loses its contractual nature, and its provisions may be enforced by a court order". *Brewer v. Brewer*, 869 S.W.2d 928, 932 (Tenn. Ct. App. 1993).

The sentences which appellants complain of were merely enforced by the judgment which they appealed from in this appeal, but had been handed down in the earlier orders that were not appealed. We find this issue to be without merit.

Appellants also take issue with the Trial Court's failure to remove the guardian ad litem. While the adoption statutes do not provide for the mandatory appointment of a guardian ad litem to look out for the child's best interests, this Court has recognized that "the statutes also do not prohibit the appointment of a guardian ad litem in adoption proceedings." *In re: adoption of M.J.S.*, 44 S.W.3d 41, 59 (Tenn. Ct. App. 2000). Tenn. R. Civ. P. 17 also provides that a guardian ad litem may be appointed by the court to defend an action for an infant, "or whenever justice requires." Our Supreme Court has stated that the decision regarding whether to appoint a guardian ad litem is "within the sound discretion of the trial judge and requires the trial judge to appoint the guardian ad litem whenever justice requires." *Gann v. Burton*, 511 S.W.2d 244, 246 (Tenn. 1974). *Also see, Anderson v. Memphis Housing Authority*, 534 S.W.2d 125, 129 (Tenn. Ct. App. 1975). Accordingly, it is in the Trial Court's discretion as to whether a guardian ad litem should be removed.

Appellants argue that the guardian in this case was unfairly biased in favor of the appellees. No evidence of unfair bias by the guardian appears in the record, and clearly there was no evidence that the guardian failed to represent the child's interests. We also find this issue without merit.

We affirm the judgment of the Trial Court, and remand, with the cost of the appeal assessed to the appellants.

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HERSCHEL PICKENS FRANKS, J.