Guardianship of Kelvin, 94 Mass. App. Ct. 448 (2018)

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In this case, the Appeals Court was asked to decide who bears the burden of proof on a petition to remove a guardian under G.L. c. 190B, § 5-212, and what standard of proof is necessary to satisfy this burden.Citing *Care and Protection of Erin*, 443 Mass. 567, 571 (2005) and the burden of proof on a petition for review and redetermination, the Appeals Court concluded that the parent must make an initial showing of changed circumstances such that the child may no longer be in need of a guardian. Once the parent satisfies this initial “burden of production,” the guardian then bears the ultimate burden of proving by clear and convincing evidence that the parent is currently unfit and that continuation of the guardianship serves the child’s best interests.

*Facts*: Kelvin’s paternal grandfather filed a petition in the probate court to become his guardian. The trial judge found Kelvin’s mother unfit and appointed the paternal grandfather as his permanent guardian. The mother later petitioned under G.L. c. 190B, § 5-212 to remove the guardian and regain custody of Kelvin. At the trial on the mother’s petition for removal, the judge placed the burden of proof on the mother to prove her fitness. The judge found that the mother was currently unfit and that it was not in Kelvin’s best interest to leave the guardian’s care and return to the mother’s custody, and dismissed her petition. The mother appealed. The Appeals Court concluded that the trial judge erred, and reversed and remanded.

*Discussion*: The Appeals Court reasoned that because the same liberty interests are at stake, the burden of proof in a petition to remove a guardian should be the same as in a petition for review and redetermination of a care and protection adjudication under G.L. c. 119, § 26(c). The party requesting review and redetermination has the initial burden of producing “some credible evidence that circumstances have changed…such that the child may no longer be in need of care and protection.” If this burden is met, the burden then shifts back to DCF to prove, by clear and convincing evidence, that the parent is still unfit and, therefore, the child is still in need of care and protection. The burden is never on the parent to prove that they are currently fit. Therefore, it was improper for the trial judge, here, to place the burden on the mother to prove her current fitness with respect to her petition to remove the guardian.