IN THE COURT OF APPEALS OF IOWA

No. 6-458 / 05-1640
Filed November 16, 2006

IN THE MATTER OF THE GUARDIANSHIP OF MELISSA MARIE SELLS

TROY LEE SEEMANN and AMY ANN SELLS,
Appellants.

Appeal from the Iowa District Court for Black Hawk County, K.D. Briner, Judge.

Troy Seeman and Amy Sells appeal from the district court order denying their application for visitation with their daughter, who is in the guardianship of the appellees. **AFFIRMED.**

Robert L. Rausch of Rausch Law Firm, Waterloo, for appellants.

Karla J. Shea of Yagla, McCoy & Riley, P.L.C., Waterloo, for appellee.

Heard by Miller, P.J., and Eisenhauer, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

EISENHAUER, J.

Troy Seeman and Amy Sells appeal from the district court order denying their application for visitation with their daughter, Melissa Sells, who is in the guardianship of Nancy and Eddie Slutter. They contend the court erred in refusing to grant visitation with Melissa. The Slutters request an award of their appellate attorney fees. We affirm.

I. Background Facts and Proceedings. Troy Seeman and Amy Sells have four children: Melissa, age fourteen; Brittany, age eleven; Mercedes, age seven; and Holly, age six. Troy and Amy lived with Troy's father for the first six months of Melissa's life. They then moved in with Troy's mother and stepfather, Nancy and Eddie Slutter. Troy and Amy moved out of the home approximately one year later, but Melissa remained with the Slutters.[1]

On August 8, 1998, Nancy petitioned the court for the involuntary appointment of a guardian for Melissa, requesting she and Eddie be named co-guardians. On August 20, 1998, Troy and Amy waived all formal service requirements and signed a stipulation stating that it would be in Melissa's best interest that the Slutters be appointed her guardians. The stipulation further stated:

> The purpose of this guardianship is to allow ward to legally reside with Nancy Jane Slutter and Eddie Joe Sluuter, be claimed on their health insurance and allow them to make decisions regarding schooling and health care issues and to obtain health care as needed for the minor ward.

A decree naming the Slutters as Melissa's guardians was entered on August 25, 1998.

[1] Troy claims that Melissa left the home when they did, but the district court found the record contradicts Troy's claim.

Troy and Amy have a very unstable employment record. Since the guardianship was entered, Troy and Amy have not provided support for Melissa, with the exception of $300 paid to her orthodontist in February 2000. Troy was incarcerated several times between 1998 and 2003 and there is evidence of domestic abuse and infidelity problems between Amy and Troy. Troy and Amy had little visitation with Melissa and made little attempt to stay in contact with her.

On March 17, 2003, Troy and Amy filed an application to terminate the guardianship, alleging they were in a position to care for Melissa and that it was in Melissa's best interest to be in their custody. Trial was held in September 2003. On September 18, 2003, the district court entered an order denying the application. The court concluded:

> The evidence here discloses that the parents are not properly taking care of the three children presently in their home, that their home is not fit for Melissa to return to, that the effect of such a return would be devastating on Melissa and not in her best interest. An additional factor is the fact that the three children residing with the parents now spend the greater part of their time with Troy's father and not in the parents' home.

The court further entered the following caveat to the order:

> The Court has a genuine concern about the three daughters presently residing with these parents and whether or not they are being abused with the treatment that they are receiving. This is particularly true when there is a handicapped child in the house. The Court does not feel it would be proper for it to file charges with the Department of Human Services. However, the Court hopes that if the family feels that this abuse is continuing that they would contact the Department of Human Services for an investigation. They could refer this Court Order to the Department, if such action were taken.

On October 10, 2003, the Department of Human Services (DHS) received allegations of denial of critical care involving Amy and Troy. It was alleged the house was never clean, there were animal feces on the floor, the children suffered continual head lice, and their clothes were mildewed. The DHS worker made a visit to Troy and Amy's home on October 14 and found dog feces on the basement floor, a soiled kitchen with food scraps under the table, and the hallway leading to the children's bedrooms blocked with furniture. On a return visit on October 16, the problems had been remedied. Amy told the worker that the children had problems with head lice in the past and that it was a never-ending problem, although the girls were currently free of lice. The worker found the denial of critical care was not confirmed.

On October 8, 2004, Troy and Amy filed an application for visitation, requesting the court order liberal visitation with Melissa. Trial was held in June 2005. On September 7, 2005, the district court entered its order denying the application. The court took judicial notice of the fact findings contained in the September 2003 order and found no evidence presented in the June 2005 trial persuaded it that "Troy and Amy are much, if any, better suited to exercise parental influence in Melissa's life now than they were in 2003."

II. Scope and Standard of Review. Our review is de novo.[2] *In re Guardianship of Ankeney*, 360 N.W.2d 733, 738 (Iowa 1985). We give weight to

[2] Although our supreme court in *In re Guardianship of Ankeney*, 360 N.W.2d 733, 738 (Iowa 1985), states the scope of review in these cases is de novo, our court, in a later published opinion, stated the scope of review is for corrections of errors at law. *In re Guardianship of Wemark*, 525 N.W.2d 7, 9 (Iowa Ct. App. 1994). For the purpose of our analysis, we will defer to the higher court and apply the stricter de novo review. However, our result would be the same if we were to review for corrections of errors at law.

the fact-findings of the district court, although we are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

III. Visitation. Guardians are responsible for the day-to-day decisions made for the child's welfare. *Ankeney,* 360 N.W.2d at 737. The courts normally will not interfere with the guardians' decisions except when the evidence clearly shows the best interests of the children dictate such interference. *Id.* While, the guardians' right of custody and control of a child extend to refusing to permit other persons to have access to the child, this power is also subject to the control of the court. *Id.* The court may require the guardians to permit persons to have access to the children if the best interests of the children dictate there should be visitation with another. *Id.*

We conclude it is not in Melissa's best interest to have visitation with Troy and Amy. Melissa has lived with the Slutters her entire life. She has done well under their care. Throughout her life, Melissa has only had sporadic contact with Troy, Amy, and her sisters. By Melissa's own account, she does not have a relationship with them. In order to nurture a relationship between Melissa and her parents, weekly visitations were set up in the Slutters' home following the denial of the application to revoke the guardianship. The Slutters terminated these visits after a couple of months at the recommendation of Melissa's counselor.

The prospect of having contact with her parents affects Melissa negatively. When Troy and Amy filed the application to terminate the guardianship, Melissa became very upset, her grades dropped, and her behavior worsened. Melissa testified she does not want to have visitations with her

parents or sisters because she finds the visitations upsetting. Melissa testified Troy and Amy are not respectful to her and are physically abusive to one another in front of their children. She also felt threatened by Troy at the visitations.

Troy and Amy's testimony refutes the claims of Nancy, Eddie, and Melissa. However, the district court found the latter's testimony to be more credible. Specifically, with respect to Troy and his father, Neal, the district court stated:

> Troy continued to claim a history of parental involvement which the court finds no more persuasive than Judge Keefe did in denying the application to terminate the guardianship. When confronted with information adverse to him, Troy frequently claims not to remember. Thus, during the trial, he claimed not to remember what happened during an argument with Melissa shortly after visitation resumed in 2003; he claimed not to remember if Nancy objected to his criticizing family members to Melissa; and he claimed not to remember whether he received a letter complaining that he was sarcastic and belittling to Melissa. The court did not find persuasive his denial of having told Melissa that the dispute was going to cost Nancy a whole lot of money. The court also did not find credible Neal's denials that he had ever intimidated Melissa, especially in light of his grudging admission that on occasion he punished Melissa's sisters by hitting them with a belt.

We give weight to these findings. Iowa R. App. P. 6.14(6)(*g*). While denial of any visitation to parents is certainly unusual, under the unique circumstances of this case we agree it is appropriate.

We affirm the district court order denying the application for visitation. The Slutters request an award of their appellate attorney fees. The general rule, subject to an exception for circumstances in which a losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, is that a party has no claim for attorney fees in the absence of a statute or contract allowing such an award. *D.M.H. by Hefel v. Thompson*, 577 N.W.2d 643, 648 (Iowa 1998). The

Slutters have made no claim or showing that the exception to the general rule applies, or that a contractual provision allows an award of attorney fees under the circumstances presented in this case. They have not cited and we find no statute allowing such an award.[3]

AFFIRMED.

Miller, J., concurs specially; Robinson, S.J., dissents.

[3] In fact, fees of the attorney for the guardian are ordinarily to be paid by the ward's estate, *see* Iowa Code § 633.673, after being allowed and fixed by the probate court. *See* Iowa Code § 633.200. We assume, without so deciding, that when a ward's estate is unable to pay the guardian's attorney's fees such fees would be a matter of contract between the party contracting for the legal services and the attorney providing the services.

MILLER, J. (concurs specially)

I concur in the result and write separately only to comment on one matter.

Footnote two of the majority opinion appears to suggest there may be a conflict between *In re Guardianship Ankeney*, 360 N.W.2d 733, 738 (Iowa 1985) and *In re Guardianship of Wemark*, 525 N.W.2d 7, 9 (Iowa Ct. App. 1994) concerning the appropriate scope of review in cases such as the one presently before us. I do not believe there is necessarily a conflict. *Ankeney*, as this case, dealt solely with an issue of visitation after a guardianship had earlier been established. Our scope of review is therefore, as stated in *Ankeney*, de novo. Although the primary issue on appeal in *Wemark* dealt with visitation, it was not the sole issue. The appeal was from an order providing for the involuntary appointment of guardians. The underlying action was therefore triable as a law action, *see* Iowa Code § 633.33, which may explain the court's holding that the scope of review was for errors at law.

ROBINSON, S.J. (dissenting)

I dissent.

By denying visitation between parents and child, the relationship between Troy Seeman and Amy Sells and their teenage daughter, Melissa, is seriously jeopardized. Likewise, Melissa's relationship with her three younger siblings is put at risk.

Troy and Amy's parenting abilities, or lack thereof, have been fully recognized. Nonetheless, it is difficult to imagine a dissolution of marriage case where these parental deficiencies could or would result in the complete denial of visitation. It is ultimately the court, not the guardians, that must decide whether visitation is appropriate and in the child's best interest. *In re Guardianship of Wemark*, 525 N.W.2d 7, 9 (Iowa Ct. App. 1994). Only under dire circumstances should a child have no contact with her parents and siblings. The facts in this case do not warrant such a result.

Given Melissa's age, the lack of recent contact with her parents and siblings, the acrimonious relationship between guardians and parents, and the need to reestablish and rebuild a daughter-parent relationship, an order allowing visitation at least one evening for two to three hours every week or two would be reasonable. This would allow, at a minimum, an opportunity for the family to be together for dinner and have a chance to reconnect. Supervision by the guardians or anyone else would be unnecessarily constraining and counterproductive.

Professional counseling would likely help all concerned in this case. What with Troy and Amy's obvious financial constraints, however, counseling should

not be a condition to a minimal visitation order. *See In re Marriage of Russell*, 479 N.W.2d 592, 596 (Iowa Ct. App. 1991).