IN THE COURT OF APPEALS OF IOWA

No. 2-689 / 12-0237
Filed October 3, 2012

IN RE THE GUARDIANSHIP OF
D.A.B.P., A Minor,

And Concerning

KILEY E. CARLSON,
Mother-Appellant.

Appeal from the Iowa District Court for Louisa County, Michael J. Schilling, Judge.

D.A.B.P.'s mother appeals the district court's order that the child's grandmother be appointed his guardian, claiming substantial evidence does not support its decision. **AFFIRMED.**

Theresa L. Sosalla of The Neppl Law Firm, Ltd., Rock Island, Illinois, and John J. Sherman of Lauren M. Phelps, P.L.L.C., Davenport, for appellant.

Roger A. Huddle of Weaver & Huddle, Wapello, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

D.A.B.P.'s mother appeals the district court's order appointing the maternal grandmother as his guardian. The mother claims the decision is not supported by substantial evidence. She also encourages us to read the guardianship statutes in Iowa Code chapter 633 (2011) in conjunction with the juvenile justice provisions in Iowa Code chapter 232. Finally, she claims the district court violated her constitutional right to due process.

We decline the mother's invitation to superimpose the standards from chapter 232 onto these guardianship proceedings; the district court applied the correct law to the guardianship question before it. The grandmother presented clear and convincing evidence that D.A.B.P.'s mother is not a qualified or suitable caregiver at this time and it is in the child's best interest to be placed with the grandmother. The mother's argument that she was denied due process was not preserved for our review.

I. Background Facts and Proceedings

The mother was nineteen in February 2007 when she gave birth to D.A.B.P. Both the mother and the child's twenty-one-year-old father lived with the grandmother at the time of D.A.B.P.'s birth. The young family stayed in the grandmother's home in Morning Sun until the child was one year old.

The grandmother testified she provided most of D.A.B.P.'s daily care during that first year. The grandmother recalled the mother was only interested in caring for D.A.B.P. when her parenting was in the "limelight." D.A.B.P. and his parents left the grandmother's house and moved to Danville when D.A.B.P. was

sixteen months old. The mother retained custody of D.A.B.P., and according to the grandmother, prevented her from seeing her grandson until the summer of 2008, when the mother again asked the grandmother to regularly watch D.A.B.P.

At the mother's request, the grandmother would watch D.A.B.P. three to five days a week; the grandmother also bought food, clothes, and diapers for the child while the mother attended to other tasks such as schoolwork. In the fall of 2008, the mother and D.A.B.P. moved back in with the grandmother. The mother began working in Cedar Rapids, and would remain in the city to socialize on the weekends while D.A.B.P. stayed home with the grandmother. The grandmother testified that once or twice the mother did not return home for an entire week.

In the spring of 2009, the mother took D.A.B.P. to live in Cedar Rapids for four months, but then returned to the grandmother's home. The grandmother continued to care for D.A.B.P. while the mother worked and socialized in Cedar Rapids. The grandmother was concerned with the mother's parenting efforts when she was at home.[1] D.A.B.P.'s father occasionally would visit his son, and the grandmother testified she believed he could be trusted with the child's care. That fall, the grandmother was hospitalized for a week as a result of an asthma attack. D.A.B.P. and his mother moved in with a maternal uncle outside of Mount Pleasant until late 2009. During this period, the grandmother would make contact with the child when he was in the custody of his father.

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[1] The grandmother testified when the mother did care for D.A.B.P., she set back the grandmother's efforts to potty train him. The mother would put D.A.B.P. back in diapers because "it was easier."

The mother again moved back in with the grandmother in January 2010. The grandmother returned to the role of primary caregiver for D.A.B.P. when the mother left for entire weekends. In July 2010, the mother was absent for two weeks while she stayed with a new boyfriend.[2] D.A.B.P.'s father took over childcare for one week in August, but returned his son to the grandmother because he was unable to provide a safe environment while he worked, and was running out of food and money to support the child. The mother also fell on hard times in the fall of 2010, losing her job and vehicle.

Starting in October 2010, the mother spent an increasing amount of time with her boyfriend in Moline, Illinois, leaving her son with his grandmother in her absence. The grandmother testified that it was during this period that she first considered seeking a guardianship over D.A.B.P.

D.A.B.P.'s father was incarcerated in September 2010, and moved into a half-way house around the winter holidays. D.A.B.P. spent time with his father around Christmas, and returned to the grandmother's care on New Year's Eve. The mother protested this arrangement and when she returned home to retrieve her possessions from the grandmother's house, the situation escalated into a physical confrontation requiring police intervention. The mother pleaded guilty to assault for throwing a video game component at the grandmother. She then moved in with her boyfriend in Moline, leaving her son with the grandmother.

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[2] The grandmother suspected her daughter did not tell her how long she would be away in July because the daughter did not believe her mother would approve of the new boyfriend's background. He had been convicted of domestic abuse assault twice and was a registered sex offender.

On January 7, 2011, the grandmother filed a petition to establish guardianship over D.A.B.P. On April 21, 2011, the mother signed a consent and waiver of guardianship for the grandmother to act as D.A.B.P.'s guardian.

The district court held a hearing on June 14, 2011, considering testimony from the grandmother, the mother, the father, and the mother's boyfriend. The district court appointed guardians ad litem for the child and for the father because of his incarceration. The grandmother retained counsel while the mother represented herself. The grandmother testified she had provided the majority of financial support for D.A.B.P. since his birth, and she is able to continue supporting him. She testified the mother's sole financial contribution to D.A.B.P. was forty-five dollars she gave the grandmother to buy clothes for him.[3] The mother testified she was now employed and lived with her boyfriend in Moline. At the close of the hearing, the district court designated the grandmother as D.A.B.P.'s temporary legal guardian.

On December 27, 2011, the district court granted the grandmother's petition to serve as D.A.B.P.'s guardian. The court noted the mother had been her four-year-old son's primary caregiver for three short stints, totaling only one year. And the court found the mother did not have a stable home life or income during those times. The court concluded the grandmother carried her burden to show by clear and convincing evidence "(1) the need for a guardian to provide for [D.A.B.P.'s] best interest; (2) placement with [the mother] at this time is likely to have a seriously disrupting and disturbing effect upon [D.AB.P.'s] development;

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[3] The father contributed financially to D.A.B.P.'s care while he and the mother were together.

and (3) that she is a qualified and suitable guardian." The mother now challenges the guardianship order.

II. Scope and Standard of Review

The parties disagree as to the proper standard of review. The grandmother argues review in guardianship proceedings is for legal errors, citing *In re Guardianship of D.D.H.*, 538 N.W.2d 881, 883, (Iowa Ct. App. 1995). The mother contends the proper standard of review is de novo, citing *In re Guardianship of Knell*, 537 N.W.2d 778, 780 (Iowa 1995).

Iowa Code section 633.33 specifically states that actions for the involuntary appointment of guardians are triable in probate as law actions. *In re Guardianship of G.G.*, 799 N.W.2d 549, 551 (Iowa Ct. App. 2011). That legislative language signals our review of such actions is for errors at law, and we will affirm the district court if the decision is supported by substantial evidence. *See In re Guardianship of M.D.*, 797 N.W.2d 121 (Iowa Ct. App. 2011) (following "explicit directive of legislature in section 633.33" to review for correction of legal error). But we also keep in mind that the best interests of the child are paramount when considering the guardianship of minors. *G.G.*, 799 N.W.2d at 551.

III. Discussion

A. Should We Read the Guardianship Law in Conjunction with the Juvenile Justice Chapter?

The district court recognized this case is governed by the statute relating to guardianships. *See* Iowa Code § 633.559. The mother argues the language

in sections 663.551–.562 should be read "*in pari materia*"—or on the same matter and subject—as the juvenile justice statutes in chapter 232. The grandmother counters that our supreme court has never invoked chapter 232 in guardianship proceedings, nor otherwise read the two chapters in conjunction with each other. She distinguishes juvenile proceedings under chapter 232 as a state action involving the loss of parental rights from a guardianship proceeding brought by another individual.

We decline the mother's invitation "to definitively incorporate the Juvenile Justice Act procedures for removal of a child from parental care custody into the Probate Code's guardianship provisions." The principle of in pari materia does not apply unless the statutes under consideration relate to the same person or thing, or to the same class or persons or things, or have identical purposes or objects. *See Ballstadt v. Iowa Dep't of Revenue*, 368 N.W.2d 147, 149 (Iowa 1985). Chapters 232 and 663 address distinct situations and the interpretation of the guardianship provision at issue here is not aided by reference to the juvenile justice statutes.[4] We address the mother's remaining arguments to the extent that they relate to the law governing guardianship proceedings.

B. Does Substantial Evidence Support the District Court's Conclusion?

Section 633.559 establishes a strong preference for a child to remain in the care and control of his natural parents. *M.D.*, 797 N.W.2d at 127. It reads, in

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[4] The mother argues the chapters are interrelated because they cross reference each other. *See* Iowa Code §§ 232.104(7)(b); 663.559. We do not believe these cross-references demonstrate the legislature's intent to read the two chapters together.

part: “[T]he parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian.” Iowa Code § 633.559. The language reflects a strong societal interest in preserving the child’s relationship with a natural parent. *Knell*, 537 N.W.2d at 781.

This presumption may be rebutted if the non-parent proves the need for appointment by clear and convincing evidence. *M.D.*, 797 N.W.2d at 127 (citing Iowa Code § 663.551(1)). The petitioner must prove “the natural parent is not a qualified or suitable caregiver.” *Id.* In determining a child’s best interest, we may look to the parent’s past performance as indicative of the type of future care that a parent is able to provide. *In re Guardianship of Roach*, 778 N.W.2d, 212, 214 (Iowa Ct. App. 2009). The court must consider both the immediate and long-range interests of child. *Knell*, 537 N.W.2d at 781. The overall test to overcome this strong parental preference is whether the non-parent shows “that placement with the natural parent is likely to have a seriously disrupting and disturbing effect upon the child’s development.” *M.D.*, 797 N.W.2d at 127–28 (internal quotation omitted).

The mother contends the district court wrongfully reasoned that her past economic instability justified denying her custody of D.A.B.P., and asserts “[i]f the policy of Iowa is to remove a child from the custody of his parents simply because they are poor, then countless Iowans will [be torn from their children].”

We do not read the district court’s analysis as suggesting such a sweeping policy. It is true that previous immaturity and financial irresponsibility are insufficient, standing alone, to overcome the presumption of parental fitness

when those downfalls are not present risks. *Northland v. Starr*, 581 N.W.2d 210, 213 (Iowa Ct. App. 1998). But the district court was concerned with the mother's pattern of instability in this case:

> [The mother's] situation at trial was not markedly different from her situation in Danville in 2008; or her circumstances in Cedar Rapids in 2009. In each instance [the mother] was unable to sustain and maintain a stable residence and job . . . . Significantly, [the mother] signed the consent to guardianship during the same limited time period she wants the Court to focus on to conclude she is capable of caring for [D.A.B.P.]

The court also noted the mother had not been regularly caring for her son during the eighteen months leading up to trial. The district court was justified in looking to the mother's track record in deciding whether the grandmother satisfied her burden of proof. *See Roach*, 778 N.W.2d, at 214 (recognizing a parent's previous performance may indicate the future care provided to the child). The evidence presented supports the court's findings.

We likewise reject the mother's argument that the court granted the grandmother's petition for guardianship because the grandmother was more financially secure. The court determined the mother was unable to live independently and care for her son. The fact that the grandmother provided substantial financial support and day-to-day care for D.A.B.P. shows the grandmother qualified as a suitable guardian for the child.

The mother objects to the district court's observation that her "personal contact with [D.A.B.P.] has not been regular, ongoing, and continuous between late 2009 and the date of trial." She asserts the finding conflicts with evidence that the grandmother prevented her from seeing her son leading up to trial.

Although the evidence was in conflict regarding the extent of the mother's efforts to see D.A.B.P. during that time frame, we defer to the district court's credibility findings because of its opportunity to see and hear the parties. *See In re Guardianship of Stewart*, 369 N.W.2d 820, 824 (Iowa 1985). The record supported the district court's conclusion that the mother's lack of meaningful contact demonstrated her inability to provide stable, ongoing care for her son.

The mother next asserts the district court improperly shifted the burden of proof regarding parental fitness to her, by stating:

> If [the mother] had shown at trial a one-year (or similar) period of stability while actually caring for [D.A.B.P.], the result here would likely be different. Likewise, if [the mother] had presented objective testimony from witnesses describing positive parenting traits and successful parenting, the Court would not hesitate to deny [the grandmother's] petition.

The mother removes the district court's quote from its context. In its thorough and accurate recitation of the law relating to guardianship proceedings, the district court identified the presumption that a parent is most fit to care for a child. It also recognized the burden the grandmother, as the petitioning non-parent, must meet to overcome the presumption. The district court's disputed language suggests the kind of information that may have rendered the grandmother's evidence less than clear and convincing. Without such evidence in the record, the court properly concluded the grandmother met her burden to show that placing D.A.B.P. with his mother would have had a seriously disrupting and disturbing effect on his development.

The mother also contends the district court improperly considered inadmissible evidence. She admits she did not raise the proper objection at trial,

but blames the lack of error preservation on her pro se status. We cannot consider her unpreserved claims on appeal.[5] At the beginning of the hearing, the court asked the mother if she intended to proceed without an attorney, and she responded in the affirmative. We do not use a deferential standard when litigants choose to represent themselves. *Kubik v. Burk*, 540 N.W.2d 60, 63 (Iowa Ct. App. 1995). If a lay person chooses to proceed pro se, it is at her own risk. *Metropolitan Jacobson Dev. Venture v. Bd. of Review*, 476 N.W.2d 726, 729 (Iowa Ct. App. 1991). Failing to specify the proper grounds for an objection acts as a waiver of the admission of the testimony on appeal. *Milks v. Iowa Oto-Head & Neck Specialists, P.C.*, 519 N.W.2d 801, 806 (Iowa 1994).

In addition, the mother criticizes the court's reliance on the report from the attorney appointed to represent D.A.B.P. The attorney explained he talked with the grandmother and observed her interaction with D.A.B.P. and "nothing could be perceived that would suggest in any way that a guardianship is inappropriate as proposed in the petition." The district court stated: "[t]he guardian ad litem for [D.A.B.P.] thoughtfully recommended a guardianship because he concluded [D.A.B.P.]'s best interests would be served. This court agrees." We see no error in the attorney's handling of his representation of D.A.B.P. under section 633.561(4) or in the court's reference to his report.

The mother also criticizes the district court's reliance on her alleged consent to the guardianship. The grandmother offered an exhibit at trial entitled "Consent and Waiver of Notice" that was signed by the mother on April 21, 2011.

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[5] Our finding in this regard applies to the mother's subsequent argument that her consent and waiver was inadmissible as well.

The document stated that D.A.B.P. had been in the primary care of his maternal grandmother for much of his life and the mother intended for the grandmother to make decisions for the child while the mother "straighten[ed] out" some legal problems. At the hearing the mother admitted signing the form and testified she realized the grandmother believed she consented to the guardianship.

On appeal, the mother argues for the first time the consent and waiver form was not properly notarized. This issue was not raised in the district court, and therefore is not preserved for appeal. *See Bowles v. Schilling*, 581 N.W.2d 192, 194 (Iowa Ct. App. 1998). The district court was entitled to consider the fact the mother signed this consent form—regardless of whether it was properly notarized—at a time when she claimed a measure of stability in her life. The mother's professed lack of commitment to parenting her son is a viable factor when the district court was called to determine whether she was fit to serve as his full-time guardian.

After hearing testimony and arguments on the matter, the district court drafted a well-reasoned decision analyzing the law and precedents relating to guardianship proceedings. Substantial evidence supports its conclusion that D.A.B.P.'s placement with his mother at this point in time would disrupt his positive development. The mother has bounced in and out of D.A.B.P.'s life—leaving the preschooler little certainty about whether she would be available to meet his physical and emotional needs. We also agree it is in D.A.B.P.'s best interest to be placed with his grandmother, who has been a constant and reliable force in his life.

C. Was the Mother Denied Due Process?

The mother contends the district court denied her due process by finding she waived her right to legal representation. The grandmother responds that no right to court-appointed counsel exists for parents in guardianship proceedings.[6]

The mother does not assert on appeal where this issue was raised or decided in the district court. "Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal." *In re K.C.,* 660 N.W.2d 29, 38 (Iowa 2003). Accordingly, the issue is not properly preserved for our review.

AFFIRMED.

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[6] The mother's challenge is based on the premise that the juvenile justice act specifically grants a parent the right to an attorney, and that it should equally apply to guardianship proceedings. *See* Iowa Code § 232.89(1).