IN THE COURT OF APPEALS OF IOWA

No. 2-945 / 12-0759
Filed March 13, 2013

CORY MARUNA,
Petitioner/Appellee**,**

Vs.

SAMANTHA E. PETERS and KIMBERLY R. ORADE,
Respondents/Appellants**.**

IN THE MATTER OF THE GUARDIANSHIP OF JACQUELINE RAELENE HARPER,
Ward.

Appeal from the Iowa District Court for Clayton County, John J. Bauercamper, Judge.

The grandmother and mother of a minor child appeal a district court order terminating the grandmother's guardianship of the child and placing her in the physical care of her father. **REVERSED AND REMANDED.**

Webb L. Wassmer of Simmons Perrine Moyer Bergman, P.L.C., Cedar Rapids, for appellants.

Jeffrey E. Clements, West Union, for appellee

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

A mother and grandmother of a minor child appeal a district court order terminating the grandmother's guardianship over the child and placing the child in the physical care of her father.

I. Background Facts and Proceedings

Cory Maruna and Samantha Peters are the unmarried parents of a child, born in 2005. At the time of the child's birth, the young parents had their share of problems. They agreed to place the child in a guardianship with Samantha's mother, Kimberly Orade. The child remained in Kimberly's care and custody from the time she was three weeks old through termination-of-guardianship proceedings in 2012.

When the child was approximately one year old, she was diagnosed with a form of cerebral palsy that resulted in slight paralysis in her right arm and leg. Kimberly appropriately managed the disorder, taking the child to cerebral palsy clinics every six to twelve months, and massaging her legs to alleviate cramping. She also addressed the child's seizures and severe allergies. Health professionals uniformly praised Kimberly's care of the child.

Over the years, Samantha and Cory matured into responsible adults. Both continued their education and became involved in stable relationships. Samantha, her husband, and another child moved in with Kimberly. Samantha shared household duties with Kimberly and helped care for the child. She also became a full-time college student. Cory married, moved to a town thirty minutes away from Kimberly, obtained a full-time job, and attempted to exercise regular visitation with the child. Initially, he saw her every other Saturday for four to six

hours at a time. Pursuant to court order, those visits were later expanded to two-night weekends.

Cory eventually filed a "Petition for Custody" as well as a motion seeking termination of the guardianship and placement of the child with him. The two actions were consolidated.

Following a hearing, the district court granted Cory's requests for termination of the guardianship and physical care of the child. Kimberly and Samantha appealed.[1] As Kimberly is the guardian,[2] we will refer to her in the balance of the opinion.

II. Analysis

Kimberly raises the following issues: (A) the district court lacked jurisdiction to terminate the guardianship under Iowa Code section 633.679 (2011); (B) the district court should not have applied the parental preference presumption set forth in section 633.559 and should not have placed the burden to rebut that presumption on her; and (C) termination of the guardianship was not in the child's best interests. Our review of these issues is de novo. *See* Iowa Code §§ 633.33, 600B.40; *In re Guardianship of Stewart*, 369 N.W.2d 820, 822 (Iowa 1985).

A. Standing—Iowa Code section 633.679

Subject to an exception not applicable here, section 633.679(1) provides that "at any time after the appointment of a guardian or conservator, *the person*

[1] Kimberly and Samantha obtained a stay of the district court ruling pending appeal.
[2] Samantha concedes that the district court did not address her request for custody and physical care made during her testimony at the hearing. To the extent she reasserts this request on appeal, we conclude error was not preserved.

under guardianship or conservatorship may apply to the court by petition, alleging that the person is no longer a proper subject thereof, and asking that the guardianship or conservatorship be terminated." (Emphasis added.) For the first time on appeal, Kimberly argues that the child was the only person who could seek a termination of the guardianship. Based on that premise, she asserts Cory "did not have standing to file his motion for termination of guardianship and the district court lacked jurisdiction to termination the guardianship." *See In re Guardianship & Conservatorship of Schmidt*, 401 N.W.2d 37, 38 (Iowa 1987) ("Authority to petition for termination is limited to the ward.").

While issues involving a court's subject matter jurisdiction may be raised at any time, standing is "technically not [a] matter[] of subject matter jurisdiction." *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 473 n.1 (Iowa 2004). Standing must be raised from the outset to preserve error. *Des Moines Metro. Area Solid Waste Agency v. City of Grimes*, 495 N.W.2d 746, 750 (Iowa 1993). As Kimberly did not raise this issue in the district court, she waived error. *Alliant Energy-Interstate Power & Light Co.*, 732 N.W.2d 869, 875 (Iowa 2007).

B. Parental Preference—Iowa Code section 633.559

Iowa Code section 633.559 is titled "Preference as to *appointment of guardian*" and provides in pertinent part that "the parents of a minor child, or either of them, if qualified and suitable, shall be preferred over all others *for appointment* as guardian." (Emphasis added.) Kimberly argues the statute applies only to the initial appointment of a guardian and not to the termination of

a guardianship. While the statutory language supports her contention, the Iowa Supreme Court has concluded otherwise.

In *In re Stewart*, 369 N.W.2d at 821, the father of a child sought to terminate a guardianship to which he consented four years earlier. The district court granted his request. *Id.* at 822. On appeal, the maternal grandparents who had served as guardians argued the court should not have required them to rebut the presumption in favor of natural parents. *Id.* at 823. The Iowa Supreme Court held the father "did not relinquish his presumptive right to custody when he agreed that the [grandparents] should be appointed as guardians for" the child. *Id.*

We see no material distinction between *Stewart* and the facts of this case. Pursuant to section 633.559, Cory had a presumptive right to custody of his child and Kimberly had "the burden to overcome the parental preference and show that the best interest of [the child] required continuation of the guardianship." *Id.* She could do so by establishing that return of custody to the natural parent would likely have a seriously disrupting and disturbing effect upon the child's development. *In re Guardianship of Knell*, 537 N.W.2d 778, 782 (Iowa 1995).

C. Best Interests

Kimberly argues she satisfied her burden. On our de novo review, we agree.

The child was in Kimberly's exclusive care for approximately seven years. Kimberly devoted herself to the child and to fostering the child's physical and mental health. She was assisted in that endeavor by Samantha, and by the child's great-grandmother and great-great-grandmother, both of whom lived next

door and saw the child on an almost daily basis. The great-grandmother testified,

> Kim has been the consistent parent this whole time. That's the one [the child] is bonded to as a parent, not that she doesn't have some kind of bonds with her biological parents, but the main one who has been there 100 percent of the time, all the time, has been Kim. And [the child] knows that. That's her security. That's her love.

The child's family nurse practitioner echoed those observations:

> At each encounter between myself and [the child], Ms. Orade has been present and has been the caretaker bringing [the child] in for medical evaluation. . . . Ms. Orade has been fastidious about getting [the child] to each of her appointments in a very timely fashion, following through with recommended therapies in their home, which they share, and making sure that [the child] is enrolled in appropriate school situation. Ms. Orade has always been extremely attentive to [the child's] every need. . . .

The child's primary physician similarly stated:

> Since I have begun to follow [the child] at 21 months of age, it has been consistently clear that Kim is doing an excellent job of caring for [the child]. As far as her medical and therapy needs, Kim has consistently gone above and beyond what would be expected of a parent. Kim has consistently brought her to her Pediatric Rehabilitation Clinic visits. She has enrolled her in appropriate community therapy and school programming to help maximize her developmental progress. She has followed through on all rehabilitation medical recommendations such as bracing and home activities. Kim has consistently found creative ways to help [the child] work on her motor skills and maximize her independence in her daily living skills.
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> [The child] is doing remarkably well with her development despite her right hemiplegic cerebral palsy. I believe that Kim has significantly contributed to her impressive progress. From a rehabilitation medicine standpoint, Kim has done an excellent job in caring for and parenting [the child].

We recognize that a guardian's excellent care may not be sufficient grounds to continue a guardianship. *See Northland v. Starr*, 581 N.W.2d 210, 212 (Iowa Ct. App. 1998). But here there was evidence that a transfer of custody

could adversely affect the child's mental and physical health. The nurse practitioner stated:

> . . . I feel strongly that with [the child] having been in the motherly care of Ms. Orade since birth, that I would expect it to be extremely emotionally distressing to [the child] to be taken out of Ms. Orade's primary guardianship care. I am unable to predict how this change in custody would affect [the child's] cerebral palsy, though I do know that Ms. Orade has basically devoted herself to [the child's] every medical, emotional and social need since [the child's] birth. I feel that [the child] and Ms. Orade live in a very stable, loving, nurturing home situation. I have absolutely no concerns about [the child] continuing to make her home with Ms. Orade, whom she considers to be her mother.

A psychologist confirmed that the child was experiencing distress following visits. He noted that, while the child enjoyed seeing her father, she did not want to be removed from her grandmother's care. He opined that the child appeared "to suffer from separation anxiety" and feared "being taken away from her grandmother."

The child's physician stated that the child remained "at high risk for delays in her development" and would "continue to need a parent who is vigilant in bringing her to medical appointments, engaging her in activities at home and in the community, and working with school and therapists, to help maximize her developmental progress and reach her potential."

We recognize that Cory expressed a keen interest in the child and in performing these duties for the child. He made efforts to visit her, sought court intervention when he believed his efforts were being blocked,[3] and paid for monthly physical therapy services to augment the services the child was already

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[3] Kimberly countered each claimed incident of obstruction. Additionally, Cory's wife did not recall that Kimberly obstructed visitation based on Cory's failure to pay child support, as he claimed.

receiving. At the same time, he conceded he only attended one cerebral palsy clinic in four and one-half years, and only four of seventeen special therapy appointments scheduled in 2011. Despite the best of intentions, Cory was not in a position to regularly attend to the child's significant medical needs. Additionally, Cory conceded that the child would have to change schools if he acquired custody, leading to further disruption of her routine.

In light of these and other concerns, the child's guardian ad litem opined that "it would be in the best interests of [the child] to keep the Guardianship in place." We too are persuaded that a change of custody would disrupt the physical and mental health of this fragile child. For that reason, we reverse the district court's termination of the guardianship and remand for dismissal of Cory's custody and termination petitions.

REVERSED AND REMANDED.