IN THE COURT OF APPEALS OF IOWA

No. 7-378 / 06-2083
Filed June 27, 2007

IN THE MATTER OF THE GUARDIANSHIP OF CRAIG NICHOLAS BRIGGS, Ward,

NICHOLAS A. BRIGGS,
Appellant,

Upon the Petition of
SAMANTHA HAMRICK,
Petitioner-Appellee,

And Concerning
NICHOLAS A. BRIGGS,
Respondent-Appellant.

Appeal from the Iowa District Court for Sac County, Joel E. Swanson, Judge.

A father appeals the district court's denial of his petition to terminate a guardianship. **REVERSED AND REMANDED**.

Phil Redenbaugh, Storm Lake, for appellant.

Dave Jennett and Daniel Connell of Daniel Connell, P.C., Storm Lake, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Baker, JJ.

BAKER, J.

Nicholas Briggs appeals the denial of his petition to terminate the maternal grandmother, Eve Wren's, guardianship of his son. We reverse and remand.

I.Background and Facts

Samantha is the mother and Nicholas is the father of C.B., who was born in April 2002. Although they lived together with C.B. for approximately three months after he was born, C.B.'s parents have never been married. In July 2002, C.B.'s maternal grandmother, Eve, accepted custody of C.B. because his parents were arrested on drug charges. C.B. has resided with Eve and her husband Scott since that time. In March 2003, an uncontested permanency hearing was held in juvenile court. All parties voluntarily agreed that C.B.'s best interests required continued placement with Eve. In August 2003, Eve was appointed C.B.'s guardian by the district court.

Nicholas has been employed with Tyson Foods since April 2003. He currently earns $16.30 per hour and provides health insurance for his family, including C.B. In July 2003, Nicholas started drug and alcohol rehabilitation. He no longer uses drugs and very rarely uses alcohol. Nicholas is currently married to Tara. They have one child, born in August 2004. Tara stays home to care for their son and, if Nicholas had physical care of C.B., would care for C.B. while Nicholas is at work. Nicholas and Tara own their home. They have extended family living in close proximity to their home. Except for a three-month period between December 2002 and March 2003, Nicholas has had regular visitation with C.B. He has seen him for birthdays and holidays. The record indicates Nicholas has continually been interested in C.B.'s welfare and has made

considerable efforts to see him. For the most part, Eve has allowed Nicholas visitation as requested.

Samantha currently lives with Eve. She has another child, a daughter born in October 2003, who also lives with Eve. Samantha testified that, if the court were to grant her physical care of C.B., she would "hand guardianship over" to Eve. Samantha agrees that she would not be an appropriate caretaker at this time.

In March 2006, Nicholas filed a petition to terminate guardianship. In June 2006, Samantha filed a petition to intervene, requesting that Eve's guardianship of C.B. continue. Samantha also sought to establish custody, physical care, child support, and medical insurance. The parents agree they should be granted joint legal custody but disagree as to C.B.'s physical care.

In October 2006, Sandra Pelzer, a licensed independent social worker, was hired by Eve to conduct a "parental investigation." She twice spent approximately two hours in Eve's home assessing the environment and C.B.'s behavior in the presence of Samantha, Eve, Scott, Samantha's daughter, and Samantha's sister.

Nicholas was discussed during the assessment. Pelzer reported that C.B. "appeared anxious and irritable when discussing his father and stepmother, and resisted those activities . . . and refused to participate in activities when 'daddy' was mentioned." She concluded that C.B. "demonstrated a strong negative emotional reaction to his father, and a resistance to visit him." Pelzer, however, never spoke with or interviewed Nicholas or Tara, visited their home, or observed C.B.'s behavior in their presence. She testified that, because Nicholas was a

"peripheral figure" in C.B.'s life, she did not think it was important to see Nicholas and C.B. interact with each other.[1] Based on these two visits, Pelzer recommended Eve be awarded custody and further determined that "termination of both parents' rights be pursued." She reported that removal from Eve's care would be "clearly detrimental" to C.B. because he "demonstrated emotional reactivity and anxious tendencies, and these predispositions make him much more likely to develop a mental illness with a major life change and loss of a primary caregiver and younger sister." She testified that the period for attachment, i.e. bonding, for children is birth to thirty-six months, and for C.B. the "permanent attachment, that can't be undone" occurred with Eve. Pelzer further testified,

> Likewise, an attachment of parental attachment can't happen after age thirty-six months, so you can't have a child be separated from their parents the first thirty-six months of the life and then have the parent come in at forty-six months of life and think they're going to have a typical attachment to that child, it will not happen . . . .
>
> It's my opinion that Nick cannot establish a parental, a father figure attachment for [C.B.], because that window of opportunity closed about thirty-six months.

Therefore, she concluded, even if Nicholas made the necessary changes to care for C.B., it would be contrary to C.B.'s welfare to be removed from Eve's care.

Following a November 15, 2006 bench trial, the trial court denied Nicholas's petition to terminate the guardianship of C.B. The trial court set child

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[1] Pelzer also testified that,

> "typically it takes me eight hours to make a determination in a case, but in this case it was so clear-cut that to me it just seemed so straightforward and so cut-and-dried that I didn't continue another four hours, because I felt like I had enough clinical data . . . ."

support for Nicholas and Samantha, to be paid to Eve, and a visitation schedule between C.B. and Nicholas.

II.Merits

A petition to terminate a guardianship is an equitable proceeding. *See In re Guardianship and Conservatorship of Reed*, 468 N.W.2d 819, 826 (Iowa 1991) (when a case turns on the best interests of a child, and may involve overturning presumptive parental rights, principles of equity must be applied). As such, our review is de novo. *In re Guardianship of Knell,* 537 N.W.2d 778, 780 (Iowa 1995). We give weight to the trial court's findings of fact, especially concerning the credibility of the witnesses, but are not bound by them. *In re Guardianship of Stewart*, 369 N.W.2d 820, 822 (Iowa 1985).

The determining factor is the best interests of the child. *Zvorak v. Beireis,* 519 N.W.2d 87, 89 (Iowa 1994). The law presumes that those interests will be best served by placing the child in the care of a qualified and suitable natural parent. *Id.*; *see also* Iowa Code § 633.559 (2005) ("The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian.").

> [I]n every case a showing of such relationship, in the absence of anything more, makes out a prima facie case for parents claiming the custody of their children. "Indeed," as said in one case, "this presumption is essential to the maintenance of society, for without it man would be denaturalized, the ties of family broken, the instincts of humanity stifled, and one of the strongest incentives to the propagation and continuance of the human race destroyed."

Risting v. Sparboe, 162 N.W. 592, 594 (Iowa 1917).

Recognition that the non-parental party is an excellent caretaker for the child is rarely strong enough to interfere with the presumption in favor of the

parent. *Northland v. Starr,* 581 N.W.2d 210, 212 (Iowa Ct. App. 1998). Accordingly, "we have acted in some cases to remove children from conscientious, well-intentioned custodians with a history of providing good care to the children and placed them with a natural parent." *Zvorak,* 519 N.W.2d at 89. The guardians have the burden to overcome the parental preference and show that the child's best interests require a continuation of the guardianship. *Stewart,* 369 N.W.2d at 824. Even where a strong argument can be made that it may be in the child's best interests to remain with the guardian at the present time, the decision must be based not only on the child's current best interests but also on his best long-range interests. *Id.* at 823. If returning the child to the custody of the parent is "likely to have a seriously disrupting and disturbing effect upon the child's development, this fact must prevail." *Painter v. Bannister,* 258 Iowa 1390, 1396, 140 N.W.2d 152, 156 (1966). Absent concrete evidence of a disruptive effect on the child, however, the continuity and stability of remaining in a familiar setting is insufficient to overcome the presumption favoring the parent. *Stewart,* 369 N.W.2d at 825.

While Nicholas has experienced problems in the past that would have precluded him from having custody of C.B., the trial court found, and we agree, that Nicholas "has made a turn-around in his life," would provide adequate shelter and support for C.B., and "is sincere in his efforts to obtain physical care of his son." Eve testified that Nicholas loves C.B. and that Nicholas and Tara could reasonably care for him. While we agree Eve has done a remarkable job in providing care for C.B., we do not find that she has met her burden to overcome the parental preference.

The trial court's primary reason for refusing to terminate the guardianship appears to be C.B.'s bonding with Eve and the potential problems if this bond is disrupted. The trial court relied heavily on the "valuable testimony" of Pelzer to determine that C.B. has bonded with Eve and that removing him from her care would have a "seriously disrupting effect on his development" and would be detrimental to his best interests. We find Pelzer's testimony of little or no value in this decision.[2] She only twice met with C.B. for less than two hours each visit. Pelzer never met with Nicholas or Tara, nor did she observe C.B.'s interaction with them.[3] Our court has accorded little weight to this type of testimony. *See In re Marriage of Pothast*, 539 N.W.2d 199, 202 (Iowa Ct. App. 1995) (holding a custody evaluation conducted with only the mother and child "is of little value and accords little weight"); *In re Marriage of Scheffert*, 492 N.W.2d 203, 205 (Iowa Ct. App. 1992) (according little weight to unrebutted opinion of psychologist who met with some, but not all, material parties); *In re Marriage of Grandetti*, 342 N.W.2d 876, 879 (Iowa Ct. App. 1983) (finding the trial court correctly dismissed testimony of expert witness who had met with father and children only once and never met with mother).

Based upon her brief assessment of C.B.'s environment, Pelzer concluded not only that Eve should continue to have guardianship, but that termination of

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[2] The insufficiency of her "investigation" is exemplified by her report that C.B. "had almost no contact with his father between the time of removal and permanent guardianship (July 2002 – August 2003)." The record indicates Nicholas has maintained regular contact with C.B., except for a brief period between December 2002 and March 2003.

[3] While we are troubled by Pelzer's report that C.B. "demonstrated a strong negative emotional reaction" to Nicholas and conclusion that removing C.B. from Eve's care would be detrimental, we are unable to give weight to her opinion due to the insufficiency of her investigation.

Nicholas's parental rights should be pursued. We find there is insufficient foundation for her opinion. Without her testimony, we are left only with the parental presumption for Nicholas.

Even if we were to give weight to Pelzer's opinion, the facts in this case do not overcome the presumption favoring the natural parent. Our supreme court has held that, if returning a child to the custody of the parent is "likely to have a seriously disrupting and disturbing effect upon the child's development, this fact must prevail." *Painter*, 258 Iowa at 1396, 140 N.W.2d at 156. In recent years, the *Painter* standard has been difficult to meet, and the presumption favoring the natural parent has prevailed. *See, e.g., Northland*, 581 N.W.2d at 213 (requiring four-year-old boy who had lost his mother be "separated from the man he has thought of as his father since infancy" and returned to natural father); *Stewart* 369 N.W.2d at 825 (requiring return of child to natural father where father had kept in close contact, provided regular financial support, and frequently visited during the eight years child had lived with guardians); *In re Burney*, 259 N.W.2d 322, 324 (Iowa 1977) (holding that, although placed with guardians when he was four days old, two-year-old child whose mother had visited child once or twice a month, had not been in the guardian's custody "so long that an extraordinary threat to his well-being is posed by the prospective transfer"); *In re Guardianship of Sams*, 256 N.W.2d 570, 573 (Iowa 1977) (returning children to mother where the presumption preferring parental custody was not overcome by showing that "those who provided the assistance love the children and would provide them with a good home"); *Doan Thi Hoang Anh v. Nelson*, 245 N.W.2d 511, 518 (Iowa 1976) (finding the presumption favoring mother was not rebutted where there

was no showing of parental unfitness and a cogent reason was present requiring transfer of custody); *Hulbert v. Hines*, 178 N.W.2d 354, 362 (Iowa 1970) (holding the best interests of a child, who due to the mother's mental health problems had lived with her aunt and uncle since shortly after her birth, would be served by returning her to parents' custody). *But c.f. Knell*, 537 N.W.2d at 783 (holding the presumption of parental preference rebutted where the natural father had made few attempts to contact the child over a period of six years and had given no thought to dealing with the psychological adjustment child would face); *In re Guardianship of Stodden*, 569 N.W.2d 621, 625 (Iowa Ct. App. 1997) (holding that, where child had lost his father and been cared for by his stepmother, and his natural mother had visited him only once every two to three months, his interests would not be served by transferring custody). In this case, there is insufficient evidence to establish that returning C.B. to his father's custody is "likely to have a seriously disrupting and disturbing effect" upon C.B.'s development. *See Painter*, 258 Iowa at 1396, 140 N.W.2d at 156. Further, we do not have the additional factor of an "unstable, unconventional, arty, Bohemian" lifestyle with which the *Painter* court expressed concern. *Id.* Nicholas is a suitable father. The presumption favoring him is not overcome.

Were we to follow *Painter's* prohibition against returning a child to a parent where it will have a disruptive effect on the child's development, and accept Pelzer's conclusion that, even if Nicholas made the necessary changes, it would be contrary to C.B.'s welfare to be removed from Eve's care, we would, in effect, create the situation that any temporary guardianship of an infant, if not de jure, is de facto permanent. Further, if we were to accept Pelzer's opinion, it would have

to be weighed against the societal interest expressed in the presumption that the "parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others." Iowa Code § 633.559. If the disruption of the bond between a child and its guardian alone were sufficient to overcome the presumption, it is unlikely an infant would ever be returned to its parent.

It has been stated that "a parent does not lose the preference by seeking help in caring for the children in a time of need." *Knell*, 537 N.W.2d at 782; *see also Stewart*, 369 N.W.2d at 823 (holding father did not relinquish his presumptive right to custody when he voluntarily agreed that his parents-in-law be appointed his daughter's guardians). Parents should be encouraged to seek help with their children without the risk of thereby losing the custody of the children permanently. *Garvin v. Garvin*, 260 Iowa 1082, 1095-96, 152 N.W.2d 206, 215 (1967) (Mason, J., dissenting). "Unless we give weight to this fact, parents may be deterred from temporarily placing children in other hands, even where the child's immediate best interests might be served by such a separation." *Id.*, at 1096, 152 N.W.2d at 216. Based on this factual scenario, in the case of the appointment of a guardian for an infant under the age of three, the presumption would become meaningless. Further, to countenance this result is to discourage a parent of an infant from seeking help. Such a result would defeat that which we seek to encourage.

This is not a case where "a parent who has taken 'an extended holiday from the responsibilities of parenthood' may not take advantage of the parental preference for custody." *Stewart*, 369 N.W.2d at 823 (citation omitted). Nicholas has always been a part of C.B.'s life. Except for one brief period early in C.B.'s

life where he was denied access to C.B., Nicholas has had visitation with him at least every month. Nicholas and C.B. have celebrated birthdays and holidays and have had extended visitations during the summer.

This is also not a case where the parental preference is not a factor because the prior guardianship proceeding involved a finding that the parental preference has been overcome. *See id.* at 823-24. "An involuntary guardianship would eliminate the parental preference from later consideration only if the relative custodial rights of the proposed guardian and the parent were put in issue and tried in the guardianship proceeding." *Id.* at 824. The establishment of this guardianship was voluntary. The presumption clearly remains with Nicholas.

Parents should be encouraged in time of need to seek assistance in caring for their children without risk of losing custody. *Sams*, 256 N.W.2d at 573. The preference for parental custody is not overcome by showing that such assistance was obtained, nor by showing that those who provided the assistance love the child and would provide a good home. *Stewart*, 369 N.W.2d at 823; *see also Doan Thi Hoang Anh*, 245 N.W.2d at 516 ("[T]he law is well established that surrender of the custody by its parents is presumed temporary unless the contrary is made to appear by proof, clear, definite and certain."). Nicholas's reliance on Eve to care for C.B. at a time when he was unable, and Eve's remarkable job in caring for C.B., are not alone sufficient to overcome the preference for parental custody. Further, the natural consequence that a bond has developed between a child and his or her guardian is not sufficient to overcome the preference for parental custody. The presumption was enacted by the legislature. "The Iowa legislature presumably balanced the competing

interests when it made the policy decision to [create the presumption]. It is not for this court to question the wisdom of the legislature's decision." *Chung v. Legacy Corp.*, 548 N.W.2d 147, 151 (Iowa 1996).

Two good homes are available for C.B. Eve has provided for him in an exemplary fashion. We recognize that continuation of the guardianship would provide C.B. continuity and stability in a familiar setting, while a change in custody may be disruptive. The advantage of stability provided by continuation of the guardianship must be weighed against the benefit he will receive from living with his father. Nicholas has turned his life around. C.B.'s interests will be best served by placing him in his care. C.B. will have the opportunity to maintain close contact with his family during regular periods of visitation with Eve and his mother. The presumption favoring parental custody has not been overcome. We therefore grant Nicholas's petition to terminate the guardianship of C.B. and award him custody. We remand to the district court for a determination of Samantha's child support and visitation schedule consistent with this opinion.

REVERSED AND REMANDED.