IN THE COURT OF APPEALS OF IOWA

No. 8-680 / 08-0185
Filed December 17, 2008

IN THE MATTER OF THE GUARDIANSHIP OF CORALLEE CURPHY,

MICHAEL WATTS,
Father-Appellant.

Appeal from the Iowa District Court for Polk County, Ruth B. Klotz, Associate Probate Judge.

A father appeals a district court ruling appointing another relative as permanent guardian and conservator of the child. **AFFIRMED.**

Melissa Nine of Kaplan & Frese, L.L.P., Marshalltown, for appellant.

Elizabeth Kellner-Nelson of Pendleton Law Firm, P.C., West Des Moines, for intervenor appellee.

Dawn Bowman of DeMichelis Law Firm, P.C., Chariton, for minor child.

Heard by Huitink, P.J., and Vaitheswaran and Potterfield, JJ.

VAITHESWARAN, J.

A father appeals a district court order appointing another relative as permanent guardian and conservator of the child. We affirm.

I. Background Facts and Proceedings

Corallee was born in 1995 to Michael Watts and Valinda Curphy. Corallee always lived with her mother. She also lived with or was in close proximity to her mother's twin sister, Maranda. When Corallee was twelve, her mother died in a car accident.

Maranda petitioned to have herself appointed Corallee's guardian and conservator. The district court appointed her temporary guardian for medical and school purposes. Michael filed a cross-application for guardianship. Following trial, the district court granted Maranda's petition. Michael appealed.

II. Analysis

Guardianship petitions such as this one are tried in equity and, therefore, our review is de novo. *In re Guardianship of Knell*, 537 N.W.2d 778, 780 (Iowa 1995). The statutory provision governing this action provides:

> The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian. Preference shall then be given to any person, if qualified and suitable, nominated as guardian for a minor child by a will executed by the parent having custody of a minor child, and any qualified and suitable person requested by a minor fourteen years of age or older, or by standby petition executed by a person having physical and legal custody of a minor. Subject to these preferences, the court shall appoint as guardian a qualified and suitable person who is willing to serve in that capacity.

Iowa Code § 633.559 (2007). Section 633.559 does not give a biological parent an absolute right to be appointed guardian of his or her child, but instead creates

a rebuttable presumption, which may be overcome. *Carrere v. Prunty*, 257 Iowa 525, 531–32, 133 N.W.2d 692, 696 (1965). The presumptive right gives way when that right has been relinquished or where the welfare and best interests of the child mandate a different result. *Id.* Ultimately, if the return of custody to a child's natural parent "is likely to have a seriously disrupting and disturbing effect upon the child's development," alternate custody arrangements should be made. *Knell*, 537 N.W.2d at 782.

On our de novo review, we agree with the district court that alternate custody arrangements were warranted. Corallee was twelve years old at the time of trial and had always lived with her mother or aunt. When the child was young, Maranda acted as a second mother, living with Valinda, adjusting her work schedule to care for Corallee, and assisting with finances. As Corallee grew older, Maranda worked with Valinda to discipline the girl. She stated, "if [Corallee] would do something naughty, we would always kind of consult together because we kind of raised her together like a mother and a father." She attended all of Corallee's softball games over a two-and-a-half year period, as well as school activities. She testified, "I have been there since she was born. I have helped raise her. She feels like she can confide in me about things. I know her friends, I know her school, I know all of her medical history." She continued,

> Corallee just lost her mother three months ago and I think that's a huge part here. Her mother was her most important thing to her and she has lost that most important thing, and to put her into a new environment where she doesn't know anybody, she has one friend that's a cousin down there, she has never been to that school, she doesn't know anybody at that school, I think it would be very detrimental to her future.

> She is just now start—she has great grades, she is in cheerleading, she is doing good in school. She likes going to school.

Corallee's school counselor confirmed Maranda's views about a possible move. She testified that Corallee had a "strong group of friends" at the middle school, most of whom she had known since elementary school. She opined that it would not be in Corallee's best interests to transfer custody to her father, stating:

> She's just lost her mom, school is starting. To change schools, to change parentship, to change who she is surrounded with I think would be really hard for Corallee to adjust to at this point and I think a longer period of time to be able to adjust to those changes and build that relationship would be more appropriate.

The counselor continued,

> Corallee is very bonded to Maranda and to her family there, that's who she's grown up with, her friends, her school. She is just really good where she is. She is just real—she is in her niche. She knows where she needs to be and she's got a good support system.

We also consider a custodial parent's wishes. *Thompson v. Collins*, 391 N.W.2d 267, 268 (Iowa 1986) (stating it was "appropriate to take into account the desires of the deceased custodial parent"); *Painter v. Bannister*, 258 Iowa 1390, 1396, 140 N.W.2d 152, 156 (1966) (same). Maranda testified that Valinda wished to have her daughter placed in Maranda's care if anything happened to her. While Valinda's desire is not dispositive, it is another factor supporting affirmance.

We turn to Michael's history with Corallee. That history is significant and we will summarize it in detail. As the district court found, Michael was a fit and suitable parent. *See Knell*, 537 N.W.2d at 780 (noting district court's finding that

father was "qualified and suitable parent under the statute"). *But see In re Marriage of Reschly*, 334 N.W.2d 720, 721 (Iowa 1983) (in dissolution case, holding that court would only consider alternative to presumptive preference for parental custody where neither parent was suitable custodian). He had no criminal history or substance abuse history and the record showed that he rarely consumed alcohol. *Cf. Reschly*, 334 N.W.2d at 721–22 (concluding maternal grandparents should have custody of child where parent had extensive history of criminal activity, drug use, and unemployment that was also present around the time of the custody hearing).

The record also does not suggest that Michael abandoned Corallee. *See Doan Thi Hoang Anh v. Nelson*, 245 N.W.2d 511, 516 (Iowa 1976) (stating abandonment "includes both the intention to abandon and the external act by which the intention is carried into effect") (citation omitted). Michael lived with Valinda and Corallee for most of the first year of the child's life. Shortly thereafter, he enrolled in a job training program in western Iowa. During the two-year training period, he lacked transportation or much vacation time and was unable to visit the child in central Iowa more than a couple of times. However, after the training ended, he began seeing Corallee about two times a month. He even took her to Arizona on a family trip. Although his relationship with the child became strained after this trip, there was evidence that Michael's former spouse was the cause of the strain. Michael testified that approximately two years before Valinda's death, he began seeing his daughter every other weekend at his mother's house. While Maranda and Corallee's stepfather disputed the extent of the contacts during this period, there is no question Michael maintained a

relationship with his daughter. After Valinda's death, Maranda and Michael informally agreed to an every-other-weekend visitation schedule as well as daily phone contact. Michael saw his daughter over two weekends in the two months preceding the guardianship hearing and was scheduled to spend Thanksgiving with her. In the end, he abided by Corallee's wishes to spend Thanksgiving with her aunt.

Michael also paid child support for approximately nine years. Although he began the payments only after being ordered to do so, it is undisputed that, once ordered to pay, he fulfilled his obligation. *See Northland v. Starr*, 581 N.W.2d 210, 213 (Iowa Ct. App. 1998) (recognizing "past immaturity and lack of financial responsibility" do not overcome presumption in favor of parental custody if indiscretions are not "present risks"). Finally, Michael covered Corallee under his employer health insurance plan. *Cf. Carrere*, 257 Iowa at 527, 133 N.W.2d at 693 (denying father custody when his interest in his daughter had been minimal, he did not provide for his daughter financially, and it did not appear that he ever sought any visitation rights with the child).

We recognize Michael could have asserted his parental rights more forcefully throughout Corallee's life. *See Thompson*, 391 N.W.2d at 268 ("[A] parent who acquiesces in or capitulates to his ex-spouse's desire that he have no contact with his child establishes a base order of priority under which his child's well being is of little or no importance."). He did not contact her school or attend curricular or extra-curricular activities, did not fully exercise visitation under the informal arrangement with Corallee's mother and aunt, and did not insist on being included in special events such as birthday parties. However, his external

acts did not reflect an intent to abandon Corallee. *Nelson*, 245 N.W.2d at 515–16.

Despite this conclusion, we are not convinced Michael was in a position to become the full-time custodian of a twelve-year-old child who had just experienced the sudden loss of her mother. *See Knell*, 537 N.W.2d at 782 (citing testimony that it would be "very traumatic" to separate child from custodians so shortly after her mother's death); *In re Guardianship of Stodden*, 569 N.W.2d 621, 624–25 (Iowa Ct. App. 1997) (concluding return of child to biological mother would have been "seriously detrimental" to child's well-being). The child had not stayed with Michael for more than two weeks in one stretch. Maranda, in contrast, was the single constant in the twelve-year-old child's life. *Cf. Northland*, 581 N.W.2d at 213 (concluding parental preference not rebutted where father maintained contact with four-year-old child). Unlike Michael, she was consistently involved in Corallee's physical, emotional, and educational development. Following the death of her twin sister, she worked with school authorities to monitor and comfort Corallee. She provided a stable and secure environment for Corallee at a time of extreme trauma in the child's life. *See Painter*, 258 Iowa 1397, 140 N.W.2d at 156 (concluding seven-year-old child should remain with grandparents despite lack of evidence that father was morally unfit, where child was "well disciplined, happy, relatively secure and popular with his classmates, although still subject to more than normal anxiety").

Based on this record, we agree with the district court that a transfer of this pre-teen child from the custody of her "second mother" to the custody of her father would have proved destabilizing. As the court noted in *Knell*, a child "puts

down roots" with the passage of time and "[c]ourts must carefully deal with those roots in determining the child's best interest." 537 N.W.2d at 783. We conclude Maranda rebutted the presumption in favor of Michael.

This conclusion should not be read to diminish Michael's right to liberal visitation with his daughter. Commendably, Maranda facilitated that contact after she was appointed temporary guardian. Corallee "should be encouraged in every way possible" to continue that contact because there are many ways Michael can enrich her life. *See Painter*, 258 Iowa at 1400, 140 N.W.2d at 158.

III. Appellate Attorney Fees

Maranda requests appellate attorney fees. She cites no statutory authority that would allow us to order Michael to pay all or a portion of her attorney fees. *See* Iowa Code §§ 633.200 (allowing court to fix compensation for fiduciaries and their attorneys), 633.673 (charging guardian's costs, including fees of guardian's attorney, to ward or ward's estate). Accordingly, we decline the request.

We affirm the district court's appointment of Maranda as permanent guardian and custodian of Corallee.

AFFIRMED.