IN THE COURT OF APPEALS OF IOWA

No. 9-863 / 09-0535
Filed November 25, 2009

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF M.O.,

R.J. and D.J.,
Petitioners-Appellants.

Appeal from the Iowa District Court for Mills County, James S. Heckerman, Judge.

R.J. and D.J. appeal an order denying their petition for appointment of an involuntary guardian. **AFFIRMED.**

Chad Primmer, Council Bluffs, for appellants R.J. and D.J.

Karen Dales, Council Bluffs, for appellee G.O.

DeShawne Bird-Sell, Glenwood, guardian ad litem.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Randy, the maternal grandfather of Maddison, and his wife Denise appeal the district court order denying their petition for involuntary guardianship. On appeal, Randy and Denise assert the district court erred in finding that Maddison's father, Garrett, is a suitable parent and that it is in Maddison's best interest to remain in his care. We affirm.

I. Background Facts and Proceedings

Maddison was born August 2006 to Garrett and Kim. At the time, Garrett and Kim did not have sufficient means to support themselves. Therefore, they lived with Kim's father and stepmother, Randy and Denise, in Salisbury, Maryland.

Following Maddison's birth, there was discussion about Randy and Denise becoming guardians of Maddison in order to give Garrett and Kim "a chance to get their life in order, a place to live and steady jobs." However, no formal guardianship was executed.

Rather, in November 2006, Garrett and Kim decided to take Maddison and move to Iowa. Upon arriving in Iowa, Garrett and Kim were able to find their own housing, but continued to struggle to find consistent employment. Their relationship was also very volatile. In August 2007, Kim filed a petition for relief from domestic abuse. In addition, in January 2008, Garrett was charged with domestic abuse assault. Garrett admitted that this assault occurred when he grabbed Kim by her throat and choke-slammed her into a table during an argument. Following the assault, Garrett was ordered to attend anger management therapy and to complete a batterer's education program. However,

Garrett only attended two therapy sessions and never completed the batterer's education program.[1]

In August 2008, Kim died unexpectedly from an overdose of prescription medications. In the week following Kim's death, Randy and Denise filed this petition for the guardianship of Maddison.

The case came to trial on February 26, 2009. At trial, Randy and Denise raised several concerns about Garrett and his suitability as a parent for Maddison.

Randy and Denise emphasized Garrett's serious financial problems and asserted he was "lazy." Garrett is unemployed and primarily dependent upon government assistance as a means of support. Randy and Denise also accused Garrett of being financially irresponsible, including buying an X-Box, tattoos, and a ring for his girlfriend using the government aid.

Randy and Denise also stated that Garrett had "failed" in parenting two children he had prior to marrying Kim while living in Maryland. Garrett was shown to be in arrears on child support payments for one child, and had his parental rights terminated to the other child. In addition, at the time of trial, a woman that Garrett started dating following his wife's death alleged that she was pregnant and that Garrett was the father.

They also expressed concerns about Garrett's temperament as a parent. Denise testified that while she talked to Kim on the phone, Garrett "belittled [Maddison] several times" and called her "some very rude names." Further, in addition to the two domestic abuse claims brought by Kim, Garrett was subject to

[1] The assault charges were eventually dismissed following Kim's death.

a child abuse assessment in January 2009. In the assessment, Maddison was found to have a bump on her left forehead. Garrett explained that the injury occurred when Maddison bumped her head on the countertop while in the care of Kim's mother. The Iowa Department of Human Services (DHS) found the allegations of abuse were not confirmed, and stated there was "no indication that the child is being mistreated." DHS also found the "home [was] more than adequate to meet the needs of the child."

Denise further testified that Kim, just prior to her death, was planning on leaving Garrett and returning to Maryland with Maddison to live with Randy and Denise. (Garrett disputed this contention.) Denise also stated that Kim had told her that "if anything ever happened to her, please come get Maddison."

Randy and Denise also stated that they have a home and the means to support Maddison. They testified that they have adopted Kim's other child. Regarding Maddison, Randy explained, "I'm not lookin' to take Maddison from him on a permanent basis. I just want him to get his life in order so he can support her by himself or with his girlfriend without using state aid and the social security money that he gets."

Garrett admitted that he was not "father of the year," but maintained that the evidence did not prove he is unfit as a parent. Specifically, a report prepared by the guardian ad litem stated that although Garrett was "not the greatest man," he appeared "to be providing adequate day-to-day care for Maddison."[2] The guardian ad litem described three separate, unannounced visits to Garrett's

[2] Ironically, Garrett objected to consideration of this report, although it was, on balance, helpful to him. The district court overruled the objection and received the report.

residence. Each time, the guardian at litem found that Maddison's living conditions and care were adequate. The guardian ad litem concluded that Garrett "cannot be determined . . . to be unsuitable."

Garrett showed that Randy and Denise have not cared for Maddison since she was three months old, and that Randy and Denise have only seen Maddison twice since Garrett and Kim moved to Iowa. Randy conceded that at that this time, Maddison would probably not have any idea who he is. He conceded that if a guardianship were ordered, there would have to be a period of transition involved.

After all the evidence was presented, the district court denied Randy and Denise's petition for guardianship, finding they failed to show that Garrett was an unfit parent, and it was not in the best interest of Maddison to remain in his care, custody, and control. Randy and Denise appeal.

II. Standard of Review

The standard of review as set forth in our case law has been somewhat inconsistent. Iowa law specifically provides that actions for the involuntary appointment of guardians shall be triable in probate as law actions. Iowa Code § 633.33 (2007) ("Actions . . . for the involuntary appointment of guardians . . . shall be triable in probate as law actions . . . ."); *see also* Iowa Code § 633.555 (stating the opening of a guardianship "shall be tried as a law action"). "In view of the specific language of these statutes, the legislative intent to provide a trial at law in an involuntary guardianship is clear." *In re Guardianship and Conservatorship of Wemark*, 525 N.W.2d 7, 9 (Iowa Ct. App. 1994).

In *In re Guardianship and Conservatorship of D.D.H.*, after thoroughly reviewing the statutory language and the precedents, we held that the scope of review for appointment of a guardian of a minor was for errors at law. 538 N.W.2d 881, 882-83 (Iowa Ct. App. 1995). We there quoted, among other things, the supreme court's detailed discussion of the subject in *In re Guardianship of Murphy*, where it held that "any modification to allow de novo review must come from the legislature." *D.D.H.*, 538 N.W.2d at 883 (quoting *Murphy*, 397 N.W.2d 686, 688 (Iowa 1986)).

However, a month later, in *In re Guardianship of Knell*, the supreme court applied a de novo standard of review to a proceeding for appointment of a guardian. 537 N.W.2d 778, 780 (Iowa 1995). The supreme court did not discuss the applicable standard of review in detail, simply citing the parties' *agreement*[3] and *In re Guardianship of Stewart,* 369 N.W.2d 820, 822 (Iowa 1995). *Knell*, 537 N.W.2d at 780. *Stewart*, however, was a termination of guardianship case, not an appointment case. 369 N.W.2d at 821-22. The legislature has mandated that terminations, but not involuntary appointments, be tried in equity. *See* Iowa Code § 633.33 (noting that apart from actions for the involuntary appointment of a guardian, and two other categories of proceedings, "all other matters triable in probate shall be tried by the probate court as a proceeding in equity"); *In re Guardianship of B.J.P.*, 613 N.W.2d 670, 672 (Iowa 2000) ("Actions for the termination of a guardianship constitute 'other matters triable in probate,' and are equitable in nature.").

[3] In this case, there is no agreement between the parties. The appellant urges us to apply a de novo standard of review. The appellee has not filed a brief on appeal.

Since *D.D.H*. and *Knell* were decided, subsequent cases have tended to follow one opinion or the other, thus forming two armadas of ships passing in the night. *See, e.g., Northland v. McNamara*, 581 N.W.2d 210, 212 (Iowa Ct. App. 1998) (citing *Knell* and applying a de novo standard of review); *In re Guardianship of Hensley*, 582 N.W.2d 189, 190 (Iowa Ct. App. 1998) (citing *D.D.H*. and applying an errors at law standard of review). Making matters somewhat more complicated, in *In re Guardianship of Reed*, the supreme court acknowledged that "[a]lthough our review is on error, the equitable nature of proceedings for the appointment of a guardian remains." 468 N.W.2d 819, 825 (Iowa 1991). Thus, the court stated "it is indispensable that principles of equity be applied." *Id*. at 826 (quoting *Jensen v. Sorensen*, 211 Iowa 354, 367, 233 N.W. 717, 723 (1930)).

In light of the conflicting judicial precedents, we will follow the explicit directive of the legislature in Iowa Code section 633.33 and review this matter at law. We note also that in this case the trial judge did rule on objections, although in each instance the objection was overruled. *See Ernst v. Johnson County*, 522 N.W.2d 599, 602 (Iowa 1994) ("Where there is uncertainty about the nature of a case, a litmus test we use in making this determination is whether the trial court ruled on evidentiary objections."). However, we will be mindful of the supreme court's admonition that "principles of equity" should be applied because the best interests of a child are involved. *See Reed*, 468 N.W.2d at 825-26.

III. Analysis

Iowa's statutory scheme contains a presumption in favor of the natural parents when a proceeding is initiated to obtain guardianship of a child.

Northland, 581 N.W.2d at 212. Iowa Code section 633.559 states that "[t]he parents of a minor child, . . . if qualified and suitable, shall be preferred over all others for appointment as guardian." However, this parental preference is rebuttable. *Knell*, 537 N.W.2d at 781. The burden of proof rests with the non-parent to rebut the presumption by establishing that the child's best interests require that the child be placed into the non-parents' care. *Id*. In determining the child's best interest, we must take into account the strong societal interest in preserving the natural parent-child relationship. *Id*.

Randy and Denise have raised legitimate concerns as to Garrett's instability, temperament, and past parenting behaviors. *See Northland*, 581 N.W.2d at 213 (the presumption favoring parental custody may be overcome by evidence of a parent's current immaturity and lack of financial responsibility when these indiscretions are present risks). However, despite these concerns, Garrett was found to be providing Maddison with an adequate and furnished home, and was found to be meeting Maddison's needs. The report of the guardian at litem provides substantial evidence on this point. Moreover, there is no confirmed evidence in the record that Garrett has abused or mistreated Maddison, apart from using an inappropriate tone and language on some occasions. Although the concerns exist, we agree with the district court that they are not sufficient to outweigh the preference for custody in the natural parent. The record supports the district court's finding that Garrett "is not an unfit parent for Maddison."

It is also noteworthy that Maddison has been with Garrett her entire life. *See Knell*, 537 N.W.2d at 782 ("[I]f a person having lawful care of a child has properly provided for a child's social, moral and educational needs for a

substantial period of time and the child has become attached to that environment and those responsible for his or her welfare and happiness, a court is not justified in transferring that custody to another except for the most cogent reasons."). Moreover, Randy and Denise have only seen Maddison twice since she has moved to Iowa. As noted, Randy admitted that Maddison would not recognize him at this point and that a transition period would be necessary. Also, both Randy and Denise did not believe that Garrett could not ultimately care for Maddison in the future; they just felt he "needs help" at this point.

It is not disputed that Randy and Denise would be capable of providing for Maddison, and might offer a better environment for her than Garrett does. However, this alone is not sufficient to overcome the preference for parental custody. *Northland*, 581 N.W.2d at 213; *In re Guardianship of Burney*, 259 N.W.2d 322, 324 (Iowa 1977) ("Courts are not free to take children from parents simply by deciding another home offers more advantages.").

For the foregoing reasons, we affirm the district court's order denying Randy and Denise's petition for involuntary guardianship.

AFFIRMED.