

IN THE COURT OF APPEALS OF IOWA

No. 0-273 / 09-0723
Filed June 30, 2010

JOSHUA R. STANLEY,
Petitioner-Appellant,

vs.

JULYNN M. AIKEN,
Respondent-Appellee.

**IN THE MATTER OF THE GUARDIANSHIP
OF L.S. and J.S.,**
Wards,

JACQUELINE STANLEY,
Guardian-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,
Judge.

Jacqueline Stanley appeals a district court order terminating her guardianship, and Joshua Stanley appeals the district court's award of child support. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Jesse A. Macro Jr. and Tammi M. Blackstone of Gaudineer, Comito &
George, L.L.P., West Des Moines, for appellants.

Julynn M. Aiken, Albert Lea, Minnesota, pro se.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

This appeal arises from a concurrent jurisdiction proceeding involving paternity and guardianship orders for two minor children, L.S. (born October 2000) and J.S. (born November 2001). The children's paternal grandmother, Jacqueline Stanley (Jacki), appeals the district court order terminating her guardianship and restoring custody of the children to their mother, Julynn Aiken (Julie). The children's father, Joshua Stanley, also appeals the district court's award of child support. For the reasons set forth herein, we affirm the order terminating guardianship but reverse the child support order and remand for further consideration.

I. Background Facts and Proceedings.

Julie and Joshua were involved in a romantic relationship and had two children together. However, prior to the birth of their second child, their relationship fell apart and Julie took primary responsibility for the children's care.

Following the children's births, Joshua struggled with substance abuse. In 2002, 2003, and 2004, Joshua was charged with possession with intent to deliver methamphetamine. As a result of these three felonies, Joshua was sentenced to twenty years in prison in October 2004. Until Joshua was paroled in March 2007, he had little involvement in his children's lives.

Julie has also struggled as a single parent. In August 2002, Julie was the subject of a confirmed child abuse report after she left her children at daycare for over twenty-six hours while she went out with some friends. This resulted in a child in need of assistance proceeding, and the removal of the children for

approximately six months. During this time, the children were primarily placed with Jacki.

Julie also struggled with maintaining consistent housing. Julie estimated that between 2001 and 2008, she has lived in ten different residences in four different cities. The longest Julie and the children have lived in a single location was one year in Jefferson, Iowa.

Julie has also had some difficulties in her relationships. In 2003, Julie gave birth to another child, but placed the child for adoption. Julie then began a relationship with John Meyer. This relationship has produced two more children, born in 2005 and 2007. Julie and John's relationship has been marred by domestic violence. In 2004 and 2007, John was charged with domestic abuse assault with Julie identified as the victim. These incidents took place while the children were in the family home.

On June 28, 2008, Julie left her children at her father's house while she and John attended a rock concert. When Julie and John did not return by early the next morning, Julie's father contacted Joshua to have him come and get the children. When Joshua arrived, Julie had returned home. At this time, Julie agreed in writing to a "temporary situation" that was "revocable at anytime" whereby Joshua would care for the children.

At this time, Joshua lived with Jacki in Des Moines, while Julie and John lived in Albert Lea, Minnesota. Julie and John initially lived with John's family, but by October 2008, they were able to rent their own residence.

On July 17, 2008, Joshua filed a petition to establish paternity, custody, support, and visitation for the children. Julie answered, denied the material

allegations in the petition, and requested the children be returned to her care. On August 20, 2008, the district court filed an order awarding temporary joint legal custody, but granting physical care to Joshua with visitation to Julie.

However, four days prior to the entry of the temporary order, Joshua had a relapse on drugs. By August 27, 2008, Joshua had disappeared from Jacki's home, had terminated his employment, and was not reporting to his parole officer. A warrant was issued for his arrest. On September 25, 2008, Joshua attempted to avoid being arrested on the warrant, and subsequently pled guilty to the charge of eluding as an aggravated misdemeanor. As a result, Joshua's probation was revoked and he was returned to prison. Joshua is not expected to be eligible for parole again until September 2009.¹

On September 10, 2008, Jacki petitioned for appointment as a temporary and permanent guardian for the children. The temporary guardianship was granted.

On November 3, 2008, Jacki was appointed the children's permanent guardian. The same day, but following the entry of the guardianship order, the district court received a letter from Julie requesting the children be returned to her custody and the guardianship be denied. This letter was filed in the paternity action, however. The paternity and guardianship actions were later consolidated under an order for concurrent jurisdiction on November 6, 2008.

At the December 1, 2008 review hearing, Julie made an oral application for a formal visitation schedule. However, due to an administrative error, the court did not have time to hear the request, and the hearing was continued until

¹ It is not clear from the record whether Joshua has been paroled at this time.

January 20, 2009. At the January 20 hearing, Julie was granted visitation on alternating weekends. The order also required Julie to pay for all transportation costs related to the visits and prohibited John Meyer from being present at any time during Julie's visitation. Prior to this order, Julie had only been contacting the children by telephone.

Julie's previous letter of November 3, 2008, was treated as a motion to terminate the guardianship. The consolidated proceedings came to trial on April 14 and 15, 2009. The contested issues were whether the guardianship would continue, visitation, and child support.

At trial, Jacki raised several concerns about Julie's ability to parent her children. Jacki, who works as a child abuse investigator for the Iowa Department of Human Services, testified she has observed behavioral changes in both children following visits with Julie including "becoming more aggressive," "more resistive to following the rules," "acting out behaviors more," and "not wanting to do what they were told to do." Because of these issues, Jacki decided to enroll the children in counseling.

Jacki also testified both children have reported to her that Julie and John have "spanked and hit [them] before" when they have become angry and Julie and John use foul language in front of them. However, Jacki admitted she had not personally observed any abuse or inappropriate language in her presence. Jacki further stated the children have reported to her that John "has been around" in violation of the January 20 order, and that she actually saw John in the vehicle when Julie dropped the children off after their latest visitation. This was of great concern for Jacki because of John's history of domestic abuse.

Jacki also testified Joshua inherited a substantial amount of money upon the death of his father. Jacki has a power of attorney over this money, which she estimated at approximately \$100,000 at the time of trial. Jacki further testified that since she became the children's guardian, she has taken out approximately \$500 each month for groceries and daycare.

Jacki also had the children's current daycare provider testify. The daycare provider stated both children had significant behavioral issues when Julie first enrolled them in May 2008. According to the daycare provider, L.S. would "curl up into a ball" whenever he was disciplined, and J.S. made inappropriate sexual comments to other children. The daycare provider further testified these issues have not been present since the children were placed in the care of Joshua and Jacki. The daycare provider also reported the children stated that Julie and John used foul language and were physically abusive. Specifically, the daycare provider reported L.S. told her that John would make him "drink bottles of hot sauce." She claimed L.S. "started crying and saying that [John] wouldn't even let him drink any milk after he would have him drink a bottle of hot sauce." It was the daycare provider's belief that the story was not exaggerated. The daycare provider further testified the children reported to her that John was always around during visitations, and that on one occasion he let them watch a movie that gave them nightmares due to its graphic scenes of violence. The daycare provider also had the impression that the children were "afraid of [John], and afraid of [John] being around."

The child's counselor also testified. The counselor testified both children have exhibited anxiety due to the recent changes in their lives. However, the counselor did not provide an opinion concerning custody.

Julie also testified at the hearing. She admitted John was in the vehicle when she dropped off the children after their latest visitation; however, she stated it was only because they were going to go visit other family for Easter. Julie also admitted the children were present in the home when she and John had their prior domestic incidents. However, Julie stated she and John have since entered counseling both individually and together, and John has been diagnosed as bipolar and is now taking medication. As a result, Julie believed their relationship has improved.

Julie also acknowledged the children reported to their daycare provider that she slapped them and that John forced them to eat hot sauce. However, she denied the incidents and claimed her children have a tendency to "exaggerate" their stories.

Julie further testified her current residence is adequate for all of her children, and since Christmas 2008, she has been working on a full-time basis for an express technology temp agency, earning nine dollars per hour.

On April 21, 2009, the district court concluded it was in the children's long-term best interests that the guardianship be terminated and the children be returned to Julie's custody. In making this determination, the district court stated:

To say that Jacki and Julie do not get along is a vast understatement. Julie sees Jacki as determined to take her children away from her, and has difficulty in viewing any actions by Jacki in any other light. It is equally apparent that Jacki does not

like Julie, disapproves of virtually every aspect of her life and sees her contacts with the children as detrimental.

As a result of this contentious relationship, the district court believed that “Jacki has done almost everything possible to keep the children from their mother, to discourage contact between them and to ensure that the children are not returned to Julie’s care.” The district court also had several concerns over Jacki’s long-term ability to protect the children from Joshua, citing Jacki’s actions following Joshua’s relapse on drugs.

The district court further found the child support guidelines would result in a support obligation from Joshua of \$75 per month. The district court determined this amount was “fundamentally unfair” given Joshua’s substantial inheritance. Therefore, the district court deviated from the guidelines and ordered Joshua to pay child support of \$500 per month. The district court also ordered that upon his release from prison, Joshua could have supervised visitation with the children.

Jacki appeals the decision to terminate the guardianship, and Joshua appeals the child support order.

II. Guardianship.

A. Standard of Review.

Actions for the termination of a guardianship are equitable proceedings reviewed de novo. Iowa Code § 633.33 (2009); *In re Guardianship of B.J.P.*, 613 N.W.2d 670, 672 (Iowa 2000). We give weight to the trial court’s factual findings, especially on matters of witness credibility, but we are not bound by them. *In re Guardianship of Stewart*, 369 N.W.2d 820, 822 (Iowa 1985).

B. Analysis.

As in all child custody disputes, the determinative factor in deciding whether to terminate a guardianship is the best interests of the children. *Zvorak v. Beireis*, 519 N.W.2d 87, 89 (Iowa 1994). In considering the best interests of the children, the law raises a strong presumption that the children's welfare will be best served in the care and control of the natural parents. *Id.*; see also Iowa Code § 633.559 ("The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian."). This presumption stems from the strong societal interest in preserving the natural parent-child relationship.² *Zvorak*, 519 N.W.2d at 89.

However, the presumption of preference in favor of a natural parent is rebuttable. *In re Guardianship of Knell*, 537 N.W.2d 778, 781 (Iowa 1995). The burden to overcome this parental preference is on the non-parent to establish that the child's best interests require a continuation of the guardianship. *Stewart*, 369 N.W.2d at 823. In doing so, our supreme court has held that "if the return of custody to the [parent] is likely to have a seriously disrupting and disturbing effect

² The district court rendered its decision prior to the release of our opinion in *In re Guardianship of Roach*, 778 N.W.2d 212 (Iowa Ct. App. 2009). There we held that "once a finding has been made in a previously litigated action, rebutting the presumption in favor of the natural parent, the burden of proof changes such that the natural parent must prove a substantial change of circumstances, warranting a change of custody." *Roach*, 778 N.W.2d at 215. However, this case is significantly different from *Roach*. In *Roach*, the guardianship had been established in 2004, the mother had unsuccessfully sought to terminate the guardianship in 2007, and then had sought again to terminate the guardianship in 2008. *Id.* We ruled that the district court should have required the mother to demonstrate a substantial change of circumstances in 2008, given the prior 2007 trial. *Id.* at 214-15. Here, by contrast, a permanent guardianship order was entered without a contested hearing and the mother's "motion to terminate" (i.e., her letter to the court) arrived that day. *Roach*, in our view, does not apply in this situation because there was no "finding . . . in a previously litigated action." *Id.* at 215.

upon the child's development, this fact must prevail." *Painter v. Bannister*, 258 Iowa 1390, 1396, 140 N.W.2d 152, 156 (1966).

Jacki claims she met her burden in overcoming the parental presumption. Jacki argues Julie is an unfit parent due to domestic abuse within her home, Julie's disregard for the prior court order requiring John not to be present during visitation, the children's behavioral issues following visits, the alleged abuse perpetrated on the children by Julie and John, and Julie taking "an extended holiday from the responsibilities of parenthood" on several occasions.

Upon our de novo review, and giving deference to the court that actually saw and heard both Jacki and Julie testify, we do not find Jacki sufficiently rebutted the parental presumption in favor of Julie. Although domestic abuse within the home is always a serious concern, the record shows Julie and John have been taking appropriate steps to address the issue. The couple has entered counseling both individually and together, and John has been taking medications for his diagnosis of a bipolar disorder. As a result, their relationship has improved. See *Northland v. Starr*, 581 N.W.2d 210, 213 (Iowa Ct. App. 1998) (holding the presumption favoring parental custody is not overcome by evidence of a parent's past indiscretions when they are not present risks); *In re Mann*, 293 N.W.2d 185, 190 (Iowa 1980) ("Parents are not to be denied custody for past indiscretions which do not demonstrate a present risk.").

As to John's presence during visitation, there is support for the district court's conclusion that the fault rests, at least in part, with Jacki. The district court found that the provision pertaining to John was insisted on by Jacki "to maximize the inconvenience of visitation for Julie and to set up possible

violations as a further reason not to return custody to Julie,” not out of a concern for the children.

Jacki also points to the children’s behavioral issues following visits with Julie. As the children’s counselor testified, the children have exhibited anxiety as a result of the instability due to the changes from the guardianship proceedings. However, the counselor did not offer an opinion regarding custody and noted some positives in the visits with Julie.

Furthermore, like the district court, we do not find this to be 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 (quoting *Carrere v. Prunty*, 257 Iowa 525, 531-32, 133 N.W.2d 692, 696 (1965)). Since they were born, Julie has been the children’s primary caregiver. Although a lapse in judgment resulted in the children being placed into Joshua’s care, it was not “an extended holiday.” Julie has also maintained contact with the children throughout these proceedings, and has always sought the children’s return to her care. *Cf. Knell*, 537 N.W.2d at 782 (finding an “extended holiday” when a parent did not make a serious effort to maintain contact with their child for six years).

Although Jacki loves her grandchildren and can provide for their care, this is also not sufficient. *See In re Guardianship of Sams*, 256 N.W.2d 570, 573 (Iowa 1977). Jacki has failed to show that Julie is not qualified and suitable as a parent, and that the children’s best interests require the children to remain in her care. Additionally, we share the district court’s concerns about actions that Jacki took on behalf of her son Joshua. In particular, prior to the entry of the order

granting Joshua temporary custody, Jacki failed to notify anyone that Joshua relapsed on methamphetamine.

Accordingly, we affirm the district court order terminating Jacki's guardianship and restoring custody of the children to their natural parent, Julie.

III. Child Support.

A. Standard of Review.

In paternity actions, our review of "issues ancillary to the question of paternity, such as support," is de novo. *Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005).

B. Analysis.

Child support in a paternity action is to be calculated according to the uniform child support guidelines. See Iowa Code §§ 600B.25(1) (directing support to be set pursuant to section 598.21B); 598.21B(1)(a) (directing the supreme court to maintain uniform child support guidelines and criteria). The child support obligation resulting from application of the guidelines is entitled to a rebuttable presumption that it is the correct amount. *Id.* § 598.21B(2)(c); Iowa Ct. R. 9.4. However,

[i]f a strict application of the guidelines would be unjust or inappropriate, a court may adjust the guideline support amount upward or downward if such adjustment is "necessary to provide for the needs of the children or to do justice between the parties under the special circumstances of the case."

In re Marriage of McKenzie, 709 N.W.2d 528, 533 (Iowa 2006) (quoting Iowa Ct. R. 9.4). To justify a departure from the guidelines, the court must make "a record or written findings, based on stated reasons, that the guidelines would be unjust or inappropriate" under the criteria prescribed by the supreme court. Iowa Code

§ 598.21B(2)(d); see also Iowa Ct. R. 9.11 (setting forth the criteria for a variation).

In this case, Joshua earns little to no income because he is incarcerated. Therefore, “since it is the policy of this state that every parent contribute to the support of his or her children in accordance with the means available,” the district court determined that under the guidelines, Joshua would only be obligated to provide \$75 per month for his two children. See Iowa Ct. R. 9.26, chart 2 (2009). The court then determined this amount was “fundamentally unfair when Josh has been providing \$2,000 per month for the children to his mother, while he is incarcerated, because of his substantial inheritance.” Accordingly, the district court concluded a variance from the guidelines was required under the circumstances, and set a child support amount of \$500 per month.

Joshua now challenges this determination, arguing the district court erred in deviating from the child support guidelines without good cause and in setting the support amount based upon a miscalculation of the amount he was actually providing to Jacki during the guardianship. Upon our review, we disagree with Joshua’s first argument but find merit in his second.

On the first point, Joshua’s substantial inheritance of approximately \$100,000 was a proper factor to be considered in a potential deviation from the guideline amount. See *In re Marriage of Will*, 602 N.W.2d 202, 205 (Iowa Ct. App. 1999) (finding inheritance or gifted property not to be a part of a person’s net monthly income, but as a factor that justifies deviating from the guideline amounts). Here, the district court had good cause for a deviation, especially considering that Joshua’s lack of regular income was due to his own

incarceration. See *In re Marriage of Vetternack*, 334 N.W.2d 761, 763 (Iowa 1983) (refusing to reduce child support where incarcerated father had equity in his home that could satisfy his obligation). We agree with the district court that an inheritance received by an incarcerated person may properly be taken into account in establishing that person's child support obligation.

However, on our *de novo* review, we believe the district court misunderstood the extent to which that inheritance had been previously used to support L.S. and J.S. when they were in Jacki's care. Jacki testified that while she was the children's guardian, she took out approximately \$500 *per month* from Joshua's inheritance to pay for groceries and daycare. The district court, however, based its support award on an assumption that Jacki had been using \$500 *per week* (or \$2000 per month) from Joshua's inheritance. Because the district court's support order of \$500 per month was based on an incorrect factual finding, we believe the appropriate course of action would be to remand so the court may enter a new child support order in light of the corrected facts.

IV. Conclusion.

Upon our review, we find that the district court did not err in terminating the guardianship. We also affirm the district court's decision to deviate from the child support guidelines. However, because the specific amount of the deviation was based on an incorrect factual finding, we reverse that part of the court's order establishing child support at \$500 per month and remand so the court may enter a new child support order.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.