IN THE COURT OF APPEALS OF IOWA

No. 0-326 / 09-1651
Filed August 25, 2010

IN THE MATTER OF THE GUARDIANSHIP OF SPENCER ROSS BOWEN BROWN,

JOHN L. BROWN,
Intervenor-Appellant.

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

Ward's father appeals from district court ruling granting the guardian's motion to dismiss the father's motion to vacate the guardianship and request for other relief. **VACATED AND REMANDED.**

Harvey L. Harrison and Earl B. Kavanaugh of Harrison & Dietz-Kilen, P.L.C., Des Moines, for appellant.

Susan R. Stockdale, Des Moines, for appellee.

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

SACKETT, C.J.

Cynthia S. Bowen filed a petition seeking guardianship of her then minor son, Spencer Bowen Brown. She was named guardian. Cynthia's fraudulent actions in establishing the guardianship prevented John Brown, Spencer's father, from learning of, or participating in, the hearing establishing the guardianship. John first learned of the guardianship after it was established and brought this action to vacate it. John's claim was dismissed on Cynthia's motion, the court finding John was not a party in interest and had no standing to seek termination of the guardianship. John is an interested party and Cynthia's fraudulent action prevented him from participating in the hearing. We vacate the order establishing Cynthia as guardian and remand for further proceedings.

I. SCOPE OF REVIEW. Iowa Code section 633.33 (2009) governs the nature of probate proceedings. It states,

> Actions to set aside or contest wills, for the involuntary appointment of guardians and conservators, and for the establishment of contested claims shall be triable in probate as law actions, and all other matters triable in probate shall be tried by the probate court as a proceeding in equity.

Iowa Code § 633.33. Actions for the termination of a guardianship constitute "other matters triable in probate," and are equitable in nature. *In re Guardianship of B.J.P.*, 613 N.W.2d 670, 672 (Iowa 2000); *see also In re Guardianship of Sams*, 256 N.W.2d 570, 572 (Iowa 1977). We review equitable actions de novo. Iowa R. App. P. 6.907.

II. BACKGROUND AND PROCEEDINGS. Spencer was born on May 14, 1991. His parents' marriage was dissolved on September 1, 2005, and their dissolution decree provided Cynthia and John would be joint legal custodians of Spencer. A schedule was structured to allow each parent to have fifty percent of the time with Spencer, who apparently is autistic in a high functioning range.

On May 7, 2009, seven days before Spencer's eighteenth birthday, Cynthia filed a petition asking to be appointed Spencer's temporary and permanent guardian. She swore in a verified petition Spencer was presently in her care, custody, and control and that he was in need of a temporary guardian to insure he remain in school. The petition failed to state that John was Spencer's father and a joint custodian. On the same day the associate probate judge entered an order scheduling a hearing on the petition for temporary guardianship for May 18, 2009, and appointing attorney Jurgen Jensen as counsel to represent Spencer. Spencer was served with the petition for appointment on May 14th, his eighteenth birthday, while in his mother's home. John was not notified of the proceedings. Nor was it mentioned to him that night when Spencer, his parents, and his two older sisters had dinner out and celebrated Spencer's birthday.

On May 18, 2009, Spencer's attorney filed an answer and report that basically stated: (1) proper service was made on Spencer, (2) on May 17, 2009, he interviewed Spencer in West Des Moines, Iowa, (3) he advised Spencer of the nature of the proceedings and its purpose as well as Spencer's rights and Spencer understood the nature of the proceedings, (4) that Spencer consented

to the appointment of the guardian named in the petition, and (5) in his opinion it was in the best interests of Spencer to have a guardian and conservator appointed for him. It is not clear as to whether Jensen was advised of John and the custody order that had been in place. But Jensen did not make that information available to the court.

On May 18, 2009, the probate court considered the petition for appointment of a guardian. Cynthia appeared and was represented by her attorney. Jensen, the attorney appointed to represent Spencer, also appeared. The court found that after examining the petition and answer, and being advised in the premises, a temporary guardian should be appointed for Spencer and appointed Cynthia.

On June 8, 2009, Cynthia appeared again with her attorney, along with Jensen, the attorney for Spencer. That day, the same court that ruled on the temporary guardianship petition entered an order appointing Cynthia as the guardian of Spencer. The court found it had jurisdiction of the parties and the subject matter and had considered the functional limitations of Spencer. It found by clear and convincing evidence that the allegations of Cynthia's petition were true, that Spencer was in need of a guardian, and that Cynthia was a suitable person to so serve, and should be so qualified upon filing an oath of office.

Ten days later, on June 18, 2009, John, first learning of the guardianship, filed an application to vacate it and for other relief. There were amendments to John's application and various court proceedings before the court dismissed John's claim. John asserted, among other things, that he had a right to, but did

not receive, notice of the guardianship proceedings and that the guardianship order interfered with the custodial rights set forth in the dissolution decree. On July 31, 2009, a judge of the district court entered a temporary order finding John should have visitation with Spencer and making specific provisions for it. Other proceedings occurred and on September 18, 2009, Cynthia for the first time directly responded to John's petition to vacate the guardianship by way of a motion to dismiss John's filings, asserting John did not have standing to challenge the guardianship, he had not filed a proper motion to intervene, and the court lacked subject matter jurisdiction to consider John's claims. The court granted Cynthia's motion to dismiss holding there was no requirement under Iowa law that John be notified of the petition filed by Cynthia to create a guardianship for Spencer, and John was not a party in interest. In short, the court found the requirements of Iowa Rules of Civil Procedure 1.1012 and 1.1013 relating to vacation of judgments had not been met.

III. DISMISSAL OF JOHN'S CLAIMS. John is an interested party and his interests were not represented in the guardianship. To have an interest in an action, a person must assert more than a mere general interest in the subject matter of the litigation. *In re H.N.B.*, 619 N.W.2d 340, 343 (Iowa 2000) (citations omitted). Statutes often provide the best guidance in determining who possesses the right to intervene. *Id.*; 59 Am. Jur. 2d *Parties* § 133, at 587 (1987) ("The right of intervention depends largely on the construction of the particular statute or rule under consideration"). A person has "an interest" where the person "has a *legal right* that the proceeding will *directly affect*" or "a legal liability

which will be directly enlarged or diminished by the judgment or decree." *In re A.G.*, 558 N.W.2d 400, 403 (Iowa 1997); *In re C.L.C.*, 479 N.W.2d 340, 343 (Iowa Ct. App. 1991) (emphasis supplied). In a proceeding involving a minor child, the court has said that the closeness of the relationship between the child in interest and an intervenor is a critical factor in determining the sufficiency of the interest of an intervenor. *See A.G.*, 558 N.W.2d at 404 (noting that a court should look at the closeness of the biological connection, along with all other circumstances in determining whether one is "interested"); *C.L.C.*, 479 N.W.2d at 344-45 (finding preadoptive parents, not biologically related to the child, to be "interested" in guardianship proceeding of the child because the intervenors had formed a family relationship with the child for two years). Formation of a close relationship between the intervenor and the children in interest has supported a petition for intervention in a parent-child termination action and a child-in-need-of-assistance action. *See A.G.*, 558 N.W.2d at 404; *see also C.L.C.*, 479 N.W.2d at 344.

John has a strong bond with his son and has had him in his custody fifty percent of the time since the parties' dissolution. John was one of Spencer's custodians when Cynthia filed the petition. John provided financial support for Spencer. *See C.L.C.*, 479 N.W.2d at 344. And, although Spencer is an adult, John may be required to provide financial support for Spencer in the future. Furthermore, the court found in appointing a guardian that Spencer is a dependent adult in need of a guardian, and the disposition of this matter clearly can impair or impede John's ability to protect his relationship with his son.

Cynthia filed her petition while Spencer was yet a minor. In the verified petition she misrepresented to the court that she was Spencer's custodian when at that time she only shared custodial responsibilities with John.[1] She also failed to state John was Spencer's father and made no provision for notice to be served on John.[2] Making these false and inadequate representations when Cynthia knew them to be false and inadequate allowed Cynthia to be named guardian of Spencer without notice to John or input from him.

A judgment can be vacated when fraud is practiced in obtaining a judgment. Iowa R. Civ. P. 1.1012(2). Not every case of fraud in obtaining a judgment justifies relief therefrom, for to do so requires the fraud to be extrinsic or collateral to the matter first tried. *Scheel v. Superior Mfg. Co.*, 249 Iowa 873, 882, 89 N.W.2d 377, 382-83 (1958). Extrinsic or collateral fraud may consist of acts or promises lulling the defrauded party into false security, or preventing him from making defense, and many other acts. *Id.* at 882, 89 N.W.2d at 383 (citing *United States v. Throckmorton*, 98 U.S. 61, 65-66, 25 L. Ed. 93, 95 (1878), which held that there is an exception to the general rule of finality of judgments where, by reason of something done by the successful party, there was no adversary trial or decision of the issue in the case and where the unsuccessful party has

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[1] Iowa Code section 633.552 provides in relevant part:

> Petition for appointment of guardian. . . . The petition shall state the following information so far as known to the petitioner. . . .
> (5) The name and address of the person or institution, if any, having the care, custody or control of the proposed ward.

[2] Iowa Code section 633.554 addresses persons entitled to notice of the filing of a petition for guardianship and provides, "(b) Notice shall also be served upon: . . . (1) The parents of the proposed ward, if the proposed ward is a minor."

been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, the judgment may be set aside).

As a result of Cynthia's fraudulent verified representations to the court, John did not have any opportunity to participate in the guardianship hearing of Spencer.

In *Scheel*, the court noted:

> All deceitful practices in depriving or endeavoring to deprive another of his known rights by means of some artful device or plan contrary to the plain rules of common honesty constitutes fraud sufficient to warrant interference with a judgment by a court of equity. It matters little how fraud is effected, a court looks to the effect and asks if the result is a consequence of fraud warranting interference by a court of equity.

249 Iowa at 883, 89 N.W.2d at 383 (quoting 30A Am. Jur. *Judgments* § 791 (1958)). We also disagree with the probate court's ruling that John's original and amended applications to vacate the guardianship failed to comply with rule 1.1013. Those applications set forth John's grounds for relief in detail and his defenses on the merits to the guardianship. The initial application was verified. All were served on Cynthia's counsel and the guardian at litem. Although the probate court faulted John for not filing his application in the form of an original petition in a new case, it was not necessary to do so here because the guardianship was still an open matter.

Apart from the question of fraud, John was statutorily entitled to notice at the time the petition for appointment of guardian was filed. Iowa Code § 633.554(b)(1). He did not receive such notice. A judgment entered without proper notice is generally considered void and may be attacked at any time. *In*

re S.P., 672 N.W.2d 842, 845-46 (Iowa 2003). Such a judgment is subject to attack without regard to rules 1.1012 and 1.1013. *See Claeys v. Moldenschardt*, 148 N.W.2d 479, 482 (Iowa 1967).[3]

Equity supports vacating the guardianship and we do so here and remand to the court to consider the petition for appointment of guardian after notice to Spencer, his attorney, Cynthia, and John. Guardianship vacated and case remanded.

VACATED AND REMANDED.

[3] Because we conclude the guardianship should be set aside because of the extrinsic fraud in this case and the failure to provide statutorily required notice, we do not reach John's constitutional arguments. John argues section 633.544 is unconstitutional to the extent it allows a guardianship to be established for a person who has no spouse or children, without giving notice to that person's parents. John argues that is especially true when the person has been in the custody of both parents and both parents have ongoing financial support obligations to him.