IN THE COURT OF APPEALS OF IOWA

No. 6-498 / 05-1784
Filed October 11, 2006

JULIE FRYE AND SHAWN FRYE,
Mother and Father,
Petitioners-Appellants,

vs.

ELAINE STEARNS AND JIM STEARNS,
Guardians for Andrew Ash, T.J. Frye,
And Sebastian Frye,
Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Parents appeal the district court's order annulling writs for habeas corpus regarding custody of three minor children. **AFFIRMED.**

David H. Skilton of Cronin, Skilton & Skilton, Nashua, for appellants.

Michael B. Oliver of Oliver Law Office, Des Moines, for appellees.

Heard by Vogel, P.J., and Vaitheswaran, J., and Schechtman, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

VOGEL, P.J.

Julie and Shawn Frye appeal from the district court's order that annulled the Fryes' writs of habeas corpus regarding the custody of their two sons, Thomas James (T.J.) and Sebastian, and Julie's son Andrew. Because we conclude that continued guardianship and custody of the children by Jim and Elaine Stearns is in the children's best interests, we affirm the district court's order annulling the writs.

I. Background Facts and Proceedings.

Julie is the mother of Andrew, T.J., and Sebastian, ages seven, three, and two respectively at the time of hearing. Shawn is the father of T.J. and Sebastian.[1] In the spring 2003, a decision was made that Julie would reenlist in the United States Army to help support the family. As part of her reenlistment, Julie was required to attend a "refresher" training camp in South Carolina for a period of time. Julie believed she would then be assigned to a location in Iowa near her home in Des Moines. However, upon completion of her training in April 2003, Julie was immediately assigned overseas in Germany. Shawn remained behind in Iowa with the children, attempting to arrange for their travel to Germany to reunite with Julie. Shawn encountered some problems with obtaining passports for the children, however, and decided to travel to Germany to secure Julie's signature on some documents. In June 2003, Shawn left the children, then approximately ages two months, fourteen months, and five years old, with his mother and stepfather, Elaine and Jim Stearns.

[1] Another child was born to the couple in 2004, resides with them in Germany, and is not subject to these proceedings.

Passports were eventually obtained and sent to the Stearns. Julie and Shawn testified that they intended for the children to be sent to Germany once the Stearns received the passports; however, the fall school term had begun and Julie and Shawn contend they agreed to delay any transition until the Christmas break. They next allege the Stearns refused to send the children to Germany when Julie and Shawn requested they do so. At some point in mid-2003, Julie and Shawn executed "military powers of attorney" in favor of the Stearns for medical and other necessary care of the children. Another second power of attorney was executed by Julie and Shawn in November 2003, when the first instrument expired.

A conflicting version of the events emerged when Jim testified that Julie and Shawn essentially abandoned the children, leaving the Stearns fully responsible for their care. According to Jim, neither Julie nor Shawn had any contact with the children once they left the country, except to mention them at the end of a few emails to the Stearns. Jim also testified that Julie and Shawn never attempted to bring the children to Germany or even request that they be sent, but rather maintained they wanted to wait until they were "settled." It also appears that Julie and Shawn did not contribute any financial support for the children during this time, although they did send some school supplies and Christmas gifts. After more than one year had passed, and concerned that Julie and Shawn may attempt to suddenly take the children, the Stearns sought legal recourse by initiating guardianship proceedings in July 2004. Julie's parents, the Baumgartners, agreed with this decision. Notice was sent and Julie and Shawn were present for the contested guardianship hearing in September 2004. A

guardian ad litem appeared for the children and Julie also had appointed counsel. Following the hearing the probate court granted permanent guardianship of the children to the Stearns in October 2004 and also set forth in a separate order a visitation schedule for Julie and Shawn, as well as Julie's parents, the Baumgartners. The probate court found that it was in the children's best interests that the Stearns have guardianship, stating:

> [U]pon review of the file and after having heard statements of counsel in regards to the Frye's current living arrangement with Julie Frye being in active service of the military and stationed in Germany and the mental and emotional needs of the children, the Court believes that there is clear and convincing evidence that it would not be in the [children's] best interests to be placed back in the care and custody of [their] parents at this time, and that the Stearns are capable and have met the needs of the children such that a guardianship with the Stearns is in the [children's] best interests.

The visitation schedule allows for liberal, unsupervised visitation between the children, Julie and Shawn, and the Baumgartners; however, it appears the schedule was based upon Julie and Shawn living in close proximity to the children and not overseas. The probate orders on permanent guardianship and visitation were not appealed and remained in force at the time of the hearing on the writ in district court in August 2005.

Julie and Shawn filed separate petitions for writs of habeas corpus on each child regarding the Stearns guardianship of Andrew, T.J. and Sebastian. The petitions allege that the Stearns were "illegally restraining" the children, against their best interests, and against the "long-standing precedent of this State regarding [their] placement, custody, and well-being." The petitions also claimed the Stearns obtained custody "through violating our rights as citizens of this state

and the rights Julie has as a soldier serving our country. . . . through subterfuge of these proceedings to harm [the children], to harm us, and our family." The Stearns filed a motion to dismiss the petitions, arguing that the petitions were a collateral attack on the guardianship orders which were never appealed, and the prior proceedings were res judicata and collateral estoppel barring pursuit of the writs of habeas corpus. The district court heard the contested hearing on the petitions for writs of habeas corpus on August 18, 2005, with all parties present and represented by counsel. Following the evidence admitted and testimony by several witnesses, the district court ruled that the writs should be annulled as the children's best interests were served by continued guardianship by the Stearns.

> The court now turns to the true issue in this case. The best interests of these children is that they have a stable, secure, certain home with people they know are [their] parents and will be [their] parents without a doubt. In juvenile court terms, they need permanency. This is critical for Andrew. As for the younger children, the same is true but there is a different problem as well. They don't know Julie and Shawn as their parents at all and have bonded with the Stearns as their parents. All other things being equal, it would be in the children's best interests that Shawn and Julie fulfill that role. However, all things are not equal. Shawn and Julie cannot in thirty, or even fifty, days alleviate Andrew's severe anxiety, repair his distrust of them and also establish a parental relationship with the younger children. Further, even if they could do one or the other but not both in that time frame, it is not in the interest of these children that they be split up. All of the prior proceedings in the guardianship case were aimed at reuniting these children with Shawn and Julie. However, that was under the assumption that they would be available in Iowa for an extended transition period. They are not available for that. If they put themselves in a position to do that, soon, then reunification should be pursued at all prudent speed. However, it is not in the best interests of these children that the court simply orders that they be turned over the Shawn and Julie at the end of some arbitrary time period. Further, it is not in their best interest, especially Andrew's, to pursue reunification with no assurance that Shawn and Julie will be present and available for as long as necessary to make sure reunification can take place without further emotional damage to

> these children. Shawn and Julie's argument is very heavy on the issue of keeping children with their natural parents but very light on addressing their essential abandonment of the children and the impact that has had on them.

The district court also ordered the children's therapist, Sue Gauger, to develop and submit a revised visitation schedule to the court for reevaluation of the visitation schedule:

> The visitation schedule for [Julie and Shawn] shall not be premised on reuniting them with the children as parents. The visitation schedule shall accommodate the Baumgartners' right to have regular and substantial contact with the children as long as they do not involve the children by word or act in the issues of custody and visitation. Any party not satisfied with the visitation schedule developed by Ms. Gauger may seek hearing on the matter in the guardianship case. Likewise, any party may seek further review of the status of the guardianship in the event there have been any significant change in the parties' circumstances since the hearing in these cases.

The record does not indicate that any subsequent order was made regarding an alteration of the visitation schedule. Julie and Shawn did file motions to enlarge under Iowa Rule of Civil Procedure 1.904(2), which were denied but for two small factual corrections. Julie and Shawn appeal the annulment of the writs of habeas corpus.

II. Scope and Standard of Review.

An action by writ of habeas corpus challenging the propriety of custody of a child is equitable in nature, and we review such cases de novo. *Doan Thi Hoang Anh v. Nelson*, 245 N.W.2d 511, 513 (Iowa 1976). As an equity action, we give weight to the fact findings of the district court, especially as to the credibility of witnesses, but we are not bound by them. *City of Okoboji v. Okoboji Barz, Inc.*, 717 N.W.2d 310, 313 (Iowa 2006).

III. Guardianship Proceedings.

A good part of Julie and Shawn's argument at hearing on the writs and now on appeal deals with the process of the original guardianship proceedings and their participation in that action.[2] They frame this issue as a constitutional violation of due process and equal protection based upon parental protections under guardianship proceedings versus involuntary removal (child in need of assistance) proceedings under Iowa Code chapter 232 (2005). Although raised superficially in their petitions, Julie and Shawn did not pursue these arguments with the district court as they now frame them by comparing the protections of the guardianship process with those found in chapter 232, and the district court did not rule upon these issues. To that extent, they have not been preserved for our review. *See State v. Mulvany*, 600 N.W.2d 291, 293 (Iowa 1999) (stating that error preservation is required even on constitutional issues).

During hearing on the writs, Julie and Shawn did make other specific contentions regarding the propriety of the guardianship proceeding asserting: (1) Shawn did not receive sufficient legal notice of the guardianship proceedings (although he was present at the hearing); (2) Neither Julie nor Shawn were adequately represented by counsel; and (3) Julie was being penalized for her military service. While Shawn claims he was not served, the probate court made this finding in the guardianship appointment order regarding service to the parents: "Due, timely and legal notice of the filing of the above Petition has been served on the parent[s] of the Proposed Ward as required by law in regards to the Guardianship hearing." This order was not appealed.

[2] The entire guardianship record was not made part of the record on appeal in this case.

In the initial stages of the current case, Julie and Shawn denied ever being appointed counsel or being represented during the guardianship proceedings. However, Julie later conceded in her testimony that she did have a court-appointed attorney but argued that the attorney did nothing to promote her legal interests. Shawn testified that, although he was physically present at the guardianship hearing, he was told by Julie's attorney that he could not testify or even enter the courtroom. In its ruling on the motions to enlarge following annulment of the writs of habeas corpus, the district court stated that the court disregarded these arguments because they were both irrelevant and not credible. It appears to this court that Julie and Shawn seek to collaterally attack the guardianship orders, without having appealed the orders or claiming an irregularity at the time of the proceedings and asserting some facts outside of this record. *See Sanford v. Manternach*, 601 N.W.2d 360, 364 (Iowa 1999) (stating "[a] collateral attack upon a judgment is an attack made by or in an action or proceeding that has an independent purpose other than the impeaching or overturning of the judgment, although impeaching or overturning the judgment may be necessary to the success of the action . . ."") (quoting 47 Am.Jur.2d *Judgments* § 906, at 377-78 (1995)). Our case law is clear that a judgment is not subject to collateral attack except on jurisdictional grounds. *In re Estate of Lilienthal*, 574 N.W.2d 349, 352 (Iowa Ct. App. 1997). Furthermore, our supreme court has said

> It is well-settled law when a party appears at trial in person or by counsel with actual notice of the trial, this is sufficient notice for judgment to be entered against that party. This rule applies even if

> a claim had not been served on the party and a prayer for relief had not been made in any application. Under these circumstances a party cannot collaterally attack a judgment on the grounds it did not receive proper notice of the claim. Even though a judgment may be erroneous, if the court has jurisdiction over the person and the subject matter, the judgment is conclusive on collateral attack. The Trust's notice of Kirkeby's claim was sufficient notice to confer jurisdiction on the trial court. The Trust appeared at trial and participated in the proceedings. When a party is present in court or represented by counsel, an order allowing a claim is a final adjudication unless corrected on appeal.

In re Estate of Falck, 672 N.W.2d 785, 792 (Iowa 2003) (citations omitted). *But cf. Fairfax v. Oaks Development Co.*, 713 N.W.2d 704 (Iowa 2006) (holding that a single copy of a forfeiture notice that has been personally served on one of two contract vendees, married to each other, with the intent to serve both is not sufficient service of notice to sustain a valid forfeiture of the interests of both vendees under Iowa Code sections 656.2 and 656.3, when notice was challenged by the vendees prior to judgment in district court).

We agree with the district court's conclusions that the procedural defects of the guardianship action asserted by Julie and Shawn, not on direct appeal but now in the writ proceedings, are irrelevant and a collateral attack on the order granting guardianship to the Stearns. *See also State v. Benning*, 187 N.W. 435, 435-436 (Iowa 1922) (stating that although propriety of custody in a guardianship is at all times open to investigation by the court, if the court in that proceeding had jurisdiction of the subject-matter and of the persons, and its order was not appealed, the validity of such appointment is not open to denial or dispute in habeas corpus; the writ may only be sustained upon a showing of circumstances since arising to convince the court that best interests of the child necessitates a change in its custody.) We affirm on this issue.

IV. Habeas Corpus and Child Custody—Best Interests.

The primary focus of this appeal is whether the district court was correct in annulling the writs for habeas corpus. Julie and Shawn argue that the district court erred when it determined continued placement and guardianship of the children with the Stearns is in the children's best interests. The majority of the evidence at trial consisted of competing testimony of the Stearns' version of events versus what Julie and Shawn say occurred. The district court afforded Julie and Shawn's testimony little credibility, and we give weight to this judgment in view of the court's better position to determine the real truth as to credibility of witnesses. *Martin v. Martin*, ___ N.W.2d ___, ___ (Iowa 2006).

Julie has attempted to portray this situation as a soldier being kept apart from her children, however, that was not the underlying reason for the initial guardianship or the district court's decision. Rather, the district court found and we agree that Julie and Shawn all but abandoned their children to the care of the Stearns. There was no explanation as to why Shawn stayed in Germany, after he secured the children's passports, rather than returning home to resume care of the children. There was no explanation as to why neither Julie nor Shawn attempted to contact the children during their long absence, in an effort to maintain familial ties. Andrew, the eldest child, suffered greatly from this abandonment. There was no evidence or testimony to contradict the opinion of Sue Gauger, the children's therapist. Gauger unequivocally testified that the children, and especially Andrew who suffers extreme anxiety due to reactive-attachment disorder, need the stability and permanency that continued placement with the Stearns provides. Moreover, the two younger children, T.J.

and Sebastian, have lived with the Stearns most of their lives, have developed a child/parent bond with the Stearns, and do not even recognize Julie and Shawn as their parents. Gauger indicated that any potential change in placement would have to occur gradually over a course of no shorter than thirty to sixty days with frequent and prolonged in-person contact between the children and Julie and Shawn. Michael Sorci, the children's guardian ad litem, concurred with Gauger's concerns and recommended the children remain with the Stearns. Julie and Shawn do not appear to understand the needs of the children, or be willing to comply with any transition period should the guardianship be terminated. Shawn did not give a reason at the hearing why he could not work separately toward reunification with the children if Julie needed to stay in Europe. While they made numerous references to the services available for the children's care through military programs and exposure to other cultures, Julie and Shawn provided no reason save preference for biological parents to remove the children from a home where they appear to be currently stable and thriving.

Shawn made much of his poor relationship with his mother and her alleged domineering nature when he was growing up. However, the district court found Shawn minimally credible in light of the fact that Julie and Shawn felt comfortable enough with Elaine's child-rearing abilities to leave the children in her care for extended periods of time, even before Julie enlisted in the Army. The onset of Andrew's attachment disorder was prior to Julie leaving for Germany, during a time with the children were frequently left with the Stearns. We agree with the conclusions of the district court, the children's therapist, and the guardian ad litem that the children's best interests at this time are served by

remaining with the Stearns. *See also Thompson ex rel*. *Thompson v. Collins*, 391 N.W.2d 267, 267-269 (Iowa Ct. App. 1986) (holding that a parent who has no contact with his child and provides no child support for seven years has forfeited the benefit of any presumption of parental preference as to child custody, and the best interests of the child are served by awarding his custody to his maternal grandparents with whom he lived following his mother's death). In affirming the annulling of the writs, we do not intend to speak to the future placement of the children. The parties can seek a modification of the guardianship in probate court, as they deem necessary, and that court can oversee any recommended visitation or transition to protect the rights of all the parties and the best interests of the children. Therefore, we affirm the annulment of the writs of habeas corpus.

AFFIRMED.