

**IN THE COURT OF APPEALS OF IOWA**

No. 8-255 / 07-1636

Filed June 25, 2008

**IN THE MATTER OF THE GUARDIANSHIP  
AND CONSERVATORSHIP OF  
JOSEPH RYAN McDONALD**

**ED BALL JR.,**  
Petitioner-Appellant.

---

Appeal from the Iowa District Court for Mahaska County, E. Richard Meadows Jr., Judge.

Ed Ball Jr. appeals from the trial court's decision appointing Rita McDonald as Joseph McDonald's guardian. **AFFIRMED.**

Jane M. White of Parrish, Kruidenier, Moss, Dunn, Boles & Gribble & Cook, L.L.P., Des Moines, for appellant.

Steven Gardner of Kiple, Deneffe, Beaver, Gardner & Zingg, L.L.P., Ottumwa, for appellee.

Terri Buekelman, Pella, for the minor child.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

**HUITINK, J.**

Ed Ball Jr. appeals from the trial court's decision appointing Rita McDonald as Joseph McDonald's guardian. We affirm.

**I. Background Facts and Proceedings**

Six-year-old Joseph McDonald's mother, Rhonda McDonald, died on April 30, 2007, prompting his father, Ed Ball Jr., and his maternal grandmother, Rita McDonald, to file separate petitions for appointment as Joseph's guardian. Although the trial court temporarily appointed Ed as Joseph's guardian, his subsequent incarceration resulted in Rita's appointment as Joseph's temporary guardian.

The matter proceeded to trial on June 5, 2007. The trial court's resulting ruling provides:

At this time, Ed has not demonstrated he is a qualified and suitable parent warranting the parental preference. "A parent who has taken an extended holiday from the responsibilities of parenthood may not take advantage of the parental preference for custody." *In re Guardianship of Knell*, 527 N.W.2d [778,] 782 [(Iowa 1995)], citing *In re Guardianship of Stewart*, 369 N.W.2d 820, 823 (Iowa 1985) (citations omitted.) Ed has taken that extended holiday.

Denying a natural parent custody is not something the Court takes lightly. The Court looked closely for reliable evidence indicating Ed had become more than a casual friend to Joe—that he was becoming a responsible individual. The evidence was not to be found. The Court weighed Rita's and [Ed's] parenting strengths and considered the strong societal interest in preserving the natural parent-child relationship and concluded Rita has met her burden. Joe's long-range and immediate interests are best served by placing his custody with Rita.

The trial court accordingly appointed Rita as Joseph's guardian and granted Ed liberal visitation privileges.

On appeal, Ed claims:

THE TRIAL COURT ERRED IN DETERMINING THAT JOSEPH SHOULD BE PLACED IN THE GUARDIANSHIP OF RITA MCDONALD.

- A. The Trial Court failed to give adequate weight to the presumption that children are best served in the custody of their natural parents.
- B. The Trial Court erred in determining it was in Joseph's best interest to move to California rather than be with his natural father and family in Iowa.

## **II. Standard of Review**

The parties agree the petitions for the appointment of a guardian for Joseph are properly tried in equity. Therefore, our review is de novo.<sup>1</sup> *In re Guardianship of Knell*, 537 N.W.2d 778, 780 (Iowa 1995). We give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g).

## **III. Statutory Parental Preference and Best Interests**

Iowa Code section 633.559 (2007) sets forth the preferences for the appointment of a guardian for a minor child:

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.

---

<sup>1</sup> Although we stated in *In re Guardianship & Conservatorship of D.D.H.*, 538 N.W.2d 881, 883 (Iowa Ct. App. 1995), our standard of review for appointment of a guardian is for errors at law, our supreme court in *In re Guardianship of Knell*, 537 N.W.2d at 780, a later case, stated it is de novo.

Under this section, a strong presumption exists that a child's welfare is best served in the care and control of his or her natural parents. *Zvorak v. Beireis*, 519 N.W.2d 87, 88 (Iowa 1994).

This presumption is essential to the maintenance of society, for without it, man would be denaturalized, the ties of family broken, the instincts of humanity stifled, and one of the strongest incentives to the propagation and continuance of the human race destroyed.

*Risting v. Sparboe*, 179 Iowa 1133, 1136-39, 162 N.W. 592, 594 (1917).

This statutory presumption in favor of natural parents is, however, rebuttable. *In re Guardianship of Stodden*, 569 N.W.2d 621, 623 (Iowa Ct. App. 1997). "The burden of proof rests with the non-parent to rebut the presumption favoring the parent by establishing the parent is not a suitable parent and the child's best interests require that he [or she] remain in the non-parent's care." *Northland v. McNamara*, 581 N.W.2d 210, 213 (Iowa Ct. App. 1998). In determining the child's best interests, "we must take into account the strong societal interest in preserving the natural parent-child relationship." *In re Guardianship of Knell*, 537 N.W.2d at 781. We must also consider the long-range best interests as well as the immediate best interests of the child. *In re Guardianship of Sams*, 256 N.W.2d 570, 573 (Iowa 1977).

Our de novo review of the record discloses the following evidence: When Joseph was born in August 2000, Rhonda and Ed lived together sporadically in Oskaloosa but never married. In 2004 Ed moved to Florida, where he lived with Carmen Pacheco Ocasio, his current fiancée, and her children. After Ed moved to Florida, Rhonda and Joseph lived with Ron DeVries in Oskaloosa for about three years. During that time Rhonda supported Joseph's relationship with Ed

and his extended family. Ed claimed he visited Joseph during monthly trips to Iowa. DeVries, however, testified Ed did not visit Joseph while Joseph resided with him. In addition, a December 2005 Iowa Department of Human Services report noted Rhonda had not had contact with Ed for some time, he was living in either Florida or Tennessee, and she had no phone number for him.

In March 2007 Ed returned to Iowa. Ed testified he was temporarily living in Des Moines with his brother until he could move into a home owned by his sister in Oskaloosa. Ed testified he worked as a cook at Perkins in Des Moines and hoped to find work at Firestone and/or the Post Office. On cross-examination, however, Ed admitted he had been fired from his job at Perkins and was to start work at Village Inn in Des Moines the day after trial was completed.

Ed has at least four operating while intoxicated convictions dating from 1987 through 2003. Ed testified he had completed related treatment and probation requirements in 2006. Both Ed and his family testified he no longer drinks. As an additional consequence of his convictions, Ed's driving privileges were revoked, and he did not know when these privileges would be restored.

Besides Joseph, Ed has three other children all by different mothers. As occurred with Joseph, the Child Support Recovery Unit filed paternity and child support actions against Ed. Ed has sporadically paid child support for his four children but has not paid any support since 2005. Ed failed to appear for child support hearings in 2005, and the trial court issued warrants for his arrest. In May 2007 Ed was arrested and jailed on these warrants. Ed was found in contempt for non-payment of \$66,000 in child support. The trial court allowed Ed

to purge his contempt by paying \$300 in monthly child support. Ed conceded there was "a lot up in the air for me now."

At the time Joseph was born, Rita was living in San Jose, California. Rita spent ten days with Rhonda and Joseph after Joseph was born and visited them again during his first year. Since then, Rita's visits were less frequent. Rhonda and Joseph visited Rita in California three times for seven to ten days per visit. On occasion, Rita cared for Joseph for a few days while Rhonda visited a friend. In addition, Rita and Rhonda had frequent telephone contact.

Upon learning of Rhonda's death, Rita took family medical leave and traveled to Oskaloosa to care for Joseph. Because Rhonda's will nominated Rita as Joseph's guardian, Rita assumed Joseph's care and custody on May 9, 2007. Except for a few overnight visits with Ed, Joseph has since lived with Rita in a motel in Oskaloosa.

Rita has been involved in Joseph's education while she has cared for him in Oskaloosa. She testified she takes Joseph to school daily and his teachers report improvement in Joseph's concentration and behavior during the time he has been in her care.

Rita is a resident of Folsom, California. She rents a three-bedroom home. There is a grade school located a few blocks from her home. Rita has been employed by Wal-Mart for eighteen years as an invoice clerk and manager. Her annual earnings are approximately \$55,000 plus employee benefits.

Joseph's guardian ad litem reported she was unable to confirm Ed's claims concerning his residence and employment. The guardian ad litem

recommended Rita's appointment as Joseph's guardian, citing Ed's unstable lifestyle and Rita's more stable residential and employment circumstances.

We find the foregoing evidence weighs decisively in favor of Rita's appointment as Joseph's guardian. Like the trial court, we conclude Rita has met her burden to rebut the presumption that Joseph's best interests are served by placing custody with Ed. We accordingly adopt the trial court's reasoning set forth in the earlier-quoted decision as our own and affirm the trial court's decision appointing Rita as Joseph's guardian.

**AFFIRMED.**