IN THE COURT OF APPEALS OF IOWA

No. 9-895 / 08-1456
Filed January 22, 2010

IN THE MATTER OF THE GUARDIANSHIP OF R.B.,
Ward-Appellant,

And

COURTNEY J.M. MAYO,
Guardian-Appellant.

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

A child's temporary guardian and guardian ad litem appeal the district court's ruling placing the child with the child's father. **AFFIRMED.**

Theodore Karpuk, Sioux City, for appellant ward.

Brian Vakulskas of Vakulskas Law Firm, Sioux City, for appellant guardian.

Craig Lane, Sioux City, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

DOYLE, J.

A child's temporary guardian and guardian ad litem appeal the district court's ruling placing the child with the child's father. Upon our review, we affirm.

***I. Background Facts and Proceedings*.**

R.B. was born in August 2002 to Shawn Bair and Stacie Rasmussen. The parents were not married and separated approximately eight months after R.B.'s birth. Shawn then moved to Colorado, and R.B. continued to reside with Stacie in Iowa. Stacie lived near her sister, Courtney Mayo.

Shawn commenced a paternity action in Iowa at the time of his move. The decree, filed therein on February 12, 2004, awarded Stacie sole custody, subject to reasonable rights of visitation for Shawn as agreed by the parties. Shawn had minimal contact with R.B. after his move, though he had occasional phone contact with Stacie. Shawn regularly paid child support to Stacie and provided health insurance for R.B.

Shawn moved to the State of Washington in 2003 and then to California in 2005 and then back to Washington in 2006. Shawn married Amanda in 2006, and R.B. has a half-sister born of that relationship. The family moved to Colorado in 2007. Stacie married Terrance Cherkas in November 2003, and R.B. knew and referred to Terrance as her father. R.B. also has a half-sister born of Stacie and Terrance's marriage.

Stacie died unexpectedly in December 2006. At that time, Stacie and Terrance were legally separated. R.B. began living with Stacie's sister Courtney,

and Courtney petitioned to have herself appointed R.B.'s guardian.[1] Shawn opposed Courtney's petition and filed a cross-application for guardianship. A guardian ad litem (GAL) was appointed to represent R.B.

On March 28 and 29, 2007, a final hearing was held on the petition and cross-petition. Courtney testified that Stacie had told her and their parents that Stacie wanted R.B. to live with Courtney if something happened to Stacie, though Stacie had no will attesting to such. Courtney testified that R.B. was doing well in her home; she was able to continue her regular preschool with her cousin and half-sister and she was able to continue her close relationships with Stacie's family.

Shawn testified that he had been minimally involved in R.B.'s life due to interference by Stacie and her husband, though Shawn admitted he had not taken any legal steps to enforce his visitation rights. Shawn testified that after Stacie and Terrance separated, Stacie was amenable to Shawn and R.B. becoming reacquainted. Shawn testified that he and his wife had planned to travel to Iowa to visit R.B. and his family, and that Stacie was supportive of the visit. Shawn testified that Stacie died shortly before the scheduled trip so the visit never happened. Shawn testified that after Stacie's death, he had begun having regular phone contact with R.B. and had met R.B. at her counselor's office. Shawn admitted he had a criminal history including previous drunk driving convictions and a few other minor misdemeanors, but pointed out that his last criminal incident was in 2003. Shawn testified that he was employed full-time as

[1] R.B.'s step-father did not petition for guardianship or custody of R.B.

a manager and that his wife was a homemaker, raising their child. Shawn testified that he did not have a driver's license.

R.B.'s counselor's notes were admitted into evidence. At the time of trial, R.B.'s counselor opined that she did not feel R.B. would be ready for a longer visit with Shawn, and that R.B. was in no way ready to have a long weekend or even an extended visit with Shawn. She recommended that Shawn receive supervised visitation to ease R.B. into the relationship.

The parties were permitted to submit trial briefs thereafter. The GAL's brief recommended that Courtney be named R.B.'s guardian, noting the child's close relationship to her mother's family, the father's minimal presence in the child's life before the death of Stacie, and the father's criminal history.

On August 22, 2007, the district court entered its ruling. The court found that although Shawn had a criminal history, his criminal problems did not appear to be ongoing and did not remove him as a candidate for the caretaking of R.B.. Ultimately, the court found that both Shawn and Courtney would be suitable caretakers for R.B., but found that as R.B.'s natural father, Shawn had the natural right to assert his role as R.B.'s parent. The court determined that R.B.'s young age along with the relatively short time in relationship to her age that she had been with Courtney made Shawn's natural rights to father R.B. to be stronger. The court noted that any deficiencies in Shawn's relations with R.B. could be remedied with care, compassion, and the natural resiliency of young children. However, the court also found it was critical that R.B.'s relationship with Stacie's family remain intact in some valuable form. The court found there must be a transition to R.B.'s custody moving from Courtney to Shawn. The court

therefore appointed Courtney the temporary guardian of R.B. The court further ordered:

> The court intends to provide a twelve month reintroduction and transition time period for R.B. to be reintroduced to her father Shawn Bair and for the transition to occur to the extent where R.B. is transitioned to Shawn Bair's full custody. Upon completion of the transition and reintroduction period, this guardianship will be dismissed.

The court ordered that the parties provide the court with a written transition and reintroduction proposal.

The GAL and Courtney filed separate 1.904(b) motions. Among other things, they argued the court erred in determining R.B. should ultimately be placed with Shawn and that the guardianship should simply end after a year. They contended the court should retain jurisdiction to determine the transition to Shawn was still in R.B.'s best interests at the end of the reintroduction and to review the guardianship thereafter. Shawn resisted their motions. On October 2, 2007, the court denied the GAL and Courtney's motions. The court did clarify that the twelve-month reintroduction would begin after the parties' introduction proposal was approved and that the court would retain jurisdiction to vary, modify, amend, and or adjust the reintroduction schedule and transition as circumstances dictated. The court again ordered the parties to submit transition and reintroduction proposals.

The GAL and Courtney appealed. Shawn filed a motion to dismiss their appeals. On April 17, 2008, the Supreme Court entered its order dismissing their appeals. The Court found that the court's August 22, 2007 order was a non-final order and subject to further court action. The Court determined their appeals

should be treated as interlocutory appeals. The Court then dismissed the appeals.

While the appeal was pending, Shawn continued to have contact with R.B., including regular phone calls and a week-long visit in Colorado. After the appeal was dismissed, jurisdiction was transferred back to the district court. The court on April 30, 2008 again ordered that the parties provide reintroduction and transition proposals. A telephone hearing on the matter was held on June 23, 2008. Following the hearing, the court entered its order finding that a twelve-month reintroduction/transition period was no longer necessary or practical in the case. The court noted that the parties had been conducting some reintroduction and transition visits since the court's ruling, during the pending appeal, but the reintroduction and transition visits had not been as the court had hoped. The court ordered that Shawn should have R.B. for a week at the end of June/beginning of July in Sioux City. After that week, R.B. would be returned to Courtney's care until August 16, 2008, at which time R.B. was to be permanently placed in the custody, care, and control of Shawn. The court ordered that R.B. should continue in counseling with the specific design and attention of counseling to address the upcoming transition from Courtney's home to Shawn's home, and that R.B. should continue counseling after being moved to Shawn's home. The court encouraged that the parties make attempts to reconcile their differences for R.B.'s sake.

The GAL and Courtney subsequently filed separate 1.904(b) motions, ultimately arguing that R.B. should be placed with Courtney permanently and that

accelerated placement of R.B. with Shawn was not in R.B.'s best interests. Shawn resisted the motions. Thereafter, the district court denied their motions.

The GAL and Courtney now appeal.[2]

***II. Discussion*.**

On appeal, Courtney argues the district court erred in failing to appoint her as R.B.'s permanent guardian. Additionally, the GAL contends the district court erred in ordering (1) the sudden transfer of the custody of R.B. from Courtney in Iowa to Shawn in Colorado and (2) that such transfer be permanent and be immediately followed by the dismissal of the guardianship.

***A. Courtney's Appeal*.**

Guardianship petitions such as this one are tried in equity and, therefore, our review is de novo. *In re Guardianship of Knell*, 537 N.W.2d 778, 780 (Iowa 1995). The statutory provision governing this action provides:

> 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.

[2] Notices of appeal were filed September 9, 2008, so the Iowa Rules of Appellate Procedure in effect at that time are applicable to this appeal. We recognize those rules did not require the parties to insert at the top of each appendix page the name of each witness where that witness's testimony appears. The parties' appendix was filed May 12, 2009. Although the revised rules of appellate procedure, effective January 1, 2009, are not applicable to this appeal, it would have been helpful to the court had the parties followed the revised rules and placed the names of the witnesses at the top of each page where the witness's testimony appears. *See* Iowa R. App. P. 6.905(7)(*c*). Having the witness's name at the top of each page makes our job of navigating an appendix much easier, promotes judicial efficiency, and facilitates our duty to achieve maximum productivity in deciding justly a high volume of cases. *See* Iowa Ct. R. 21.30(1).

Iowa Code § 633.559 (2007). Section 633.559 does not give a biological parent an absolute right to be appointed guardian of his or her child, but instead creates a rebuttable presumption, which may be overcome. *Carrere v. Prunty*, 257 Iowa 525, 531-32, 133 N.W.2d 692, 696 (1965). The presumptive right gives way when that right has been relinquished or where the welfare and best interests of the child mandate a different result. *Id*. Ultimately, if the return of custody to a child's natural parent "is likely to have a seriously disrupting and disturbing effect upon the child's development," alternate custody arrangements should be made. *Knell*, 537 N.W.2d at 782.

On our de novo review, we find that the district court did not err in placing R.B. with Shawn. We agree with the district court that Courtney provided excellent care to R.B. at a time of great sorrow and would be a suitable guardian for R.B. However, we also agree that Shawn established that he too would be a suitable guardian for R.B. We agree with the district court that Shawn's past criminal history was in the past and has little bearing upon the present custody placement. Shawn provided support for R.B. throughout her life, as well as health insurance. We recognize that Shawn could have asserted his parental rights more forcefully throughout R.B.'s life, but Shawn's payment of child support, his providing of health insurance, and the phone records presented at trial evidence his attempts to remain involved in R.B.'s life. Although Shawn was not familiar to R.B. at the time of Stacie's death, the evidence at trial did not establish that R.B.'s placement with Shawn instead of Courtney would seriously disrupt R.B. or have a disturbing effect upon the child's development. We

therefore conclude the district court did not err in determining that R.B. should be placed with Shawn.

B. The GAL's Appeal.

Additionally, the GAL argues the district court erred in ordering (1) the sudden transfer of the custody of R.B. from Courtney in Iowa to Shawn in Colorado and (2) that such transfer be permanent and be immediately followed by the dismissal of the guardianship. Upon our review, we find no error.

Having concluded that the evidence at trial did not establish that R.B.'s placement with Shawn instead of Courtney would seriously disrupt R.B. or have a disturbing effect upon the child's development, and given Shawn's reintroduction into R.B.'s life and visits with her, we see no reason that the transfer from Courtney's care to Shawn's care should have been further extended, given the amount of time that passed after the court's original ruling and the transfer. Furthermore, because we find that the court did not err in determining that R.B. should be placed with Shawn, we agree that there was no reason for the court to retain further oversight of the matter. For all these reasons, we accordingly affirm the judgment of the district court

AFFIRMED.