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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-651 / 91-1250

IN RE THE MARRIAGE OF JERRY ROBINSON AND YVONNE ROBINSON 543

Upon the Petition of
JERRY ROBINSON,

Petitioner,

And Concerning
YVONNE ROBINSON,

Respondent-Appellee,

GERALD ROBINSON and ALICE ROBINSON,

Intervenors-Appellants.

Appeal from the Iowa District Court for Jasper County, Michael J. Streit, Judge.

Intervening paternal grandparents seek to modify the district court's custodial order placing custody of the children with their mother. **AFFIRMED.**

Richard E.H. Phelps II of the Brierly Law Office, Newton, for appellants.

Linnea M. Nelson, Legal Services Corp. of Iowa, Waterloo, for appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

Jerry and Yvonne Robinson were married in 1981. Two children were born during the marriage: a boy born in April 1982 and a girl born in September 1984. The marriage was dissolved in 1986. By stipulation of the parties, custody of the children was placed with Jerry. Yvonne was to have visitation every other weekend. The children lived with Jerry until April 27, 1991, when he was killed in a fire.

The present custody dispute is between Yvonne and Jerry's parents, Gerald and Alice Robinson. Immediately after Jerry's death the Robinsons filed a petition to intervene and modify the original custody order to obtain custody of the children. The district court issued a temporary order placing custody of the children with the paternal grandparents. An evidentiary hearing was held. The district court placed the children in Yvonne's custody.

Robinsons appeal, contending the district court erred in granting Yvonne permanent custody of the children. The grandparents assert the statutory presumption preferring parental custody does not apply to Yvonne or if it does apply, the evidence is sufficient to overcome the presumption.

Our review in this case is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id.

Two statutes incorporate the presumption favoring the natural parent in child custody disputes. Iowa Code section 598.41(6) provides

> [t]he parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian.

Iowa Code section 598.41(6) provides

> [w]hen the parent awarded custody or physical care of the child cannot act as custodian or caretaker because the parent has died or has been judicially adjudged incompetent, the court shall award custody including physical care of the child to the surviving parent unless the court finds that such an award is not in the child's best interest.

Robinsons assert the 1986 dissolution decree placing custody of the children with Jerry negated the statutory presumption preferring parental custody. Robinsons rely primarily on Alingh v. Alingh, 259 Iowa 219, 144 N.W.2d 134 (1966), and Thein v. Squires, 250 Iowa 1149, 97 N.W.2d 156 (1959), to support their assertion. Their reliance is misplaced. In Alingh and Thein parental preference was not a factor because a prior custody determination had involved a full evidentiary hearing and finding that the parental preference had been overcome. See Alingh, 259 Iowa at 226, 144 N.W.2d at 139 (court in second habeas corpus action need not consider parental preference where earlier habeas corpus decree fixed custody in grandparents); Thein, 250 Iowa at 1157-58, 97 N.W.2d at 162 (denying mother's application to modify prior habeas corpus decrees stating: "It is to be assumed the court knew and respected the presumption referred to in arriving at these earlier decrees.")

"Where the right of custody has not been adjudicated it will be presumed, in the absence of evidence of the contrary, that a child's welfare will be best served by committing it to the custody of a parent." Thein, 250 Iowa at 1157, 97 N.W.2d at 162. In the present case, no court has previously resolved a custody dispute by balancing the parental preference favoring Yvonne against other pertinent factors. In the 1986 dissolution, no evidentiary hearing on custody was held because Jerry and Yvonne stipulated the custody of the children would be placed with Jerry. Nor was an evidentiary hearing held when the court issued the temporary order placing custody of the children with the grandparents.

This case is similar to In re Guardianship of Stewart, 396 N.W.2d 820 (Iowa 1985). In Stewart a dissolution decree granted the father custody of the child. Id. at 822. Because the father was unable to care for the child, the maternal grandparents were appointed as guardians. Id. at 822-23. When the father asked the grandparents to relinquish custody of the child, they refused. Id. at 822. The grandparents claimed the order appointing them as guardians erased the parental preference. Id. at 823. Our supreme court disagreed and held the father did not relinquish his presumptive right to custody when he agreed the grandparents should be appointed as guardians for the child. Id. The court noted an involuntary guardianship would eliminate the parental preference from later

consideration only if the relative custodial rights of the proposed guardian and the parent were put in issue and tried. Id. at 824. In the present case there has been no prior evidentiary hearing putting the relative custodial rights of Yvonne, Jerry, or the grandparents at issue. We hold the trial court properly placed the burden on the Robinsons to overcome the parental preference.

Robinsons also contend they should be awarded custody of the children because the evidence is sufficient to overcome the statutory presumption preferring parental custody. As in all child custody matters, our first and governing consideration must be the best interest of the children. Iowa R. App. P. 14(f)(15).

We commend the Robinsons for being exemplary grandparents. We recognize, as did the trial court, the Robinson home offers many advantages to the children because of the age, wealth, and parenting experience of the grandparents. In considering the long-range best interests of the children, however, we determine such advantages are not sufficient to overcome the presumption these children belong with their mother. The trial court found Yvonne's past instability demonstrated by her frequent moves did not substantially interfere with her relationship with her children. The trial court also noted Yvonne has had past problems with drug abuse; however, there was no evidence she continues to have a problem. Although there was one episode of violence between Yvonne and her present husband,

a psychologist indicated this behavior does not pose a substantial threat to the children in the future. The evidence indicates Yvonne is maturing, and as a result, her life is becoming more stable. We conclude Yvonne is presently a fit and suitable parent who can provide a home for her children.

These children are fortunate to have two good homes available for them. On balance, however, we agree with the trial court the children should live with their mother and maintain close contact with their paternal grandparents during the periods of visitation outlined by the trial court.

Costs of this appeal are taxed to appellants.

AFFIRMED.