

IN THE COURT OF APPEALS OF IOWA

No. 6-665 / 96-446

FILED

NOV 27 1996

CLERK SUPREME COURT

**IN THE MATTER OF THE GUARDIANSHIP OF BETHANY RAE LEIGH
BRADBURY, A Minor Child,**

DANA HAUB,
Appellee,

vs.

DONNA BRADBURY,
Appellant.

Appeal from the Iowa District Court for Cedar County, James E. Kelley,
Judge.

Donna appeals the district court's order terminating the guardianship and
granting Dana physical custody of Bethany. **AFFIRMED.**

David L. Scieszinski, Wilton, for appellant.

Bradley L. Norton of Norton & Norton, P.C., Lowden, for appellee.

Stuart P. Werling, Tipton, attorney for minor child.

Heard by Sackett, C.J., and Streit and Vogel, JJ.

VOGEL, J.

The mother, Donna, appeals the district court's order terminating the guardianship of her eight-year-old daughter, Bethany, and granting the father, Dana, physical custody. She argues the district court: (1) lacked subject matter jurisdiction; (2) erred in awarding Dana physical care of the child; and (3) abused its discretion in not allowing Bethany to testify.

Donna and Dana were never married. Bethany was born in January of 1987 and lived with Donna until 1993. Those years were very unstable for Bethany as Donna moved many times, had only sporadic jobs, and was heavily involved with alcohol and other drugs. Donna attempted suicide in 1989. Paternity was established in district court in Guthrie County in July of 1990 and Dana was ordered to pay child support.

In January 1993, the district court in Cedar County entered an guardianship order, placing Bethany with Donna's sister, Deborah Pratt. The purpose of the guardianship was to provide care for Bethany while Donna tried to straighten out her life. After Bethany moved in with Deborah and her family, Dana began exercising regular visitation. Meanwhile, Donna's life continued to be unstable as she moved about, and had only occasional contact with Bethany. In late 1994, Donna petitioned the district court to terminate the guardianship. Dana resisted and filed a petition to establish custody in May of 1995. The two petitions were consolidated and a trial followed from which this appeal stems.

We review on errors at law and will affirm if there is any substantial evidence to support the trial court's findings. *In the Matter of the Guardianship of Murphy*, 397 N.W.2d 686 (Iowa 1986). Questions of a court's subject matter jurisdiction are reviewed at law. Iowa R. App. P. 4.

Donna argues the district court had no subject matter jurisdiction as paternity was established in Guthrie County; and, therefore, asserts, under Iowa Code section 600B.31, Guthrie County is the only county that Dana could petition for custody. Although section 600B.31 states the court has continuing jurisdiction to, among other things, determine custody; jurisdiction is not limited to the court sitting in Guthrie County. Iowa courts have statewide jurisdiction and Donna's argument only goes to venue, not subject matter jurisdiction.

The district court was the court in which the petition for guardianship was filed and in which the order was entered. Donna argues, although the guardianship petition was filed in district court under the probate code, it should have been filed in juvenile court. Donna contends Bethany was a child in need of assistance pursuant to Iowa Code section 232.2(6)(k) (1993) and under Iowa Code section 232.61 the juvenile court has exclusive jurisdiction unless concurrent jurisdiction is granted to the district court. Iowa Code section 633.552 provides a minor may have a guardian appointed upon a showing that the minor's "best interests require the appointment of a guardian." Donna's argument the district court never had jurisdiction is without merit

as the juvenile court was never involved, nor was it required to be involved, in the guardianship.

With regard to the custody issue, we review de novo. Iowa R. App. P. 4.

Donna argues that because she had sole custody based on Iowa Code section 600B.40, Dana's petition for custody was actually one for a modification of custody, not an original custody decision under section 598.41. Such an interpretation of the proceedings would require Dana to show a substantial change of circumstances, as well as a showing he could minister to Bethany more effectively than Donna could. We find this to be a misreading of Iowa Code section 600B.31 which states, "the court has continuing jurisdiction to determine the custody in accordance with the interests of the child." When the issue of custody arises from the competing claims of unwed parents, the critical issue is not which parent possesses the greater right to the child. Rather, controlling consideration must be the interests of the child. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981).

During the first six years of Bethany's life, neither parent put the child's best interests ahead of the parent's own interests. Nonetheless, a review of the conditions in the parent's lives as of the time of the trial revealed Dana to be the superior parent. He has been a regular part of Bethany's life since the guardianship order in January 1993, with Dana frequently and regularly visiting Bethany. The child support records indicate Dana is current in his support. Dana has been married since August of 1990, and he and his wife have lived in the same home on an acreage for six years. Dana

has been employed by TCI as a cable installer technician for the past eight years. In contrast, Donna has moved on many occasions, beginning in 1993 after Bethany was living with her aunt. For two years Donna lived with a man in Georgia who was abusive to her. In October of 1995, she married another man who had a long criminal record, including three OWI convictions. He had no drivers license yet testimony revealed Donna allowed Bethany to ride in the car with this man driving.

Dana has a longer history of stability which is our best indicator of Dana's ability to meet Bethany's present and future interests. *See In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993) (past performance is indicative of the quality of future care a parent is capable of providing). We further find Dana to be able to better minister to Bethany's needs.

Donna contends it was an abuse of discretion to not allow Bethany to testify. The district court has discretion in determining whether to allow young children to testify regarding a custody preference. *See In re Marriage of Abkes*, 460 N.W.2d 184, 186 (Iowa App. 1990). The court has an inherent power to protect children in such situations. *Id.* Bethany was nine years old at the time of trial. The trial court, believing it was not in Bethany's best interest to testify at her young age, did not allow her to do so. We find no abuse of discretion in the trial court's ruling on this issue.

Dana requests attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial

positions. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). We determine each party should pay his or her own attorney fees for this appeal.

Upon consideration of all arguments raised by the parties on appeal, we affirm the decision of the district court.

AFFIRMED.