FILED
JUN 24 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA 305

IN THE MATTER OF THE CONSERVATORSHIP AND GUARDIANSHIP OF STEPHANIE WELLS

RUBY HEUN,

Appellant,

MICHAEL P. WELLS and MARY ELLEN WELLS,

Appellees.

Filed June 24, 1980

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64281

Appeal from Carroll District Court - James P. Smith, Judge.

Maternal grandmother appeals trial court order denying her petition to adopt her minor grandchild and granting the similar petition of the child's uncle and his spouse. AFFIRMED AS MODIFIED.

Dan Connell of Connell & Duffy, P.C., Storm Lake, Iowa, for appellant.

Robert S. Bruner of Bruner & Bruner, Carroll, Iowa, for appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Ruby Heun, maternal grandmother of Stephanie Wells, appeals from district court order appointing Michael and Mary Ellen Wells as Stephanie's guardian and conservator.

Stephanie was born on June 30, 1976. At that time her parents, Kenneth Wells and Loretta Heun, were unmarried teenagers. Loretta and Stephanie lived in the home of Mrs. Heun, Loretta's mother, until Loretta and Kenneth Wells were married in October of 1977. Thereafter Stephanie lived with her parents in a separate household.

Kenneth and Loretta Wells were killed in an automobile accident on February 25, 1979. Shortly thereafter, two competing petitions were filed for the appointment of guardians and conservators for Stephanie. One petition was filed by Ruby Heun, Loretta's mother, asking that she be appointed guardian and conservator. The other petition was filed by Bernard Wells, father of Kenneth Wells, requesting that Michael and Mary Ellen Wells be appointed guardian and conservators. Michael Wells in the brother of Kenneth Wells and the uncle of Stephanie. Following an evidentiary hearing the trial court denied the Heun petition and granted the Wells petition.

The evidence presented in the district court shows that Ruby Heun is 53 years old. She is employed as a cook at a restaurant, earning about $125 per week. She also receives $370 per month in veterans' benefits, and rental income from an inherited 1/8 interest in an 80-acre farm. She resides in Carroll, Iowa, with her youngest daughter, Linda, age 18, and, since the death of Stephanie's parents, with Stephanie. Linda is still in high school but the record shows some indication on her part to marry and leave Mrs. Heun's household.

Michael and Mary Ellen Wells reside in Newton, Iowa. Michael is 30 years old and Mary Ellen is 27. Both are graduates of Iowa State University and both are employed. Their combined gross salaries total approximately $40,000 per year. They have one child, an 8-year-old daughter.

Evidence at the trial also included a deposition by a psychologist, Dr. John Garfield, who had spent about two hours observing Stephanie and Mrs. Heun in the latter's home. This witness testified that he believed a very close bond existed between Stephanie and Mrs. Heun and that he feared Stephanie would suffer psychological injury if removed from that home.

The trial court found that either Ruby Heun or the Wells couple would offer Stephanie love, and the court stated that the choice was very difficult. However, the court "reluctantly" concluded that Stephanie's long-range best interests would be served by placing her in the custody of the Wells couple.

The court made the following comments in support of its conclusion:

> Stephanie will be loved in either instance. The court simply believes that her chances for a fruitful and happy life are better with Mr. and Mrs. Wells. Ruby Heun would give it everything she has, but in spite of her love for and

305B

> attitude about Stephanie and her dedication, her age is against her; as is the time and time frame required in her work. From an education standpoint, although Ruby's intentions are high, the record with her own daughters, educationally, has not been good; and this occurred during the prime of her life.

The latter comments of the trial court referred to the fact that three of Mrs. Heun's four children failed to finish high school. The fourth, Linda, was also considering dropping out of school at the time of the trial.

I. The present case, although cast in procedural form as a guardianship matter, is a child custody dispute. As such, we are bound to apply the principles that the governing consideration is the best interests of the child. Iowa R. App. P. 14(f)(15). That such rule applies in guardianship matters involving custody is clear from Patten v. Patrick, 276 N.W.2d 390, 397-98 (Iowa 1979); In re Lehr's Guardianship, 249 Iowa 625, 633, 87 N.W.2d 909, 914 (1958). Our review is **de novo**. Patten, 276 N.W.2d at 393. Accepting these rules of decision, we conclude that the evidence fully supports the trial court's order.

Mrs. Heun has given much of herself to Stephanie throughout the child's nearly four years of life. She has had more interpersonal relationship with the child than have the Wells. As a result, there will be some emotional trauma for both Mrs. Heun and Stephanie if the custodial order of the trial court is affirmed. But we nonetheless agree with the trial court's finding that, unfortunate as this circumstance is, it is outweighed by the evidence of the Wells' superior abilities to minister to the long term best interests of Stephanie. We therefore affirm the order granting custody to the Wells.

II. The Wells' cross-appeal is from that portion of the trial court's order taxing costs against them, which include an attorney fee for the lawyer appointed to represent Stephenie's interests. We believe the trial court had discretion to tax the costs against the Wells. Wymer v. Dagnillo, 162 N.W.2d 514, 519 (Iowa 1968). But, we cannot agree that the attorney fee was properly includible as part of the taxable costs. In order for attorney fees to be taxed as costs, there must be statutory authority for such action. Dole v. Harstad, 278 N.W.2d 907, 909 (Iowa 1979). We find no statute authorizing such action in custody matters not involving the dissolution of a marriage. We accordingly modify the order taxing costs so as to delete therefrom the attorney fee of Mr. Beltz. As so modified, the decree is affirmed.

AFFIRMED AS MODIFIED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J. (dissenting)

In a child custody dispute, the court must determine what is in the best interest of the child. Often this determination becomes a matter of choosing the least detrimental alternative. In re Marriage of Winter, 223 N.W.2d 165 (Iowa 1974). I disagree with the trial court's decision in this regard.

The psychological damage that occurs when a child-parent relationship is severed outweighs material benefits that may accrue. Testimony by Dr. Garfield concerning the bond between Stephanie and Mrs. Heun and the injury that would result from separation supports my concern.

Ruby Heun has provided love and material support for Stephanie throughout her young life. Since the death of Stephanie's parents, Mrs. Heun has been the only parent. She has demonstrated her unfailing devotion to family by her hard work and support for Stephanie's mother during what must have been a difficult time.

The Wells family, on the other hand, offered no support to Stephanie. For months of her life, they did not acknowledge her existence. Nothing prevented the Wells family to contribute support in the past. If their concern for Stephanie continues, nothing prevents them from offering Mrs. Heun material assistance for Stephanie's benefit in the future.

The child is in a loving, nuturing atmosphere. Removal from Mrs. Heun would not be in her best interests. Therefore, I respectfully dissent.