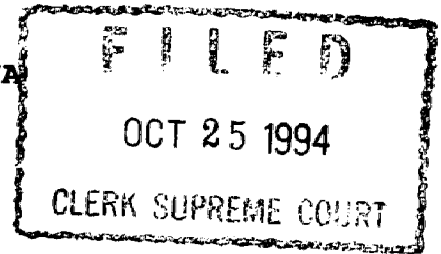


IN THE COURT OF APPEALS OF IOWA

No. 4-368 / 94-0156



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IN THE MATTER OF THE GUARDIANSHIP OF T.N.B., Child,

V.D.B.,

Appellant,

R.S.E.,

Appellee.

Appeal from the Iowa District Court for Louisa County,
R. David Fahey, Judge.

V.D.B., the paternal grandmother, appeals from a judgment appointing the maternal aunt, R.S.E., guardian of T.N.B., a minor child. **AFFIRMED.**

Michael J. Schilling of Cahill, Dieterich & Schilling Law Office, Burlington, for appellant.

Roger A. Huddle of Weaver & Huddle, Wapello, and Jane E. Reidel of J.W. Conway Law Offices, Muscatine, for appellee.

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

PER CURIAM

The issue in this appeal is whether the trial court correctly established a guardianship and guardian for Tyler born August 24, 1993. Tyler is the son of Nicole Russell and Keith Gregory Brown, Jr., hereinafter referred to as Greg. Tyler's parents had never married and his mother, Nicole, was killed in a car accident in August 1993. At the time of Nicole's death, Tyler was in her custody.

Two days after Nicole's death, Rhonda Elmore, Nicole's half sister, filed a petition asking to be appointed Tyler's guardian. Greg answered and requested he be appointed Tyler's guardian. The district court appointed Rhonda and Greg's mother, Vickie Brown, as temporary co-guardians of Tyler. Subsequently, Greg and Vickie filed a joint petition requesting co-guardianship of Tyler. After a trial, the district court found Greg not qualified or suitable to be Tyler's guardian and appointed Rhonda Elmore as Tyler's guardian.

Vickie Brown appeals. Vickie contends she and Greg, who does not appeal, should have preference as guardians and, as a grandmother, she should be given preference over an aunt for appointment. Vickie also contends she is better able to care for Tyler. We affirm.

The initial question is our scope of review. Vickie contends we review de novo because in a pretrial ruling the trial court determined the case would be heard in equity. Rhonda asserts the matter was properly tried at law. Iowa

Code section 633.33 (1993), with respect to probate proceedings in general, provides:

[a]ctions to set aside or contest wills, for the involuntary appointment of guardians and conservators, and for the establishment of contested claims shall be triable in probate as law actions, and all other matters triable in probate shall be tried by the probate court as a proceeding in equity.

Iowa Code section 633.555 (1993) deals more specifically with the opening of guardianships and provides:

[a]ll other pleadings and the trial [on the guardianship petition] shall be governed by the Rules of Civil Procedure. The cause shall be tried as a law action, and either party shall be entitled to a jury trial if demand is made therefore as provided by the Rules of Civil Procedure.

In view of the specific language of these statutes, the legislative intent to provide a trial at law is clear. In re Guardianship of Murphy, 397 N.W.2d 686, 688 (Iowa 1986). If we review on error, we will affirm if there is any substantial evidence to support the trial court's findings. Id.

However, our scope of review is determined by the nature of the trial proceeding. Iowa Fuel and Minerals, Inc. v. Iowa State Board of Regents, 471 N.W.2d 859, 862 (Iowa 1991). Where a case is designated and tried as an equity action, it will be treated as an equity action on appeal. Stone v. City of Wilton, 331 N.W.2d 398, 401 (Iowa 1983). We determine our review to be de novo. Iowa R. App. P. 4.

Vickie first contends there is a preference for a natural parent to be guardian of a minor and this preference creates a presumption in her favor.

We agree with Vickie that there is a strong presumption a guardian be a parent.

Iowa Code section 633.559 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. Subject to these preferences, the court shall appoint as guardian a qualified and suitable person who is willing to serve in that capacity.

The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian. See also In re Guardianship of Sams, 256 N.W.2d 570, 573 (Iowa 1977). The presumption is not overcome only by a showing the parent requires assistance to care for the child. See In re Guardianship and Conservatorship of Rohde, 503 N.W.2d 881, 883 (Iowa App. 1993).

The Iowa courts have also shown a strong preference for grandparents over others. In re Guardianship of Reed, 468 N.W.2d 819, 823-27 (Iowa 1991) (maternal grandfather and wife given guardianship of orphaned child despite fact parents had expressed their wish their parents not care for child); In re Marriage of Welbes, 327 N.W.2d 756, 758 (Iowa

1982) (grandparents preferred over the ministrations of strangers); Holmes v. Derrig, 127 Iowa 625, 630-31, 103 N.W. 973, 975 (1905) (court found grandparents natural guardians where parents deceased and the court said, "The grandparents, by virtue of their relationship, their character as natural guardians, and their actual possession and care of the child, stand first in the legal right to its custody . . .") (quoted with approval in Reed, 468 N.W.2d at 825, and In re Guardianship of Lehr, 249 Iowa 625, 636, 87 N.W.2d 909, 916 (1958)); In re Guardianship of Benton, 92 Iowa 202, 205-06, 60 N.W. 614, 615 (1894) (court said "[I]t seems to us that they [grandparents] should, in the event of the death of both parents, be entitled to the custody of their grandchildren, and that the common law rule, that they are guardians by nature, should obtain in this state.").

The question is not who would be the better guardian. If that were the question, we would be choosing the better caretaker without considering the degree of relationship. See Reed, 468 N.W.2d at 825. We believe our past jurisprudence belies this approach and emphasizes the importance of keeping a child within the family whenever possible. Id. Therefore, the issue is whether the rejection of the grandmother, who will foster Tyler's relationship with his father, in favor of the mother's half sister is supported by substantial evidence. Id.

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There are factors that support the appointment of each but there are also factors that negate against the appointment of each. Neither is married. Vickie has a long-term relationship with a man. Rhonda, who was twenty-six at the time of trial, has a live-in companion who is twenty-four and unemployed. The relationship has been stormy. Her companion does little to assist with Tyler's care. Rhonda works as a beautician and also receives about \$1000 a month workers' compensation benefits. Her husband was killed in a work-related accident. The benefits will be paid to her until she dies or marries.

There is evidence Rhonda and her live-in companion have purchased beer and liquor for children under the drinking age and have allowed children under the drinking age to have parties where alcohol is served in their rural home. Rhonda had a close relationship with her half sister. Rhonda's mother, who also is Nicole's mother, does not seek guardianship and testified she did not wish to raise the child.

Vickie who was thirty-six at the time of the hearing lives in a nice home with her children. The home is adequate. There is a public school and a high school close to the home. Currently living in the home are children Rocky, Greg's half brother, and Nicole, Greg's sister. Both Rocky and Nicole have a good relationship with Tyler and help with his care. Rocky is in junior high, in

sports, and on the honor roll; Nicole attends the local area college. Neither child has any significant problems. Vickie is not currently employed outside the home. She receives some form of welfare benefits. Greg receives SSI.

Two child abuse reports were introduced into evidence. The trial court reserved ruling on the admissibility of the reports but referred to abuse by Vickie in its findings. Vickie contends the reports should not have been admitted. The reports deal with a black eye Greg received when he was ten and a bruise he had on his left cheek when he was eleven. Neither injury required medical attention and were inflicted by Vickie who admitted hitting Greg after he hit her. Greg admitted hitting his mother. The reports also indicate the investigator found Vickie's three children healthy and there was no other evidence of abuse but that Greg had behavior problems but he and Vickie were in counseling at the time. The counselor gave Vickie good marks.

While Vickie should not have hit Greg, she did not injure him seriously, she was forthright about the incident, and she was cooperative in working with outside professionals.

The trial judge seriously discounted Vickie because he found Vickie was not realistic in her assessment of Greg and, because of this fact, she was not a suitable guardian. Vickie argues such a characterization is not

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fair. She points out Greg suffered brain damage as a result of contracting encephalitis. That there was originally a misdiagnosis of Greg's condition. That she has attempted to cooperate with care providers and counselors and has been frustrated in the process. Greg was hospitalized most recently at the Menninger Clinic and she contends his condition is improved. Vickie advances there is no evidence Greg has ever hurt Tyler in any way and even Nicole's mother recognizes Vickie's love for Tyler and her ability to care for him. Vickie also relates she took care of Tyler during Nicole's lifetime and she and Nicole's mother provided care for Tyler during a five-day period when Nicole went on vacation. Nicole's mother took care of Tyler at night and testified the situation went well.

Both Rhonda and Vickie point to their involvement with Nicole and Tyler. We find both played an important role in their lives and supplied supplemental services to assist Nicole with her pregnancy and the ultimate care of Tyler. Rhonda and Vickie both went to Tyler's aid when Tyler was hospitalized as a result of injuries received in the accident that killed Nicole.

We give consideration to the trial court assessment of credibility and agree with the trial court that Vickie is not a suitable custodian. We have concern about the position of Rhonda's live-in boyfriend in Tyler's life. The boyfriend shows no ambition and does not exhibit

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concern for Tyler. Rhonda is twenty-six years old and is well established. She loves Tyler. We find no reason to disturb the trial court decision. We affirm.

AFFIRMED.