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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-413 / 89-458

IN THE MATTER OF THE GUARDIANSHIP OF MIA RAY MYSAK, a Minor.

Appeal from the Iowa District Court for Black Hawk County, George Stigler, Judge.

The guardian, Mia's grandmother, appeals from a district court order terminating her guardianship of Mia and returning the child to the natural mother. **AFFIRMED.**

Stanford Patterson of Patterson Law Firm, Waterloo, for guardian-appellant Rebecca A. Mysak.

Sara Kersenbrock, Waterloo, for mother-appellee Melissa Baldwin.

Patricia A. McGivern of Clark, Butler, Walsh & McGivern, Waterloo, the ward.

Timothy J. Luce of Randall, Anfinson & Luce, Waterloo, for the putative father, Dennis Nielson.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

The guardian, Mia's grandmother, appeals from a district court order terminating her guardianship of Mia and returning the child to the natural mother. The guardian contends that the district court erred in: (1) placing an improper burden on the guardian to prove the incapability of the natural mother to care for the child; and (2) terminating the guardianship contrary to the law and facts of this case. We affirm.

Our review in cases such as these is de novo. In re Guardianship of Sams, 256 N.W.2d 570, 572 (Iowa 1977); 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.

On June 28, 1984, Melissa Mysak (Melissa) gave birth to Mia Ray Mysak (Mia). At the time, Melissa was 14, unmarried, and still in school. On February 7, 1985, a guardianship of Mia was established with the child's maternal grandmother, Rebecca Mysak (Rebecca), named as guardian.

In September 1985, Melissa gave birth to a son, Joseph Baldwin. No guardianship was established for Joseph. Subsequently, in December 1987, Melissa married Robert Baldwin. On October 6, 1988, Melissa filed this application to terminate this guardianship.

Finding no reason to determine that Melissa was unfit to raise Mia and that her two children should remain separated, the district court terminated the guardianship. The guardian has filed this appeal.

Rebecca contends the district court erred in placing the burden on her to prove the need for continuation of the guardianship. We disagree.

We find In re the Matter of Guardianship of Stewart, 369 N.W.2d 820 (Iowa 1985) to be the controlling authority in this case. In Stewart the Iowa Supreme Court terminated a guardianship and transferred custody of a minor child from a grandparent to the father. The court held that the trial court properly placed the burden on the guardian to overcome the parental preference and show that the best interest of the child requires continuation of the guardianship. Id. at 824.

Here, as in Stewart, evidence establishes that the guardianship was set up to be a temporary and not a permanent custodial arrangement. See Stewart, 369 N.W.2d at 823. At the time Melissa gave birth to Mia she was 14 years old, unmarried, immature and still in high school. Melissa testified that she consented to setting up the guardianship "[b]ecause I was going back and forth to school, and I couldn't afford to keep getting out all the time to take her to the doctors and stuff, and I needed help, so I asked my mom to help me." During the guardianship Melissa lived with her daughter and Rebecca for almost three years.

"[A] parent who has taken 'an extended holiday from the responsibilities of parenthood' may not take advantage of the parental preference for custody." Stewart, 369 N.W.2d at 823, (quoting Carrere v. Prunty, 257 Iowa 525, 531-32, 133 N.W.2d 692, 696 (1965)). As noted, Melissa lived with her daughter and Rebecca for almost three years of the guardianship. Melissa left Rebecca's home in November 1987 due to their disagreements regarding raising and disciplining Mia. Thereafter, Melissa's visitations with Mia were limited and supervised at the request of Rebecca. Melissa is now married and has a second child. Melissa requested termination of the guardianship because she now believes she's ready willing and able to take care of Mia.

The guardianship was set up with the consent of Melissa. There was no hearing regarding Melissa's fitness as a custodian. The guardianship order was not the equivalent of a final dissolution or other decree looking to the long-term best interest of Mia. Here the guardianship order was more

> akin to an agreed order for temporary custody entered during the pendency of dissolution proceedings. Such an order is superseded by the more permanent dissolution decree itself. . . . 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 in the guardianship proceeding.

Stewart, 369 N.W.2d at 824 (citing 39 Am. Jur. 2d Guardian and Ward § 66 (1968)).

We find no error by the district court in placing the burden on the guardian to prove the need for continuation of the guardianship.

Next, Rebecca contends that the district court erred in terminating the guardianship contrary to the law and facts of this case. We disagree.

In child custody cases, the best interests of the child is the first and governing consideration. Iowa R. App. P. 14(f)(15). The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983) and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The presumption of parental preference must also be considered. Stewart, 369 N.W.2d at 824.

After observing the witnesses to determine the best interest of Mia the district court stated:

> I've listened attentively, I think, to everyone who has testified this morning; and I can't see anything in this record at this juncture to raise any concerns that Mia would be in any physical or emotional danger were she returned to her mother's care. I also don't see any compelling reason on this record at this juncture to believe that Mia and her younger brother ought not be raised in the same family unit. The realities of this situation is that Ms. Baldwin is now married,. . . there is a family unit consisting of Robert Baldwin and Melissa Baldwin and Joseph Baldwin; and Mia, regardless as to how the grandparents may feel or how the mother may feel,

> has every right to be with her brother absent compelling reasons; and just as strongly Joseph has a right to be with his sister absent compelling reasons why they ought to be kept apart.
>
> . . . I think the best resolution is . . . that the guardianship ought to be terminated but out of an abundance of caution for Mia's safety we ought to have the Department of Human Services involved in supervising the reintroduction of Mia to her mother's home.

In its ruling the district court concluded:

> Section 633.559 of the Code gives a preference to a natural parent as against a third party, even a third party who is a maternal grandmother in the establishment and maintenance of guardianship proceedings. Case law also dictates that siblings ought not be separated absent compeling [sic] reason. Mia is now four years of age and knows of the existence of her three year old brother. No reason exists why the two siblings should be kept apart, and the Court has no concern but that Melissa is a qualified parent entitled to be guardian of her own child.

We agree with the decision of the district court. We find it in Mia's long-term best interest to terminate the guardianship. We find no error by the trial court and affirm its decision in all respects.

AFFIRMED.