

IN THE COURT OF APPEALS OF IOWA

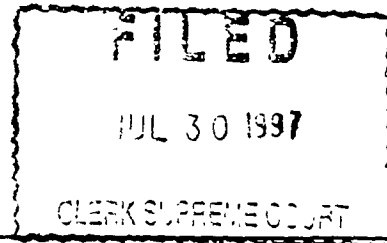
No. 7-315 / 96-2023

000253

**IN THE MATTER OF THE GUARDIANSHIPS OF JEREMY S. JEAMBEY
and JENNA L. JEAMBEY,**

GREGORY JEAMBEY, Father,

Appellant.



Appeal from the Iowa District Court for Hancock County, John S. Mackey,
Judge.

Gregory Jeambey appeals from the decision of the district court granting a
petition for the appointment of an involuntary guardian for his minor children.

AFFIRMED.

James P. Piazza and James P. Piazza, Jr., Des Moines, for appellant.

J. Mathew Anderson of Laird, Heiny, McManigal, Winga, Duffy &
Stambaugh, P.L.C., Mason City, for appellee maternal grandmother.

Considered by Cady, P.J., Vogel, J., and Hayden, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order
of the Iowa Supreme Court.

HAYDEN, S.J.

This case has its origins in a petition for dissolution of marriage Sarah Jeambey filed seeking to dissolve her marriage with her husband Gregory Jeambey (Greg). Following a hearing on temporary matters, the court awarded Sarah and Greg joint legal custody of their two young children, with physical custody placed with Sarah subject to Greg's liberal visitation. Sarah observed three burns on one of the children after a visitation by Greg. She contacted the Department of Human Services (DHS) and petitioned the court for supervised visitation. DHS determined the child abuse report was founded. The court ordered supervised visitation. On April 14, 1996, while the dissolution was still pending, Sarah died in a car accident. The next day, Pat Maben, Sarah's mother, filed a petition for the appointment of an involuntary guardian for the two children. The court granted the petition, awarding the sole care, custody, and control of the children to Pat Maben, subject to supervised visitation by Greg. He appeals. We affirm.

Greg and Sarah married on November 23, 1990. They had two children: Jeremy, born July 3, 1991, and Jenna, born February 18, 1994. Greg and Sarah met in Des Moines, moved to Maryland, then returned to Garner, Iowa in June of 1992. While they lived in Maryland, Greg was Jeremy's primary caretaker, and continued to be in Iowa until Jeremy began day care. During the marriage, Greg and Sarah shared the cooking and other household chores. When Jenna was born, Pat Maben took care of her for the first month because Sarah's day care provider did not have an

opening. Sarah testified at the temporary hearing she put Jenna in day care because Greg told her he could not care for two children.

Greg and Sarah separated in June of 1994. The children continued to reside with Sarah in Garner. Greg stayed with a friend in Des Moines and eventually moved into an apartment in Clive. At the hearing on temporary matters, Sarah testified Greg drank alcohol to excess every other day. She believed Greg had a very loving and close relationship with the children, but was concerned his love of Jeremy was obsessive. She did not believe Greg could meet the needs of the children because of his "emotional instabilities, his physical ailments . . . and based on the lack of structure and moral exposure." Greg's mother testified she had reservations about Greg caring for the children on a full-time basis because raising children as a single parent was very hard.

Greg testified he subscribed to the Montessori philosophy of raising children, which provides for much one-on-one contact during the first six years of life and exposing the child to as much as possible. Sarah did not agree with this philosophy, and the court characterized Sarah's approach as more disciplined.

Greg suffers from Post Traumatic Stress Disorder (PTSD), a combat related condition caused by his service in Vietnam. He testified he is taking medication for PTSD and characterized it as a chronic state of acute anxiety. He has been in counseling since 1987. He receives permanent VA disability benefits of \$961 per

month. He claims although PTSD prevents him from holding a job, he is capable of caring for his children.

The court awarded joint legal custody to Greg and Sarah during the dissolution proceedings, with physical custody to Sarah. The court granted Greg visitation every other week from Thursday through Monday. The allegations of physical abuse arose out of Greg's visitation during the period from January 26 to January 30 of 1995. Greg had Jeremy and Jenna at his apartment in Clive from 12:30 p.m. Thursday until he returned them to Sarah in mason City the following Monday at 5:30 p.m.

When Greg returned the children, he said, "Sarah, before you freak out, Jenna's got a few rug burns." Jenna had a burn on her left elbow, her right knee, and her left leg by her tibia. Sarah was concerned because she did not think the burns looked like rug burns. She spoke with Greg, who told her he left the room and upon returning saw Jeremy dragging Jenna across the floor. Greg told Sarah she was overreacting.

The next day, Sarah took Jenna to Dr. Fuller in Garner because one of the burns was weepy. Dr. Fuller told Sarah the burns were not rug burns but were from a heat source. When Sarah passed on this information to Greg, he repeated his explanation. Dr. Fuller recommended taking photographs of the burns, so Sarah's father took photographs. Sarah contacted DHS the next day and spoke with Pam Stemmerman. DHS began an investigation and Sarah moved the court for supervised visitation.

Pam Stemmerman observed Jeremy and Jenna at the home of their day care provider, Pat Frayne. Jeremy was shy and unresponsive, but when Pat pointed to the burn areas and asked how they happened, Jeremy said, "Accidentally burned her with a cigarette and she cried and screamed." Jeremy said he did not burn Jenna, but would not say who caused the burns. Pat said Jeremy told her his dad "did it," that his dad "got a monster face." It happened when Jenna was doing the "wild woman thing." Greg described the "wild woman thing" as an activity where Greg holds Jenna's legs while in a chair until she starts laughing.

Pam spoke with a counselor for an outreach program who had sessions with Sarah and Jeremy. The counselor reported when Sarah brought up Jenna's injuries, Jeremy said "daddy's face got like a monster." Jeremy went between two chairs and said he was hiding from "a monster." Pam spoke with Dr. Fuller, who said the burns were second degree burns and could have been caused by cigarettes.

Pam arranged for Laura Hansen, a social worker in Polk County, to interview Greg. Hansen interviewed Greg at the Clive apartment and made diagrams of the apartment and the hot water floorboard heat register. She reported Greg discovered two marks on Jenna's legs Saturday morning and thought one was a spider bite and the other a rug burn. She said Greg told her he was changing Jenna's diaper Monday morning but left her to answer the phone. He said he heard Jenna scream and saw her up against the heat register with Jeremy on top of her. He believed this caused the burn on Jenna's arm. Hansen felt the register and did not find it excessively hot,

although Greg said the heat fluctuated from extremely hot to inadequate. The building owner told Pam she had received no complaints about the heating system or reports of injuries. DHS found Greg had committed physical child abuse.

At the hearing on supervised visitation, Greg testified he believed the leg burns happened between 4:30 and 5:30 Saturday morning. He testified he awoke during those hours to change Jenna's diaper. He testified it was very dark, he took Jenna out of a playpen and set her on a cushion on the floor, and found her crying and off the cushion when he returned from the kitchen with a bottle. He said Jenna was fussier than normal but went back to sleep. He first saw the burns after he awoke at 7:15 a.m. and changed Jenna's diaper.

Greg testified he smokes cigarettes but did not cause the burns and tried to determine how they occurred. He thought at first they were spider bites, but then remembered Jeremy became angry when Jenna was playing with his train set and drug her across the floor. Greg thought rug burns were more likely the cause. After Dr. Fuller indicated the burns came from a heat source, Greg explored the possibility the baseboard heat register had caused the burns. At the hearing, he testified he was sure the leg burns came from exposed heat pipe in the bedroom. He said the burn to the arm occurred Monday morning when Jenna rolled up against the heat register in the living room. Sarah testified Jeremy told her varying accounts of what happened and she was "totally setting aside" those accounts.

The trial court found Greg's explanation was not credible and was an attempt to come up with some other explanation for the injuries. The court found Greg devised a new theory--that Jenna somehow placed both legs on a heating device--when he learned a heat source caused the burns. The court found a lack of candor by Greg's failure to tell Sarah how the injury to Jenna's arm occurred. By his own testimony he knew she burned it on the heat register but failed to tell Sarah on at least three occasions. The court found at least a fair chance existed Greg injured Jenna, and ordered supervised visitation.

When Greg appealed the founded abuse report, DHS requested Dr. Alexander review the file. Dr. Alexander reviewed the file and consulted with Dr. Gerald Kealey, head of the burn unit at the University of Iowa Hospital. Dr. Alexander diagnosed the three injuries as burns. He testified in his deposition the burn to the left arm was relatively new with "a little bit of healing process that had gone on." He testified it was fairly similar in age to the burn on the left leg, but could have been separated by a day or so. He stated the burn to the right knee was older, by four to seven days.

Dr. Alexander testified the arm burn was not a cigarette burn, but a contact burn with a hot object. He also testified the leg burns were caused by cigarettes or cigarette-like objects, although at different times. He explained the burns were punch-out burns: circular burns not flat and even with the skin and not involving much of the surrounding area. He stated the size of the burns was relevant, that the

skin was burned head on, and the object was hot enough to punch through the skin with a burn. He testified the burns had to be caused by heat well over 200 degrees Fahrenheit. He explained a metal rod at the boiling point of water could not make the burns, an exposed radiator pipe would not have made the burns, and there was no possibility the burns were rug burns.

Dr. Alexander described the arm burn as an elongated burn and a contact burn with a hot surface. He testified the burn would have caused a significant amount of pain, and a prudent person would have sought medical attention. He reasoned the child would have been yelling and there should have been some concern about infection.

Pat Maben has lived in Garner her entire life. Her husband owned and operated an insurance agency in Garner for many years. During the last months of Sarah's life, the Mabens provided much of the supervision and care of Jeremy and Jenna and have continued to do so.

The guardian ad litem (GAL) reported all Greg's family members, except his father, loved Greg but were concerned for the welfare of the children. The GAL noted family members often had trouble contacting Greg because he moved frequently and did not have a phone for some time. The GAL found troubling that Greg relied on his disability when it helped him but ignored it when it did not. The GAL found the information provided by family members was similar to the VA General Rating Formula for Psychoneurotic Disorders:

The attitudes of all contacts except the most intimate are so adversely affected as to result in virtual isolation in the community. Totally incapacitating psychoneurotic symptoms bordering on gross repudiation of reality with disturbed thought or behavioral processes associated with almost all daily activities such as fantasy, confusion, panic and explosions of aggressive energy resulting in profound retreat from mature behavior. Demonstrably unable to obtain or retain employment - 100% rating.

Greg presented testimony of a friend who knew Greg for two years and had been at the Clive apartment ten to fifteen times. The friend testified Greg played with the children all the time, taught them right from wrong, and taught them table manners.

Greg testified he now lives in a two bedroom apartment in a large apartment complex in West Des Moines. He testified he has all the furniture, toys, and clothing the children would need. He planned to use the day care facilities the complex offers as needed so he could run errands and complete household chores.

Greg testified although his disability prevents him from working, it does not prevent him from caring for his children. He stated Jeremy understood the war hurt him and his experience teaches Jeremy that people who are different and less able can still be successful in other matters.

Greg described the times the children spent with him. He would bathe and dress the children and prepare breakfast. Because they were not in school and Greg did not work, the three of them had a relaxed and flexible schedule. They would play

with toys and go to the park almost daily. Greg would push Jenna in her stroller and Jeremy rode his bike. In addition, they visited the train museum in Valley Junction.

Greg also presented deposition testimony of Dr. Coleman, an M.D. specializing in adult and child psychiatry. In his opinion the DHS report was highly biased and unprofessionally prepared. He stated Dr. Fuller never diagnosed the burns as cigarette burns and Pam Stemmerman was trying to reach a foregone conclusion. He testified Pam never interviewed Greg face-to-face and mixed together allegations of neglect and intentional harm. He argued separating the children from their father after their mother's death amounted to child abuse by the State.

I. Scope of Review

The parties disagree on the proper standard of review. Greg argues our review should be de novo, while Pat argues we should review for correction of errors at law.

Early cases held review of a proceeding to appoint a guardian of a minor was on error, not de novo. *In re Guardianship of Murphy*, 397 N.W.2d 686, 687 (Iowa 1986). Later cases questioned the scope of review in cases involving minors, which led the supreme court to adopt a standard of de novo review. *Id.* (citing *In re Guardianship of Plucar*, 247 Iowa 394, 72 N.W.2d 455 (1955)).¹ The supreme court

¹ The court in *Plucar* reasoned, "Where the issue turns upon the best welfare of the child, and involves the overturning of presumptive parental rights in the interest of the child, we have found it difficult to separate questions of law from questions of fact." *In re Guardianship of Plucar*, 247 Iowa at 396, 72 N.W.2d at 457. The court reasoned determination of such issues "carries us into the field of equity," and held "it is indispensable that principles of equity be applied." *Id.*

later ruled *Plucar* was of doubtful authority because it was decided before the enactment of Iowa Code sections 633.33 and 633.555, which provided the trial of such proceedings would be at law. *In re Guardianship of Murphy*, 397 N.W.2d at 686; see Iowa Code § 633.33 (1995) (providing actions for the involuntary appointment of guardians shall be triable in probate as law actions); *id.* § 633.555 (providing the cause shall be tried as a law action).

The court in *Murphy* held the standard of review was on error, reasoning the statutes made no exception for cases involving minors. *In re Guardianship of Murphy*, 397 N.W.2d at 688. The court held any modification to allow de novo review would have to come from the legislature. *Id.* Citing *Murphy* and examining the statutes, we later held review was properly on error, not de novo. *In re Guardianship of D.D.H.*, 538 N.W.2d 881, 882-83 (Iowa App. 1995).

One month after our decision in *D.D.H.*, the supreme court wrote, "The parties agree the petition for the appointment of a guardian for Heather, a minor child, is properly tried in equity. Therefore our review is de novo." *In re Guardianship of Knell*, 537 N.W.2d 778, 780 (Iowa 1995) (citing *In re Guardianship of Stewart*, 369 N.W.2d 820, 822 (Iowa 1985)). The *Stewart* case was an action to terminate a guardianship, not an initial action to create a guardianship, so review was properly de novo. *In re Guardianship of D.D.H.*, 538 N.W.2d at 883 n.2. The *Stewart* case also predates the court's detailed discussion of the standard of review in *Murphy*.

Moreover, the court in *Knell* did not address the issue of which standard controlled because the parties did not dispute the standard as have the parties in this case.

We hold our review of this case is on error. *In re Guardianship of Murphy*, 397 N.W.2d at 687-88; *In re Guardianship of D.D.H.*, 538 N.W.2d at 882-83. We will affirm if any substantial evidence supports the district court's findings. *Id.*

II. The Guardianship of Jeremy and Jenna

A. Framework of the Parental Preference

Iowa law provides, "The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian." Iowa Code § 633.559 (1995). In some cases, the supreme court has removed children from "conscientious, well-intentioned custodians with a history of providing good care to the children and placed them with a natural parent." *Zvorak v. Beireis*, 519 N.W.2d 87, 89 (Iowa 1994). Despite the parental preference, the supreme court has declined in other cases to return children to the custody of the natural parent. *In re Guardianship of Knell*, 537 N.W.2d 778, 781 (Iowa 1995). The presumption is a rebuttable one, and is subject to the overriding concern of the best interest of the child. *In re Guardianship of Ankeney*, 360 N.W.2d 733, 736 (Iowa 1995).

In determining the children's best interests, the court considers the long-range interest and the immediate interest of the children. *In re Guardianship of Knell*, 537 N.W.2d at 781. Pat Maben bore the burden of proof of rebutting the presumption

favoring Greg by establishing the best interests of Jeremy and Jenna required they continue in her care. *Id.*

B. Rebuttal of the Parental Preference

We hold substantial evidence supports the district court's finding Pat Maben rebutted the presumption the children's welfare would be served best by their placement with Greg. In arriving at this holding, we note the founded child abuse report and other evidence in the record bearing on abuse. There was evidence the burns were made at different times, which reveals Greg burned Jenna with two different cigarettes indicating repeated abuse. This constitutes substantial evidence.

Greg argues his explanation was consistent with that of an innocent parent engaging in a thought process of elimination to determine the cause of Jenna's injuries. We note, however, the district court did not find Greg's explanation credible, particularly in light of his failure to tell Sarah the cause of the burn to the arm when he admitted he knew how that burn occurred. Greg's explanation also conflicts with the specific medical opinions given by Dr. Alexander.

Dr. Alexander's testimony is unrebutted. Our review of the photographs of the burns only adds to the accuracy of Dr. Alexander's diagnosis. The burns to the legs were punched-out and caused by a source of heat well above 200 degrees Fahrenheit. The burns were caused by head-on contact with a cigarette, were not rug burns, and could not have been caused by the heat register. Dr. Alexander testified the burns

would have caused significant pain, and that a burn is one of the most painful traumas skin can experience.

Dr. Alexander's testimony makes irrelevant the testimony of Dr. Coleman, who believed the DHS report was highly biased and unprofessionally done. The opinion is irrelevant because it demonstrated no causal connection with the finding of abuse: any claimed defects in the investigation do not overcome the specific medical testimony that Jenna was burned with cigarettes at two different times while in Greg's care.

Dr. Coleman's opinions are not persuasive. For example, he testified the report was biased and unprofessional because Pam Stemmerman tried to reach a foregone conclusion by asking Dr. Fuller whether the burns could be from cigarettes. The day after Dr. Fuller examined Jenna, however, Pam heard Jeremy say, "Accidentally burned her with a cigarette and she cried and screamed." We fail to see how Pam acted unprofessionally when faced with this statement. Although Dr. Fuller was under an obligation to report suspected abuse, we do not believe Pam was forbidden to ask him whether the burns could have been caused by cigarettes. She was not trying to reach a foregone conclusion, but was asking Dr. Fuller to reflect on his diagnosis in light of potential facts that arose after he made his diagnosis.

Substantial evidence supports a finding Greg intentionally burned Jenna with cigarettes on two separate occasions, which caused significant pain and risked

infection. He tried to cover up his actions by creating an explanation other than abuse, and was not candid with Sarah regarding the burn to the arm.

The ultimate conclusion on rebuttal of the parental preference is also supported by substantial evidence. Greg's account of his daily routines with the children conflicts with the account of an unexpected visit by his sister Joann Neppl. She found Greg in a robe and both children nude when she stopped by on her lunch break. At one time, Greg admitted he could not care for two children, and his plan for raising the children relies on Jeremy being in school and Jenna being in day care three afternoons per week. All of Greg's family except his father expressed their love for Greg, but had reservations concerning Greg caring for two children. One of Greg's brothers was concerned with the extent of Greg's drinking and the language he used around children, such as "damn," "damn boy," and "damn girl."

In contrast, the Mabens provided much of the supervision and care of the children during the last years of Sarah's life. They have continued to do so and have allowed Greg's family to have contact with the children. They have a stable life in Garner and the children are set in a routine and community there. On our review of the record, we find the district court's finding was supported by substantial evidence.

Greg argues the district court erred by considering the report of the guardian ad litem and by allowing deposition testimony in lieu of live testimony. Greg has failed to preserve these issues for review because he failed to raise them before the district court. *See Peters v. Burlington N. R.R.*, 492 N.W.2d 399, 401 (Iowa 1992)

(holding issues must ordinarily be raised and decided by the trial court before they may be raised and decided on appeal).

Costs on appeal are taxed to Greg.

AFFIRMED.