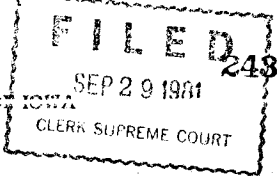


IN THE COURT OF APPEALS OF IOWA



DONALD R. GRIFFIN,

Petitioner-Appellant,

Acting as Next Friend of
KATHLEEN GRIFFIN and WILLIAM R.
GRIFFIN, Both Minors under the age of
Fourteen Years,

Plaintiffs,

vs.

MARILYN WINEBRENNER,

Respondent-Appellee.

Filed September 29, 1981

1-222
3-66080

Appeal from Polk District Court - Luther T. Glanton, Judge.

Petitioner appeals the trial court order granting permanent guardianship of his two minor children to his sister. AFFIRMED.

Diane L. Dornburg, Des Moines, for petitioner-appellant.

Dennis J. Kirkwood of Kirkwood & Rasey, Des Moines, for respondent-appellee.

Michael E. Runyon, Des Moines, guardian ad litem.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Petitioner, Donald Griffen, appeals the trial court order granting permanent guardianship of his two minor children to his sister. He alleges error on the part of the trial court in failing to state findings of fact and conclusions of law in the guardianship order, in failing to allow expert testimony on the needs of the children, and in appointing the aunt as guardian with insufficient evidence to overcome the presumption favoring the natural parent as guardian. We affirm the trial court.

Betty and Donald Griffin were the parents of four children, Paul and Carolyn, both of whom have now obtained majority, Kathy, born December 22, 1966, and William "Rusty," born March 19, 1969. In November 1977 Betty died suddenly of a massive brain tumor. Donald was unable to cope with the loss of his wife. He began drinking heavily, placed all household responsibility, including bill-paying, on Carolyn, then fifteen years of age, and took a second job. There is evidence to indicate that during this period there were times when the home wasn't clean and food was not adequate. There was also evidence that Donald made many overt sexual advances towards Carolyn, a fact he now denies. At Christmas time in 1977, Donald smashed the Christmas tree and gifts, and threw the children out of the house. Their aunt temporarily took them in.

By July of 1978, because payments weren't made, Donald lost the house. He asked his sister, Marilyn Winebrenner (the respondent), to take care of the children until he could get back on his feet. In early 1979, Donald met and married his present wife Mary and they, along with two of her children from a previous marriage, as well as a child of their own, now live in Redfield, Iowa. Marilyn Winebrenner and her husband, and Carolyn, Kathy, and Rusty live in Des Moines. Kathy has been diagnosed as epileptic and mentally retarded; she is on medication for the epilepsy and attends special education classes. At the instigation of school personnel, and with Marilyn's approval and cooperation, both Rusty and Kathy see counselors on a regular basis, primarily to help the children deal with their mother's death and the dismal period with their father thereafter, as well as with the special emotional and behavior problems Kathy has and the continuing tension which the children experience.

In January 1979, Marilyn filed a petition asking to be appointed guardian of Kathy and Rusty. Donald filed an appearance and a separate action for habeas corpus seeking return of his children in May 1979. The two actions were consolidated, and in September, before hearing, an agreement was reached leaving the children with Marilyn

but giving specific visitation rights to Donald. After their December visit, Donald refused to return the children and enrolled them in school.

The trial on Marilyn's petition for guardianship began January 29, 1980, resulting in temporary placement with Marilyn, appointment of a guardian ad litem for the children, and a custody investigation order, with review to be in six months. Donald received overnight visitations on alternate weekends. There was a subsequent hearing March 26, 1980, on motion by the guardian ad litem, to modify the visitations with Donald. He was granted one overnight visit a month and a one-day visitation per month to take place in Des Moines. A final hearing was held September 5, 1980, and, based on the evidence, the guardian ad litem's recommendation, and the custody investigator's report, the court gave custody to Marilyn subject to review in one year, and appointed her guardian October 29, 1980. Visitation with Donald was continued and his writ of habeas corpus was dismissed.

I. Donald first alleges the trial court committed error by failing to state in its order any findings of fact or conclusions of law. Iowa R. Civ. P. 179 requires a court to file both findings of fact and conclusions of law. Should the order filed by the trial court be too narrow for a party to determine proper grounds for appeal, Iowa R. Civ. P. 179(b) provides for a motion for enlargement so that the challenging party may know more specifically upon what grounds the court made its ruling. Petitioner here failed to make such a motion, and we will not predicate error on trial court's failure to file comprehensive findings of fact and conclusions of law alone. We believe any deficiency in that regard is not prejudicial to Donald in light of our *de novo* review.

II. Donald also alleges that the trial court erred by sustaining Marilyn's motion in limine on the day of trial which prevented Donald's expert from testifying because of a violation of Iowa R. Civ. P. 125(a)(2). The expert, Lawrence Scales, did present his testimony in an offer of proof and his conclusion, based on reports made for the court but without interviews with any of the parties involved, was that the children should be returned to their father. Iowa R. Civ. P. 125(a)(2) imposes a duty on parties who have participated in discovery to supplement answers in regard to the calling of expert witnesses. Donald had answered previous interrogatories to indicate he would not be calling any expert witnesses at trial and, when he determined he would be calling Mr. Scales, did not timely supplement his earlier answer. He now maintains that since placement of the children was the central issue to be tried, failure to supplement did

not prejudice Marilyn since she was already prepared for trial on the very issue about which Mr. Scales would testify. We avoid deciding this issue by considering the substance of the offer of proof on our *de novo* review.

III. We consider Donald's contentions concerning sufficiency of the evidence to overcome the presumption favoring natural parents and the best interests of the children together since the two issues are interrelated. The petitioner is correct in postulating that the principal but not sole criterion in custody determination of this sort is the long-range best interests of the children, but his right as a parent is also to be considered by us. Matter of Adoption of Gustafson, 240 N.W.2d 674, 676 (Iowa 1976). Section 633.559, The Code, in pertinent part, states: "The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian." However, "even though a parent is fit to have custody, he may be denied custody if this is clearly inimical to the best interests of the child." In re Marriage of Smith, 269 N.W.2d 406, 408 (Iowa 1978). When this principle is applied, the burden is on the third party (the aunt here) to prove the unsuitability of the parent. In Interest of Mann, 293 N.W.2d 185, 187 (Iowa 1980). But because of the presumptive preference for custody by a natural parent, the court is not free to take children from a parent simply because some other home may offer more advantages. In re Burney, 259 N.W.2d 322, 324 (Iowa 1977).

The issue here is not an easy one and, under our *de novo* review, we have considered all of the evidence, even that given in the offer of proof by Mr. Scales. In so doing, we conclude, as did the trial court, that the proper custodian for Kathy and Rusty at this time is their aunt, Marilyn Winebrenner. It is not a matter of her being able to provide a better home than the natural father; rather, Donald has not yet shown himself to be a qualified and suitable parent.

There is no question from the evidence presented that Donald was unable to meet his parenting responsibilities after his first wife died. Marilyn stepped in capably to fill the void. Despite his more stable home life currently, the record indicates there are remaining problems. Donald has not confronted the problems that exist between himself and his two older children, Paul and Carolyn, and there appears to be merit to the guardian ad litem's fears about his "throw-away" children and how Donald would handle any severe difficulties with either Kathy or Rusty. We must examine past performance of a parent to gain insight into the quality of future care likely to be given. In Interest of Ponx, 276 N.W.2d 425, 433 (Iowa 1979). It is true that Donald was

going through a bad period in his life, but so were the children, and we see little in the current record to indicate that Donald can or will deal any more effectively with future stress. It is his present wife Mary who seems most concerned with and knowledgeable about schooling for Kathy and Rusty. She has taken the initiative in handling Kathy's particular medical needs. She is the one whose testimony demonstrates a more sincere and determined attitude about continuing the children's counseling. Donald, besides not demonstrating an active interest in these crucial areas, has not maintained his visiting schedule with the children in Des Moines. The overall impression gleaned from the record as a whole is one of passive caring on Donald's part. Clearly, this attitude, when coupled with the special needs of these children, illustrates the correctness of the trial court's decision.

There are other related reasons which bear on the best interests of the children if they remain with Marilyn. Visitation with their father will continue, so that they will be able to maintain a close relationship with both Marilyn and Donald and his new family. Carolyn is presently at Marilyn's, and, even if she doesn't continue to live there, her amicable relationship with Marilyn will continue so that the children will have the benefit of Carolyn's closeness. Testimony makes clear the place of importance as a mother substitute both Carolyn and Marilyn have played in Kathy's and Rusty's lives. Unfortunately, the record also indicates that, because of the virtual state of war existing between Marilyn, Carolyn, and Donald, were the children to live permanently with Donald now, they would lose the close relationship they now enjoy with Marilyn and Carolyn. Kathy and Rusty have suffered enough losses and need support to handle the trauma they have already experienced, and the educational, medical and emotional systems in operation for them in Des Moines are all aiding in more healthy growth. At the same time, the evidence shows that both are beginning to build a good relationship with Donald, learning to trust him and depend on him again, and this, too, needs to continue.

We have considered all of the issues raised by Donald and conclude that the trial court was correct in making Marilyn the guardian of Kathy and Rusty. The trial court's decision is therefore affirmed.

AFFIRMED.