

IN THE COURT OF APPEALS OF IOWA

No. 0-133 / 89-541

FILED

AUG 30 1990

CLERK SUPREME COURT

IN THE MATTER OF THE GUARDIANSHIP OF NATALIE F. JANEKA,
A Minor

BRADLEY BEHMER,

384

Appellant,

vs.

DAWN JANEKA,

Appellee.

Appeal from the Iowa District Court for Polk County,
Ray Hanrahan, Judge.

The petitioner appeals the judgment of the district court terminating his temporary guardianship of the parties' child, born out of wedlock, and awarding custody of the child to the respondent natural mother. **AFFIRMED.**

Jill S. Rolek, P.C, Des Moines, for appellant.

Dawn Janeka, Houston, Texas, pro se.

Larry G. Wilson, Altoona, guardian ad litem for
Natalie F. Janeka.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

OXBERGER, C.J.

The petitioner, Bradley Behmer, appeals the judgment of the district court terminating his temporary guardianship of the parties' child, Natalie Janeka, and awarding custody of the child to the respondent mother, Dawn Janeka. The petitioner argues the district court erred in: (1) dismissing his application for permanent guardianship; and (2) failing to establish visitation guidelines. We affirm.

Natalie is the biological daughter of Bradley Behmer and Dawn Janeka. She was born January 18, 1982. Brad and Dawn were never married to each other, but they were cohabiting together in Clear Lake, Iowa at the time of Natalie's birth. Shortly thereafter, Brad moved to Texas. Dawn and Natalie joined him several months later.

During the next four years Brad and Dawn separated on several occasions. Natalie remained with Dawn during those times. In October 1986 Brad returned to Iowa, and Dawn and Natalie followed one month later. Shortly after their return, Brad assaulted Dawn, was arrested, and spent one night in jail. Dawn subsequently returned to Texas with Natalie. Dawn allowed summer visitation and regular phone contact between Brad and Natalie. Brad provided support for Dawn and Natalie on an intermittent basis. Dawn received governmental assistance when Brad was not providing child support.

In June 1988 Dawn requested Natalie spend the summer with Brad. Several days after Brad brought Natalie to Iowa, Dawn was arrested in connection with her association with a man who was subsequently convicted of drug-related charges. Dawn was acquitted of all charges in a jury trial.

Natalie resided with Brad from June 1988 to December 1988. On June 10, 1988 Brad filed an action to be appointed temporary guardian and permanent guardian of Natalie. He was appointed temporary guardian of Natalie on July 7, 1988. Final hearing on permanent guardianship was held September 22, 1988.

The trial court concluded that while either parent would be a suitable custodial parent, it is in the long-term best interest of Natalie that she be in the custody of Dawn. Brad filed a motion to vacate, requested a new trial, and requested a fixed visitation schedule. His motion and request were denied. The trial judge also denied his request for a fixed visitation schedule because Brad did not plead visitation and evidence was not offered thereto.

The issues are whether the scope of review applied by this court should be on error or de novo, whether the district court erred in awarding custody to Dawn, and whether the district court erred in failing to establish visitation rights for Brad with Natalie.

Our supreme court has clarified that Iowa Code sections 633.33 and 633.555 require appellate review of the appointment of guardians to be on error. In re Guardianship of Murphy, 397 N.W.2d 686, 688 (Iowa 1986); In re Guardianship of Reed, 426 N.W.2d 657 (Iowa App. 1988). The court in Murphy expressed reservations about applying this scope of review in cases involving child custody, but the court concluded absent legislative changes, section 633.555 mandated this approach. Id. Thus, our scope of review in this case is limited to correction of errors at law.

The second issue is whether the district court erred in granting custody of Natalie to Dawn. In determining child custody the court's major concern is the best interest of the child and the objective is placement in an "environment most likely to bring the children to healthy physical, mental, and social maturity." In re Marriage of Bartlett, 427 N.W.2d 876 (Iowa App. 1988). The record is replete with evidence that the trial court considered the long-term best interest of Natalie in its' determination to grant custody of Natalie to Dawn. We hold that the trial court correctly applied the standard and did not err in granting custody of Natalie to Dawn.

The final issue is whether the trial court erred in refusing to grant fixed visitation privileges with Natalie to Brad. The supreme court has ruled that, although strict

adherence to the pleading of a specific cause of action is no longer required, fair notice of the claim must be given. Shill v Careage Corp., 353 N.W.2d 416, 420 (Iowa 1984). Brad cannot be permitted to proceed on appeal as though he had filed an action for custody and visitation when he filed an action specifically requesting guardianship. Dawn was not notified of the necessity to be prepared for offering evidence on the subject of visitation. The trial court found that no evidence had been offered thereto. We hold that the trial court did not err in refusing to grant visitation privileges.

We affirm the decision of the district court.

AFFIRMED.