IN THE COURT OF APPEALS OF IOWA

No. 0-262 / 99-1232
Filed June 14, 2000

IN THE INTEREST OF B.R. AND B.R.,
Children,

R.C., Mother,
Appellant,

R.B. and R.B., Maternal Grandparents,
Appellants,

B.O., Father of B.R.,
Appellee.

FILED
JUN 14 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Washington County, Lucy J. Gamon, District Associate Judge.

Mother and maternal grandparents separately appeal the juvenile court's placing permanent custody of Brandon with his biological father. **AFFIRMED.**

Lars G. Anderson of Holland Law Office, Iowa City, for appellant R.C.

Robert G. Schlegel of Day, Meeker, Lamping and Schlegel, Washington, for appellant grandparents.

Maurine A. Braddock of Hohohan, Epley, Braddock & Brenneman, Iowa City, for appellee B.O.

Steven B. Carter, Washington, guardian ad litem for minor children.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

Rebecca, the mother, and the maternal grandparents, Russell and Raelynn, (grandparents) separately appeal the juvenile court's placing permanent custody of Brandon with his biological father Ben. Rebecca contends the court erred in its decision to transfer custody of Brandon to Ben because (1) Ben did not acknowledge Brandon as required by Iowa Code section 600B.40, (2) Brandon's best interest is to remain in the custody of his grandparents, and (3) even if there is a legal presumption favoring Ben over Brandon's grandparents, that presumption has been rebutted. Rebecca further claims she did not and could not stipulate Ben was Brandon's legally acknowledged father and if the court finds she did, then she received ineffective assistance of counsel. The grandparents contend the court erred in transferring custody of Brandon to Ben based on parental preference and concerns regarding Brandon's placement with them. We affirm.

Rebecca is the mother of Brandon born June 16, 1992. She also has three other children, two of which she had her parental rights terminated to and a third who is not at issue in this appeal.

Brandon and his half-brother, Bradley, came to the attention of the department of human services (DHS) in December 1997, when DHS learned these children (1) were living in a home that had previously been condemned and (2) were the victims of extreme inattention and neglect. A removal order was entered by the court on January 27, 1998, following a short period of voluntary placement of the children in foster care.

On February 5, 1998, both children were adjudicated to be children in need of assistance pursuant to Iowa Code sections 232.2(6)(c)(2) and 232.2(6)(g). This was due to Rebecca's failure to exercise a reasonable degree of care in supervising the children and her failure to exercise a minimal degree of care in supplying them with adequate food, clothing, or shelter.

It was unclear whether Ben was served in advance of the adjudicatory hearing. He did not appear. Ben was stationed in Korea and he testified that as soon as heard about Brandon, he took an emergency leave and came back to the United States to try and get custody. The grandparents did appear at the hearing with counsel and made an oral motion to intervene. The grandparents were willing to accept temporary custody of the children. All parties consented and the court granted the motion. The children remained in foster care pending the court's determination of the grandparents' suitability as caretakers.

Ben appeared by counsel at the February 12, 1998 continuation of the temporary removal hearing. On May 22, 1998, following a disposition hearing, Brandon and his brother Bradley were placed in the care of the grandparents. The court noted Ben is an acknowledged father of Brandon and paternity has been established. Ben had been required to pay $196 per month in child support after a judgment and order establishing paternity was filed on August 23, 1993. At the time of the hearing, Ben was current with his child support.

While Rebecca was pregnant with Brandon, she obtained a no-contact order because she claimed Ben was harassing her when she wanted to see other men. Because of the no-contact order, Ben stayed away even after he learned of Brandon's birth. Shortly thereafter, Ben joined the army.

Although the court felt Ben's true efforts to become more involved in Brandon's life did not occur until after the children in need of assistance proceeding commenced, the court noted both Ben and his wife, Mindy, have done everything possible to maximize their contact with Brandon. Even after they returned to their home in New York, they called Brandon once or twice a week. Mindy also had three visits with Brandon in a period of a little over a month and a half while Ben was gone, and both Ben and Mindy returned to Iowa in April 1999 and had visits with Brandon. When they returned to New York, Brandon went with them for a month long visit.

Although the boys thrived in their environment with their grandparents and were doing extremely well, the court believed there were three significant issues or concerns regarding their placement in the grandparents' home. These concerns include: (1) sibling rivalry between the boys, (2) Russell's lack of participation in services, and (3) Russell's drinking problem.

Roberta Sloat, a family therapist with Systems Unlimited, noted there was a great deal of sibling rivalry between Brandon and Bradley. They each crave attention, and Brandon has always struggled to try and get attention over Bradley who is bubbly, easy to get a long with, and demands a lot of attention. In addition, the Systems Unlimited staff has reported Russell has not consistently been involved with services from the beginning. The department case manager gave him a six out of ten rating for cooperation with the department. Finally, three different providers have reported concerns with regard to Russell's drinking problem. When the children were placed in the grandparents' care, the court ordered Russell to abstain from all use of alcohol. Since that order, alcohol had

been smelled on Russell's breath on several occasions, a full beer can was observed on a countertop, and a twelve-pack was observed in the refrigerator.

I. **Custody**. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings, particularly when considering credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). The paramount consideration in any custody dispute is the best interests of the child. Iowa R. App. P. 14(f)(15).

Rebecca contends the juvenile court erred when it concluded there is a legal preference favoring Ben over the grandparents. We find this argument to be without merit. The law raises a strong presumption the child's welfare will be best served in the care and control of its natural parents. *Northland v. Starr*, 581 N.W.2d 210, 212 (Iowa App. 1998). Our supreme court has stated:

> Something more than the material things of life is essential to the nurture of a child, and that something is the father's and the mother's love, or as near its equivalent as may be. Recognizing this, the law raises a strong presumption that the child's welfare will be best subserved in the care and control of parents, and in every case, a showing of such relationship, in the absence of anything more, makes out a prima facie case for parents claiming custody of their children. "Indeed", as said in one case, "this presumption is essential to the maintenance of society, for without it, man would be denaturalized, the ties of family broken, the instincts of humanity stifled, and one of the strongest incentives to the propagation and continuance of the human race destroyed.

Zvorak v. Beireis, 519 N.W.2d 87, 89 (Iowa 1994) (citing *Risting v. Sparboe*, 162 N.W. 592, 594 (1917)).

We now turn to Rebecca's and the grandparents' contention parental preference for custody of a child is rebuttable and fails where the best interests of the child are not served. Brandon has thrived and made progress in his current

environment with his grandparents. They argue the disruption in his placement could have significant long-ranging consequences and to take him away from everything he has known before is not in his best interest.

Iowa courts have frequently decided disputes in which persons who have cared for the children of another have attempted to retain custody against the wishes of the natural parent. *Northland*, 581 N.W.2d at 212. As in all custody cases, the determining factor is the best interests of the child. *Id.* 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 (1999). Recognition that the non-parental party is an excellent parent to the child will rarely be strong enough to interfere with the natural rights of the parent. *Northland*, 581 N.W.2d at 212. This court has, in some cases, removed children from conscientious, well-intentioned custodians with a history of providing good care to the children and placed them with a natural parent. *Id.*

We agree with the grandparents parental preference is rebuttable. *In re Guardianship of Knell*, 537 N.W.2d 778, 781 (Iowa 1995). However, the burden of proof rests with the non-parent to rebut the presumption favoring the parent by establishing the parent is not a suitable parent and the child's best interests require he remain in the non-parent's care and this best interest consideration goes beyond the child's immediate interest and extends to the child's long-term interest. *Northland*, 581 N.W.2d at 213.

We do not find the grandparents have met this burden. This is not a case in which Ben had abandoned Brandon. On the contrary, in addition to visitations, Ben and Mindy took proactive steps which indicated to the court their strong

interest in obtaining custody of Brandon. This included obtaining a home study from social services in New York. The study indicated their home would be an appropriate placement for Brandon. They also joined and successfully completed a Parenting in the Middle program and met with a clinical social worker to help provide services to facilitate Brandon's transition into their home. The district court noted since the commencement of the children in need of assistance proceeding, "Ben's efforts to become involved in his son's life and to visit him as much as possible have been little short of extraordinary."

The grandparents further argue due to their experience, they are better parents to minister to the needs of Brandon while Ben and Mindy have neither significant contact with Brandon nor experience in parenting children. The presumption favoring custody to the natural parent is not overcome by showing the non-parent would provide him a good home. *Id.* And like the father in the *Northland* case, even if Ben's parenting skills are not as good as the grandparents, he has shown considerable capacity to grow in this area. *Id.*

We have also considered the grandparents' contention the disruption in Brandon's placement is not in his best interest. We disagree with this contention. We realize Brandon will have to adjust to a new family and a new home, however, our society accepts children belong with their natural parents and their best interests are served by staying with their natural parents. *Id.* More importantly, we find it to be in Brandon's long-term best interest to be with Ben.

We find the presumption of parental preference has not been rebutted and therefore, the district court properly awarded Ben custody of Brandon.

II. Acknowledged Father. Iowa Code section 600B.40 (1999) gives the mother of a child born out of wedlock, whose paternity has not been acknowledged, sole custody of the child unless the district court determines otherwise.

Rebecca contends Ben has not acknowledged Brandon pursuant to this code section. She alleges without such an acknowledgement, sole custody of Brandon must remain with her. We find this argument to be without merit. A judgment and order establishing paternity was filed on August 23, 1993, and Ben has been regularly paying child support since that time. In addition, Rebecca has stipulated Ben is Brandon's father. We also note section 600B.40 specifically grants a father the right to seek custody of a child once a judgment of paternity has been entered. We find Rebecca's reliance on section 600B.40 to be misplaced. *In re L.B.*, 530 N.W.2d 465, 467-68 (Iowa App. 1995). We conclude section 600B.40 does not apply to the facts of this case. Therefore, we find no merit in Rebecca's argument.

AFFIRMED.