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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE GUARDIANSHIP OF BRADLEY LEE McKENZIE AND BRENDA KATHRYN McKENZIE, Minors	)	Filed June 29, 1982
GARY McKENZIE,	)	96
Plaintiff-Appellant,	)	2-205 3-67652
vs.	)	
JANICE BRAHN,	)	
Defendant-Appellee.	)	

Appeal from Floyd District Court, B. C. Sullivan, Judge.

Appellant-father appeals the trial court's order, which rejected his request to terminate a guardianship established for appellant's two minor children after the death of their mother who had been their custodial parent. Appellee is the sister of the deceased mother and was appointed guardian of the children pursuant to a provision in the mother's will. The trial court should have granted appellant's petition to terminate the guardianship. REVERSED.

Normand Klemesrud, Charles City, for appellant.

Ronald K. Noah, Charles City, for appellee.

Heard en banc.

PER CURIAM

Appellant-father, Gary McKenzie, appeals the trial court's order, which rejected his request to terminate appellee's guardianship over his two minor children. We find appellant was erroneously deprived of notice and an opportunity to be heard prior to appointment of a guardian for his minor children and the best interests of the children are served by terminating the guardianship.

The two children involved in this case, Bradley and Brenda McKenzie, were born in 1970 and 1973, respectively, to Mary and Gary McKenzie. In 1974, the marriage of Mary and Gary was dissolved. Custody of the children was awarded to Mary. Gary was awarded liberal visitation rights and he has consistently exercised those rights.

The children lived with Mary until March of 1981 when Mary was killed in a traffic accident. A few days later, Janice Brahn, Mary's sister, filed a petition for appointment as guardian of the children. Mary's will contained a provision nominating Janice to be appointed guardian of the children. The court appointed Janice guardian the day the petition was filed.

Gary McKenize, the children's father, later filed a petition asking that Brahn's guardianship be terminated and that he be named guardian of his children. He alleged that he had received no notice of Brahn's petition for appointment as guardian or of the trial court's order appointing her. He also alleged that he was a qualified and suitable person to be guardian.

After a hearing, the trial court refused to terminate Brahn's guardianship. Gary McKenzie appealed that decision. He contends he was denied due process because he was given no notice of Brahn's petition to be appointed guardian. He also contends it would be in the children's best interests if he, rather than Brahn, was their guardian. Finally, he asserts that the trial court's decision to continue Brahn's guardianship was not supported by the evidence because Brahn failed to meet her burden to rebut the statutory preference for the appointment of a natural parent as guardian of a minor child.

Brahn, as appellee, asserts Gary McKenzie failed to raise his contention that he was denied due process by the absence of notice of her guardianship proceeding at trial.

I. Scope of Review

This is an action in probate to set aside the appointment of a guardianship. Our review is de novo. § 633.33, The Code 1981; Matter of Guardianship of Sams, 256 N.W.2d 570, 572 (Iowa 1977); Patten v. Patrick, 276 N.W.2d 390, 393 (Iowa 1979). The trial court's findings of fact are given weight, but we are not bound by those findings. Iowa R. App. 14(f)(7).

II. Notice of Guardianship Proceedings

Initially, we conclude plaintiff sufficiently raised his contention at trial that he was denied due process by the absence of notice of the guardianship proceedings. Plaintiff's pleadings refer generally to a derogation of his rights as the father by defendant's failure to give notice of the guardianship proceedings. In his trial brief, plaintiff refers to a parent's due process rights with respect to notice of guardianship proceedings. The trial court was alerted to plaintiff's position as evidenced by the fact it held plaintiff's rights had been sufficiently protected by the adversarial hearing. A fair interpretation of the record convinces us plaintiff appropriately raised the issue of his due process right to notice of the guardianship hearing. We now turn to the question of whether Gary's rights had been violated.

In Patten v. Patrick, 276 N.W.2d 390, 393 (Iowa 1979), the supreme court stated in reference to the question whether due process required notice of guardianship proceedings be given to the children's natural father, "Due process analysis is composed of a two-step inquiry: Does due process apply? What is due?" In Patten, the court held due process does apply to guardianship

proceedings involving a natural parent. Id. at 394 In discussing the particular requirements to satisfy due process, the court held due process did not give the natural father in Patten the right to notice and to be heard prior to the culmination of the guardianship proceedings. Id. at 395. The court discussed three factors: (1) the private interest offered; (2) the risk of an erroneous deprivation of the right and the probable value of additional safeguards and (3) the state interest involved. Although the court in Patten held the private interest involved was great, the other two factors, under the peculiar facts of that case, were found to outweigh the private interest involved.

The case under consideration is different. Unlike in Patten, the risk of erroneous deprivation of Gary's rights was great. Id. at 395. As the trial court indicated, there were many factors indicating Gary was indeed a suitable parent. Gary could have provided a home for the children. Cf id. at 395. Also unlike the facts in Patten, there was no emergency necessitating immediate action by the court. The State's interests in protecting the children would not have been compromised by requiring notice and hearing prior to appointing Janice Brahn as custodian. Balancing the three factors as mandated in Patten, we conclude Gary was entitled to notice and hearing prior to consummation of the guardianship proceedings. Thus, the proceedings have no binding force on Gary. Id. at 393.

We see, however, no reason to remand the case. A full hearing was held in which evidence was taken on the issue of termination of the guardianship. We find the evidence is sufficient for us to render a decision without remanding the case.

III. Termination of Guardianship

This is essentially a child custody case. Matter of Guardianship of Sams, 256 N.W.2d at 572. As in all child custody disputes, the determinative factor is the best interests of the children involved. Id. The rebuttable presumption favoring natural parents of section 633.559, The Code 1981, is fully applicable. Id. The

burden was on Janice Brahn to establish that the best interests of the children required her appointment as their custodian. Id.

We find the evidence insufficient to overcome the presumption favoring the natural parent, Gary. In Matter of Guardianship of Sams, 256 N.W.2d 570, 573 (Iowa 1977), the court stated the presumption "is not overcome by showing that those who provided the assistance love the children and would provide them with a good home. These circumstances alone are not sufficient to overcome the preference for parental custody.... No greater showing was made here." While we agree with the court's findings that the environment offered by the Brahn's is more than suitable, we do not believe that is enough to overcome the presumption. Our review of the record indicates the environment Gary could provide, coupled with the presumption the children's interests are best served by remaining with the natural parent, establish that the trial court should have dissolved Janice Brahn's guardianship over the children. We terminate the guardianship of Janice Brahn and award Gary custody of the children.

REVERSED.