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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BEVERLY A. PATTERSON,)

Petitioner-Appellant,) Filed February 23. 1983

vs.)

DAVID KELEHER,) 2-530
3-68869

Respondent-Appellee.)

Appeal from Woodbury District Court - Charles R. Wolle, Judge.

Petitioner appeals from the judgment for respondent in this custody action brought under Iowa Code chapter 598A, asserting 1) that respondent is not the child's father; 2) that respondent is not a fit and proper person to have custody of the child; 3) that the best interests of the child would be served by awarding custody to petitioner; and 4) that the trial court should have followed the recommendation of the guardian ad litem that custody be awarded to petitioner. AFFIRMED.

James W. Redmond and John D. Ackerman of Gleysteen, Harper, Eidsmoe, Heidman & Redmond, Sioux City, Iowa, for petitioner-appellant.

Edward J. Keane of Margolin, Ryan, Gildemeister & Willia, Sioux City, Iowa, for respondent-appellee.

Considered en banc.

PER CURIAM

Petitioner, Beverly Patterson, the maternal grandmother of the child, Nicholas Patterson, appeals from judgment for respondent, David Keleher, in this custody action brought under Iowa Code chapter 598A. Petitioner asserts on appeal: 1) that respondent is not the child's father; 2) that respondent is not a fit and proper person to have custody of the child; 3) that the best interests of the child would be served by awarding custody to petitioner; and 4) that the trial court should have followed the recommendation of the guardian ad litem that custody be awarded to petitioner. We affirm.

Betsy Patterson gave birth to a son, Nicholas, on May 3, 1980. She and the infant went to live with Betsy's mother, petitioner, Beverly Patterson. Betsy was not married at the time, nor had she ever been married. On June 16, 1980, the Patterson house was destroyed by fire and Betsy was killed. Petitioner began to take care of Nicholas.

When Betsy's one-time boyfriend, respondent, challenged petitioner's right to custody, asserting that he was Nicholas' father, petitioner brought the present custody action pursuant to Iowa Code chapter 598A. Respondent filed an answer, and a guardian ad litem was appointed for Nicholas. The guardian ad litem stated in the report he filed that either party would be a suitable parent but that petitioner should be awarded custody because she was unemployed and thus "better able to devote the time and attention required to adequately raise a young child."

There was testimony at trial regarding Nicholas' paternity and the parties' parenting abilities. The trial court found that respondent was Nicholas' father, noting that respondent had been adjudicated as such in separate paternity proceedings and that petitioner had presented very little concrete evidence that someone other than respondent was the father. The trial court also found that respondent, who has now married, would be better "able to provide a stable, wholesome, and supportive life for Nicholas." The court disagreed with the

guardian ad litem's conclusion that petitioner would have more time to devote to Nicholas' care, stating that petitioner would soon need to seek employment. Based on these findings, the trial court awarded custody of Nicholas to respondent and allowed petitioner visitation. Petitioner appeals from the judgment based on these findings.

I. Scope of Review. Actions under the Uniform Child Custody Jurisdiction Act are equitable in nature, St. Clair v. Faulkner, 305 N.W.2d 441, 445 (Iowa 1981), and our review is **de novo.** Iowa R. App. P. 4. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7).

II. Paternity of Respondent. Petitioner claims the trial court erred in finding respondent was the father of her grandchild. We affirm the trial court.

The child was born on May 3, 1980, to the late Betsy Patterson. The date of birth would place the date of conception in the early days of August, 1979, at which time respondent and Betsy were living together and engaging in sexual intercourse. The relationship between respondent and Betsy apparently deteriorated soon after August 1979. On May 20, 1980, the State of Iowa brought an action on behalf of Betsy against respondent to establish respondent's paternity. This action apparently was filed pursuant to Iowa Code chapter 252A. The record reflects that respondent initially denied paternity. On the night of June 18, 1980, Betsy, together with her two brothers, also children of petitioner, and a child under the care and custody of Betsy, tragically died in a house fire. On June 23, 1980, respondent entered into a consent decree in the paternity proceedings, thereby establishing his paternity of Betsy's child, Nicholas.

Respondent then sought custody of the child, but such efforts were resisted by petitioner. Petitioner's subsequent request to have the paternity consent decree vacated was denied by the court. Petitioner also sought to have the child

declared to be in need of assistance under Iowa Code chapter 232. In petitioner's CHINA petition, she stated that the child's father was unknown. Petitioner was granted custody of the child by the court following ex parte proceedings. The CHINA petition was later dismissed and the present action for custody was commenced by petitioner under chapter 598A. During the pendency of these various actions, the child has remained in the custody of the petitioner.

Many of the issues addressed by the parties in the present action concerned elements which would have been more properly addressed in the paternity proceeding. The petitioner tried to establish that any one of the several male friends of Betsy could have been the father of the child. The willingness of petitioner to impugn the character of her deceased daughter by establishing her daughter's promiscuity demonstrates the tenacity with which the litigants waged this custody contest. An extended statement of the circumstances would be helpful to no one, and very possibly harmful to the child. Suffice it to say, we have examined the record and find that it fully supports the trial court's findings and conclusions on the issue of respondent's paternity. The trial court had the added advantage of being able personally to watch and listen to the parties and the other witnesses. See Jacobs v. Jacobs, 216 N.W.2d 312, 314 (Iowa 1974). We accept the trial court's finding and conclusion that respondent is the child's father.[1]

III. Respondent's Fitness to have Custody. Petitioner asserts that the evidence adduced at trial established respondent's unfitness to have custody of the child. We disagree.

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[1] We find it unnecessary to extend this opinion by addressing whether petitioner was precluded from contesting paternity under Matter of Evans, 267 N.W.2d 48, 51 (Iowa 1978) ("Once the paternity issue was resolved, absent an appeal, familiar principles of res judicata bar further litigation.") Resolution of this issue in favor of petitioner would not alter this court's disposition of the matter on its merits.

There is a presumption of parental preference in granting custody. Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511, 517 (Iowa 1976). The court in In Interest of Mann, 293 N.W.2d 185 (Iowa 1980), was confronted with a situation where the trial court had awarded custody to a paternal uncle and aunt instead of the parents of the child under a chapter 598A petition. In discussing the propriety of this action, the court stated that:

> . . . courts have the power to award custody of a minor child to a stranger to the action, such as a grandmother or an aunt. If both parents are unfit, or if the only parent who contests the issue with a stranger is unfit, custody is properly awarded to a stranger to the action . . . It has been recognized moreover, that 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.

Id. at 186 (quoting In re Marriage of Smith, 269 N.W.2d 406, 408 (Iowa 1978)). "[T] he burden is on the third person to prove the unsuitability of the parents." In Interest of Mann, 293 N.W.2d at 187. "[I] n original custody proceedings under chapter 598A, it is only when neither parent is a suitable custodian that an alternative should be considered." Id. at 190.

In an effort to establish the unsuitability of the respondent, petitioner cites to respondent's encounters with the law and his first shaky marriage. In rejecting petitioner's contentions, the trial court stated:

> [Respondent] . . . is a fit and proper person to have custody of Nicholas. Although as a younger man . . . [respondent] had several encounters with the law and was involved in an unsatisfactory marriage, the great weight of the evidence establishes that he is now dependable both in his good employment as a butcher and in his role as father to the child of his marriage to Penny, step-father to her two other children, and "father" exercising temporary visitation with Nicholas. . . .

We find that the trial court's findings are well founded on the record before us. The personal aspersions cast by the litigants serve no practical purpose and only obfuscate the real issue before us. We find that petitioner failed to carry her burden in establishing the unsuitability of respondent as custodian.

IV. Best Interests of the Child. Petitioner further claims that it is not in the best interests of the child to award custody to respondent. We disagree.

Our governing consideration in all custody disputes is what is in the best interests of the child. Iowa R. App. P. 14(f)(15). The trial court found that awarding custody to respondent "is more likely to . . . provide a stable, wholesome, and supportive family life for Nicholas . . . It is important for a child . . . to be part of a rooted family life, and [respondent, his wife], the children they are raising and [respondent's] family in the . . . area offer more in that regard. . . ." We agree with the trial court that it is in the best interests of the child that his father have care, custody and control of the child, subject to the right of petitioner to visitation.

The best interests of the child will not be benefitted by permitting the wounds opened in this litigation to fester between the parties. We believe it is important that the child have access to a close and continuing relationship with his maternal grandmother. We urge the parties, for the benefit of the child, to make the appropriate amends after such brutal litigation.

V. Guardian ad litem Report. The parties agreed that the report of the guardian ad litem would not be introduced into evidence and the court noted that it would not be considered as evidence or given any weight as evidence. There is no basis for either party to complain that the trial court rejected the findings of the report. Accordingly, we affirm the trial court in all respects.

AFFIRMED.