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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-136 / 89-568

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF JOSEPH EDMUND REED, A Minor

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GERRY SMITH and **ROBERTA SMITH,** Coconservator and Coguardian, Respectively, of JOSEPH EDMUND REED,
Appellants,

vs.

EDMUND R. REED and **JANICE REED,** Coconservator and Coguardian, Respectively, of JOSEPH EDMUND REED,
Appellees,

vs.

ROD SURBER and **RAE ANN SURBER,** Coguardians of JOSEPH EDMUND REED,
Appellees.

Appeal from the Iowa District Court for Lucas County, J. W. Jordan, Judge.

The maternal grandparents of a minor child, Gerry and Roberta Smith, appeal a judgment of the district court appointing third parties as coguardians of the minor child. The Smiths argue the trial court erred in: (1) refusing to grant a jury trial on the issue of whether additional coguardians should be appointed for the minor child; (2) appointing third parties as coguardians; and (3) not awarding physical custody to them. **AFFIRMED.**

Thomas M. Walter and David J. Hester of Johnson, Hester & Walter, Ottumwa, for appellants Smith.

Paul Goldsmith of Goldsmith Law Office, Chariton, for appellees Surber.

Deborah S. Krauth of Krauth Law Firm, Cherokee, guardian ad litem for the minor child Joseph Edmund Reed.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

DONIELSON, P.J.

Appellants Gerry Smith and Roberta Smith had a daughter Melody. Appellees Edmund R. Reed and Janice Reed had a son, Stephen Reed. Stephen and Melody were married in 1984. They moved to Chariton, Iowa, in 1985. They had one child, Joseph Edmund Reed, born December 5, 1985. In 1986 Stephen decided to become a minister, but Stephen and Melody were killed in an automobile accident on December 21, 1986, as they returned from a trip to arrange living quarters while Stephen attended Bible college. The Smiths took care of Joseph until August 7, 1987, when a trial court decision placed Joseph in the care of Rod and Rae Ann Surber. Both the Smiths and the Reeds had sought to be named as guardians and conservators for Joseph.

The Smiths live on a farm, but Gerry works primarily off the farm. Gerry is divorced from his first wife, who was the natural mother of Melody. The Smiths attend the Brethren Church, which is a "full gospel" charismatic church. The Reeds are farmers. Formerly Catholics, the Reeds now belong to the Berean Church, a Pentecostal church. A great deal of their time centers around religious activities. Stephen and Melody were members of the Assemblies of God Church. Their minister indicated they expressed a desire not to have their parents raise Joseph if anything happened to them as they would prefer that members of their church raise him. They specifically

mentioned their friends and fellow church members Rod and Rae Ann Surber as potential guardians for Joseph.

In June 1987, the trial court concluded that because of their respective ages and mutual antagonism, it would not be in Joseph's best interest to be placed in the custody of either set of grandparents. The court felt either set of grandparents would devote an unhealthy amount of competitive attention on him. The court made Gerry and Edmund coconservators and Roberta and Janice coguardians of Joseph. In appointing coguardians, the trial court expressed the view that it realized both sets of grandparents should be a part of Joseph's life and it hoped its ruling would allow this to be accomplished.

The trial court stated it had the power under Iowa Code section 600A.2 to name a custodian for Joseph, and the court named Rod Surber and Rae Ann Surber as custodians. The Surbers were given physical care of Joseph. Since August of 1987 Joseph has remained in the physical care of the Surbers. Gerry and Roberta appealed from the trial court's decision.

The court of appeals affirmed the decision of the trial court appointing Janice Reed and Roberta Smith as coguardians. The court, however, concluded the trial court had erred in creating the office of custodian and placing custody with the Surbers. The court ruled physical custody could only be placed with a guardian. The court of appeals

remanded the case back to the trial court, directing it to determine who should have physical custody of Joseph.

On June 2, 1988, the trial court filed an ex parte order, placing custody with the Surbers. The order was later set aside. The Surbers, however, subsequently applied to be appointed successor guardians, later amending such motion to coguardians. The Surbers additionally filed an oral application to be temporary coguardians, which was granted by the trial court, pending a full hearing on the application.

During the pendency of these hearings, the Surbers had moved to Rochelle, Illinois. Mr. Surber became a manager for a local newspaper in Rochelle. Rod currently earns about $25,000 per year, while Rae Ann earns about $2500 from baby-sitting.

On August 17, 1988, the Smiths filed their answer to the Surber's petition and also filed a demand for a jury trial. The trial court denied the motion for a jury trial. Hearing on the Surbers' application and on the issues remanded by the court of appeals was held on February 7, 1989. At trial, Dr. John Hartson testified Joseph appeared to be in good health and had integrated normally into the Surber family. Dr. Hartson testified since Joseph had already been with the Surbers for eighteen months, it would be too traumatic for him at his age to be displaced into a new home. Citing Joseph's integration with the Surber family and the continuing strained

relationship between his grandparents, the trial court ruled the Surbers were to be appointed coguardians along with Mrs. Smith and Mrs. Reed, and physical custody was to remain with the Surbers. The trial court awarded the Smiths and Reeds alternate month visitations, and one week each for visitation in the summer. The Smiths subsequently filed a motion to amend and enlarge the findings and modify the judgment. The motion was denied by the trial court. The Smiths have subsequently appealed.

The Smiths contend the trial court erred in refusing to grant a jury trial on the issue of whether additional coguardians were required for Joseph. The Smiths argue pursuant to Iowa Code section 633.555, actions under sections 633.552 are to be tried as law actions to a jury if demanded. The Smiths claim the Surbers have failed to establish by the evidence that a necessity existed for the appointment of additional coguardians, they argue the Surbers are not the proper parties to have physical custody of Joseph.

I.

The Smiths, relying on Iowa Code section 633.555, filed a demand for a jury trial on the issues in the Surbers' petition for the appointment of coguardians. The trial

court denied their request, and the action proceeded to be tried by the court.[1]

At issue is what effect is to be given to section 633.555.[2] That section states:

> All other pleadings and the trial of the cause shall be governed by the Rules of Civil Procedure. The cause shall be tried as a law action, and either party shall be entitled to a jury trial if demand is made therefor as provided by the Rules of Civil Procedure.

An identical provision is found in the section dealing with the opening of conservatorships. Iowa Code § 633.569.

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 and not de novo. In re Guardianship of Murphy, 397 N.W.2d 686, 688 (Iowa 1986). The court in Murphy expressed reservations about applying such a scope of review in cases involving child custody, but the court concluded absent legislative changes, section 633.555 mandated this approach.

Murphy, however, did not address what aspects of guardianship proceedings may be subject to a jury trial. It is this court's considered decision that a determination

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1. We note that in declining to grant a jury trial, the trial court concluded the right to a jury extends only to the question of whether the allegations of the guardianship petition are true. As we too adopt this position in our decision, we decline to render an opinion with regard to the trial court's conclusion that the Smiths were not "parties" pursuant to section 633.555.

2. All references are to the 1987 Iowa Code.

as to whether the allegations of a guardianship petition are proven may be resolved by a jury. Any decision regarding the appointment of a specific guardian is a decision for the court.

A review of the guardianship statutes supports this position. Section 633.552 sets forth the allegations which must be contained in a guardianship petition, and section 633.555 states the cause shall be tried as a law action and subject to a jury trial upon demand therefor. Section 633.556 provides, "If the allegations of the petition as to the status of the proposed ward and the necessity for the appointment of a guardian are proved, the court may appoint a guardian." (Emphasis added).

In interpreting a statute, all portions of a legislative enactment are to be considered together. Welp v. Iowa Dep't of Revenue, 333 N.W.2d 481, 483 (Iowa 1983). It is clear from the wording and organization of sections 633.552-.556 that the provision for a jury trial extends no further than proving the allegations of a guardianship petition. For example, if an issue existed as to a proposed ward's status as being mentally or physically incapacitated, Iowa Code § 633.552(2)(a), or that a ward's best interests required the appointment of a guardian, Iowa Code § 633.552(4), then a jury trial would be warranted. However, where, as in this case, no challenge has arisen to either the status of the ward or the necessity for the appointment of a guardian, then the action proceeds without

a jury trial. We reject the Smiths' argument that the Surbers had the burden to prove to a jury the necessity for the appointment of additional guardians as opposed to merely alleging and proving the necessity for the appointment of a guardian for the minor Joseph Reed.

Language in past cases also suggests the right to a jury trial is for the purpose of determining if a petition's allegations are true. See Richardson v. Richardson, 217 Iowa 127, 129, 250 N.W. 897, 898 (1933) (where substantial evidence has been tendered to establish unsoundness of mind, the question becomes one for the jury); Holly v. Holly, 157 Iowa 584, 587, 138 N.W. 445, 446 (1912) (either party may have a jury trial regarding the merits of a petition, but not with regard to setting aside the appointment of a temporary guardian).

The allegations of the guardianship petition--that Joseph was a minor and his best interests required the appointment of a guardian--were previously concluded and no appeal was taken on those issues. The trial court's subsequent decision to consider the Surbers' application to be appointed coguardians, their appointment as Joseph's coguardians, and the decision to award them the physical care of Joseph were not questions for a jury's determination. No error occurred denying the Smiths' request for a jury trial.

II.

The Smiths claim the trial court erred in appointing the Surbers as coguardians for Joseph and in awarding them physical custody.[3] As we noted in our earlier decision in this case, there is nothing in the probate code prohibiting the appointment of coguardians. In re Guardianship of Reed, 426 N.W.2d 657, 659 (Iowa App. 1988).[4] As the trial court noted in its decision, the relationship among the two sets of grandparents is strained, and we conclude it is advantageous in this matter to have the Surbers appointed as coguardians with Roberta Smith and Janice Reed.

Just as an order appointing a custodial guardian is subject to review on error, Murphy, 397 N.W.2d at 688, we similarly conclude a trial court's decision as to which of multiple guardians is to have physical custody of a ward is also subject to review on error.

We look to the record to see if substantial evidence supports the district court's findings. Id. The record

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3. As no party has appealed the propriety of appointing Mrs. Reed or Mrs. Smith as coguardians with the Surbers, we decline to express any opinion on this issue. We note in passing, however, that appointment of the grandmothers as coguardians was not necessary to ensure continued grandparent visitation with Joseph. See In re Guardianship of Ankeney, 360 N.W.2d 733, 737-38 (Iowa 1985) (even if guardian has adopted ward, court may order grandparent visitation with ward over guardian's objection if such visitation would be in ward's best interest).

4. Contrary to the Smiths' characterization of our prior decision in this case, our first opinion did not mandate that the trial court choose between Mrs. Smith and Mrs. Reed to determine who would have custody of Joseph. Our decision did not preclude the trial court from appointing the Surbers as coguardians with the physical care of Joseph.

reveals the Surbers were friends of Joseph's parents and they belong to a church of the same denomination as that to which Joseph's parents had been members in Chariton.

The record indicates Joseph has flourished since his placement in the Surber home. He has bonded with the family members and is well adjusted. The Surbers have encouraged Joseph's relationships with his grandparents and they intend to continue doing so.

Custody determinations, especially under the tragic circumstances of a case like this, are never easy. The trial court was presented with a great deal of evidence regarding Joseph and the parties interested in his care. From our review of the record, it is apparent substantial evidence supported the appointment of the Surbers to provide for Joseph's physical care. Even under de novo review, we would still reach the same conclusion.

We earnestly ask the parties in this case not to further compound Joseph's terrible loss by creating any further antagonism among themselves. The Surbers, the Smiths, and the Reeds together may be able to provide Joseph with both a strong and secure immediate and extended family structure. He deserves as much.

AFFIRMED.

Hayden, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

While I would like to agree with the majority, I cannot. According to the dictates of In re Guardianship of Murphy, 397 N.W.2d 686 (Iowa 1986), this is a law action. A jury trial may be demanded with respect to the issues triable at law. South Cent. Iowa Prod. Credit Ass'n v. Scanlan, 380 N.W.2d 699, 703 (Iowa 1986). The right to a trial by a jury is preserved and should not be impaired except for a compelling reason. Morningstar v. Myers, 255 N.W.2d 159, 161 (Iowa 1977); Conrad v. Dorweiler, 189 N.W.2d 537, 539 (Iowa 1971).

I would hold current law directs the matter be remanded to the trial court to hold the jury trial for which demand was made.