FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE GUARDIANSHIP OF JEREMY LEE MURPHY	)	Filed ~~June 25, 1986~~
	)	6-98
		85-1585
BILL BRASS and EDITH BRASS,	)	121
Appellants	)	

Appeal from the Iowa District Court for Cerro Gordo County (No. 19776) - B. C. Sullivan, Judge.

Appellants appeal from an order appointing a guardian for a one-year-old boy who had been in their care. Order appointing guardian modified. **REVERSED AND REMANDED TO JUVENILE COURT.**

C. A. Cady III of Hobson, Cady & Drew, Hampton, for appellants.

Larry J. Johnson of High, Walters & Johnson, Iowa Falls, for appellees Steven Shane and Kimberly Shane.

Randy Nielsen of Pappajohn, Shriver, Eide & Nicholas, Mason City, for appellees Milton Murphy and Debra Murphy.

Candila Coutts, Mason City, for Jeremy Lee Murphy.

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

SACKETT, J. 122

Appellants Bill and Edith Brass, who have served as foster parents of Jeremy Lee Murphy, a minor child, appeal from an order appointing Steven and Kimberly Shane as Jeremy's guardian and transferring custody of Jeremy to the Shanes. Appellants contend they should be the guardian of Jeremy and custody should remain with them.

Milton Murphy and Debra Murphy are the natural parents of Jeremy Lee Murphy, born November 5, 1984. In March, 1985, Jeremy was adjudicated a child in need of assistance, and custody of Jeremy was transferred to the Department of Human Services for foster care placement. The foster parents chosen by the department were Paul Martin and Diane Martin. The Martins are not related to the Murphys.

Diane Martin later became ill. In June, 1985, custody of Jeremy was ordered transferred to foster parents Bill Brass and Edith Brass. Edith Brass is Milton Murphy's half sister. Jeremy has been there ever since. In October, 1985, Steven Shane and Kimberly Shane filed an application for appointment as Jeremy's guardian. Kimberly Shane is Debra Murphy's full sister. Later in October, 1985, the Brasses filed an application for appointment as Jeremy's guardian. By virtue of Jeremy's age, both petitions for guardianship were involuntary.

Trial was held on both guardianship petitions. The district court appointed the Shanes as Jeremy's guardian and transferred custody of Jeremy to them. The Brasses appealed from the district court's ruling. The Shanes moved to dismiss the Brasses' appeal asserting the Brasses lacked standing to appeal. The Iowa Supreme Court, by Justice Larson, denied the motion to dismiss.

I.

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We must first determine our scope of review. The Brasses contend our review is de novo. The Shanes contend the matter was triable at law and as such the findings of fact made by the trial court are binding if supported by substantial evidence.

Despite the unusual posture in which this case reaches us, the focus is not on the issue of the rights of the petitioning parties. Rather, the primary issue is who will have custody of Jeremy. In child custody cases the first and governing consideration is the best interest of the child. Iowa R. App. 14(f)(15).

In early cases the Iowa Supreme Court held questions in guardianship proceedings were at law. However, since 1915 the court has consistently held that proceedings involving the custody of a minor are triable de novo. In re Guardianship of Lehr, 249 Iowa 625, 629, 87 N.W.2d 909, 911-12 (1958). See also Matter of Guardianship of Sams, 256 N.W.2d 570, 572 (Iowa 1977). Our review is de novo. Jeremy is incapable of guarding his own interest. Consequently, we and the trial court have the duty to guard his interest, to see he has a full day in court and to ensure his rights are not sacrificed. See Cavender v. The Heirs of Smith, 5 Iowa 157, 194-5 (1857).

It is the policy of the law to protect the interests of minor children incapable of looking after their own affairs. An infant becomes a ward of the court on the institution of an action or proceeding affecting his person or property. As such, it is the right and duty of the court to protect the rights and interests of an infant party to the litigation on its own motion, even though it has appointed a representative for the infant. This rule applies whether the infant is a plaintiff or defendant, whether the proper relief is asked in the pleadings and whether the claim or defense is properly pleaded. See 43 C.J.S. Infants §220 (1978).

II.

To adequately address the issue of Jeremy's custody we find it necessary to review the juvenile proceedings in this matter. On March 1, 1985, a petition was filed seeking to have Jeremy found a child in need of assistance. Allegations were made at the time of filing the petition:

> Illustrative of the child's situation are the following:
>
> a. The child has been recently admitted to St. Joseph Mercy Hospital. At the time of his admission to the hospital, he was suffering two black eyes, bruises on his skull, bruises on his back and scratches about his face.
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> b. During the investigation of these injuries, the parents reported to an officer of the Department of Human Services that the child has sustained scratches due to his long fingernails and the injuries and bruises were the result of his having bumped into furniture, into the refrigerator, or when a mobile fell on him in the bed. It is the opinion of the worker that the injuries do not appear to be those that could have occurred in the fashion described by the parents
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> c. Upon his birth, the child was in the 50% for development. At the time of his admission to the hospital, approximately four months later, he ranked only in the 5%. Dr. Thomas Boyd, on February 25, 1985, diagnosed the child as failure to thrive. One indication of the failure to thrive situation was that on a single overnight, in the hospital, the child gained 7 ounces.
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> d. The parents either do not understand the developmental needs and abilities of an infant, or are unable to provide for those needs. Specifically, it appears the parents do not understand the feeding and burping process for an infant. Nor do they appear to understand how to handle or provide safety for the infant so as to protect it from bodily injury.

An order was filed by the juvenile court on March 29, 1985, finding clear and convincing evidence that Jeremy was a child in need of assistance within the meaning of Iowa Code §§232(5)(b), 232.5(1) (1983).

As a result of a dispositional hearing on June 6, 1985, Jeremy was found to remain a child in need of assistance. The Department of Human Services introduced undisputed evidence the natural parents were still unable to care for Jeremy in their home on a full-time basis. The main issue at the June 6, 1985, dispositional hearing was whether Jeremy should be placed in a local foster home, according to a department recommendation, or with relatives. At the dispositional hearing home studies were introduced on the Brass and Shane homes. The court determined neither parent objected to placement in the Brass home and placement was in fact ordered to be in the Brass home.

On August 29, 1985, a review hearing was held. The juvenile court determined Jeremy remained a child in need of assistance and it was not in his best interest to be returned to his parents. Custody was ordered to remain with the department. The court determined Jeremy was adequately cared for in the Brass home and it would be contrary to his best interest for that placement to be changed or terminated.

On October 23, 1985, the juvenile court again found Jeremy to be a child in need of assistance. The court also determined a petition to appoint a guardian had been filed as a probate matter in Cerro Gordo County by the natural parents together with Jeremy's guardian ad litem. Pursuant to Iowa Code §232.3(2) (1985), the juvenile court determined the parties were authorized to litigate all guardianship issues in Cerro Gordo County district court. The juvenile court further determined when a dispositive order was entered in Cerro Gordo County district court the child in need of assistance proceedings should be terminated. There then followed the determination by the district court that the Shanes should be appointed guardian of Jeremy.

In addressing Jeremy's best interest we first determine Jeremy should still remain a child in need of assistance. We also determine this proceeding appears to be an attempt to circumvent the CHINA procedure and in effect circumvents the juvenile court from addressing the issue of the parents' abilities to care for Jeremy. Without resolution of this issue by the juvenile court Jeremy will be left in a limbo situation with: (1) no stability; (2) no order of continued supervision by the department of human services; and (3) no permanency.

In addition, if the proposed termination of the CHINA proceeding were to stand, the juvenile court would have no check on the parents' activities, despite juvenile court findings clearly supported by the record that the natural parents were seriously deficient in parenting skills and continue to remain unable to care for Jeremy. Furthermore, the juvenile court evades the issue of termination of parental rights. As such, Jeremy could well become a football in the Iowa legal system. Furthermore, the district court also lacks subject matter jurisdiction for supervision absent an adjudication that the child is in need of assistance. Iowa Department of Social Services v. Blair, 294 N.W.2d 567, 569 (Iowa 1980). The best interest of Jeremy demand the CHINA proceedings not be terminated.

Having determined Jeremy remains a child in need of assistance, we must look at the issue of Jeremy's custody. Iowa Code §§232.102(5) and (6) (1985) direct if a child is not returned home and the child has previously been placed in a licensed foster care facility, the department or agency shall consider placing the child in the same licensed foster care facility. The department which retains supervision recommended Jeremy's continued placement with the Brasses. Other than the parents' wishes, there appears no reason in the record to change Jeremy's placement. The district court did determine the Brasses might be

too attached to Jeremy. However, we fail to see how very caring, loving people can be detrimental to Jeremy and obviously the attachment was already formed at the time the guardianship proceedings were initiated.

The parents originally had no objections to the placement of Jeremy with the Brasses. Jeremy has received excellent care in the Brass home. While we do not ignore the parents' wishes for placement, we view their wish in light of their past conduct to the child.

While visitation is important if the parent-child relationship is to be preserved, the record reflects no reason why visitation cannot continue under the current placement. Jeremy's best interest dictate that he should not be forced to be uprooted from his current custodial environment and placement shall remain with the Brasses. We hold the matter should be remanded to juvenile court for further order on departmental supervision and parental visitation.

REVERSED AND REMANDED TO JUVENILE COURT.

Schlegel, J., concurs, Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting) 128

I respectfully dissent. I believe the majority brushes aside the clear statutory language of Iowa Code section 633.33 (1985). I would affirm the probate court's decision placing guardianship of Jeremy with the Shanes.

I.

Iowa Code sections 633.552-.561 (1985) govern the procedures for the opening of a guardianship. Concerning pleadings and trials, section 633.555 states:

> All other pleadings and the trial of the cause shall be governed by the Rules of Civil Procedure. The case 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.

(emphasis added). That our scope of review should be on assigned error is further evidenced by Iowa Code section 633.33 (1985), which provides:

> Actions to set aside or contest wills, for the involuntary appointment of guardians or conservators, and for the establishment of contested claims shall be triable in probate as law actions, and all other matters triable in probate shall be tried by the probate court as a proceeding in equity.

This case is distinguishable from In the Matter of Guardianship of Sams, 256 N.W.2d 570, 572 (Iowa 1977), where the court stated:

> As in all child custody disputes the determinative factor is the best interests of the children. The rebuttable presumption favoring natural parents of §§ 633.559 and 633.571 is fully applicable. The burden was on Mr. Slater to establish that the best interests of the children required his appointment as their custodian. Furthermore, the proceeding was in equity and our review of the probate court's ruling is de novo. In re Guardianship of Plucar, 247 Iowa 394, 72 N.W.2d 455 (1955); see § 633.33, The Code.

In Sams, the petitioner sought to terminate an already-established guardianship. This case did not involve the initial determination of whether a guardianship should be established when an involuntary petition had been filed.

Similarly, In re Guardianship of Lehr, 249 Iowa 625, 628-29, 87 N.W.2d 909, 911-12 (1958), where a termination of a guardianship petition was filed, the court stated:

> In many early cases this court held that questions in guardianship proceedings were at law. [Authorities] Since about 1915 we have consistently held that proceedings of this nature, involving the custody of a minor, are triable de novo. [Authorities]
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> In Jensen v. Sorenson, supra, [211 Iowa 354, 233 N.W. 723] we said: "The appellee urges upon us that the case is not triable de novo and is reviewable on errors only. Where the issue turns upon the best welfare of the child and involves the overturning of presumptive parental rights in the interest of the child, we have found it difficult to separate questions of law from questions of fact, and have found ourselves unable to adhere very strictly to the rule contended for by appellee. We have necessarily recognized the fact that the determination of such issues carries us into the field of equity, and that it is indispensable that principles of equity be applied."
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> We recently considered the question In re Plucar's Guardianship, supra [247 Iowa 394, 72 N.W.2d 457], using following language: "Since the right to the child's custody is the principal matter in controversy it would seem our review should be de novo under the rule adopted in Jensen v. Sorenson, 211 Iowa 354, 367, 233 N.W. 717, 723, and subsequently adhered to many times. While the cited case was an action in habeas corpus it also involved the appointment of a guardian and a decree of adoption."
>
> The distinction is not too important because we approve the findings of fact and judgment of the probate court in denying termination of the guardianship of Howard W. Forte.

Finally, in Arent v. Arent, 239 Iowa 737, 740, 32 N.W.2d 660, 661 (1948), which involved the appointment, not the termination, of a guardianship, the court stated:

> The proceeding relative to the appointment of a guardian is at law. We have previously held that the findings of the probate court in the selection of a guardian are entitled to great weight. We have further held that if the evidence is in conflict such findings as made by the probate court ought not to be disturbed. It has also

> been our holding that findings of fact by a probate court are conclusive on the appellate court when they are fairly supported by competent testimony.
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> This court will not interfere in the selection of a guardian made by a probate court unless it is shown that there has been a clear abuse of discretion in making the appointment. (citations omitted)

Both petitions are in fact involuntary petitions because the voluntary guardianship petition requirement under Iowa Code § 633.557 (1985) cannot be satisfied since the ward, Jeremy, is under the age of 14 years. Thus, because this case was tried upon involuntary petitions to establish a guardianship, I conclude that our review should be on assigned errors of law under § 633.33. Thus, Brasses must show the probate court abused its discretion.

II.

The Brasses maintain the probate court erred by awarding custody of Jeremy to the Shanes. Jeremy resided with the Brasses for less than six months before the court's order. Testimony indicated that either family was qualified to care for Jeremy, which we find was true. The natural parents, however, stated a preference for the Shanes. While no legal presumption attaches to the desires of the natural parents, it is evidence which can be taken into account. Iowa Code § 633.559 (1985); Painter v. Bannister, 258 Iowa 1390, 1396, 140 N.W.2d 152, 156 (1966) (deceased parent's desire as to custody given consideration).

Two reasons stated for the change were: The Shanes lived in what was perceived to be a better school district and the Shanes had raised children before, whereas Jeremy was the first child the Brasses would have raised. The determination in this case was understandably a difficult and close one to make. I cannot find, however, the requisite deficiencies in the probate court's decision so as to merit the change in the disposition of Jeremy urged by the Brasses. Given

the petitions, one party would be appointed guardians and one would not. Unfortunately, both parties were qualified, but only one could be Jeremy's guardian. Even though it is desirable to fix the child's status as soon as possible and to rarely interfere with this determination, Jeremy was in the Brasses' custody for less than six months. See generally Halstead v. Halstead, 259 Iowa 526, 531, 144 N.W.2d 861, 864 (1966); In re Interest of Leeney, 317 N.W.2d 513, 516 (Iowa Ct. App. 1982).

Expert testimony indicated that although moves are always somewhat unsettling, a move in this instance would not be sufficiently adverse to Jeremy's interest to necessitate a determination that the Brasses retain custody. Iowa law does not entitle the Brasses to benefit from a presumption of retaining custody based on their brief tenure as foster parents. I do not read the probate court's opinion as stating the Brasses were inadequate parents, but the court was forced to make a choice which it properly did. Jeremy would be provided superior care in the Shane home and will experience the stability and guidance of which he has thus far been deprived. I note that, like the Lehr court, had our scope of review been de novo, the result would have been the same. For these reasons, I would affirm the probate court's decision.