IN RE INTEREST OF LAKOTA Z. AND JACOB H., JR., CHILDREN UNDER 18 YEARS OF AGE. JERI H. AND DENNIS H., APPELLANTS, V. JACOB H., SR., APPELLEE.

804 N.W.2d 174

Filed October 14, 2011. No. S-10-1046.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Child Custody: Parental Rights.** Under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers to the parent-child relationship and the preferences of the child.
3. **Constitutional Law: Parental Rights: Presumptions.** Absent circumstances which justify terminating a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.
4. **Parental Rights: Guardians and Conservators: Presumptions.** In guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.
5. **Parental Rights: Guardians and Conservators: Proof.** An individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.
6. **Juvenile Courts: Parental Rights: Due Process.** Even when children are adjudicated and under the jurisdiction of a juvenile court, the Due Process Clause of the U.S. Constitution demands some showing of parental unfitness if parents are to be deprived of their interest in the care, custody, and control of their children.
7. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent that is overcome only when the parent has been proved unfit.
8. **Juvenile Courts: Parental Rights: Case Disapproved.** To the extent that *In re Interest of Eric O. & Shane O.*, 9 Neb. App. 676, 617 N.W.2d 824 (2000), holds that the parental preference principle is not applicable to an adjudicated juvenile, it is disapproved.
9. **Parent and Child: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing or which has caused, or probably will result in, detriment to a child's well-being.

Appeal from the County Court for Hall County: PHILIP M. MARTIN, JR., Judge. Affirmed.

Jerry Fogarty for appellants.

James A. Wagoner for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

The children who are the subject of this guardianship case were adjudicated and placed in the care and custody of their paternal grandparents after their parents neglected them, and their grandparents were eventually appointed their guardians. But their father, after completing drug court and obtaining counseling, sought to have the guardianship terminated and his children returned to him. The county court, finding that the father was not an unfit parent, ordered that the guardianship would terminate. The question presented in this appeal is what standard of proof should have been applied to the father's request for termination of the guardianship.

BACKGROUND

This case began with a juvenile petition filed in county court on June 10, 2003, alleging that Lakota Z. and Jacob H., Jr. (Jacob Jr.), were children as defined under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), because they lacked proper parental care and were in a situation that was dangerous to their health or morals. The petition was supported by the affidavit of a child protective services worker, who averred that 21-month-old Lakota and 7-month-old Jacob Jr. were at risk due to parental neglect. Specifically, the affidavit indicated that Grand Island, Nebraska, police had found the children's home to contain drug paraphernalia, but not food or diapers, and that after a domestic dispute between their parents, the children had been moved to the home of their paternal grandparents, Jeri H. and Dennis H. The court issued an ex parte order placing Lakota and Jacob Jr. in the temporary custody of the Nebraska Department of Health and Human Services (DHHS).

The children's father, Jacob H., Sr. (Jacob Sr.), was charged with child neglect and drug possession, along with false imprisonment and assault arising out of a fight with the children's mother. Jacob Sr. admitted at trial that he had assaulted the

children's mother on several occasions. The objective of the initial case plan was reunification, and with respect to Jacob Sr., the case plan established goals of managing his anger, addressing his individual health needs, living a chemical-free lifestyle, and providing for the children's needs. Jacob Sr. did not obtain counseling and was removed from a family violence treatment program for noncompliance. But a DHHS caseworker testified that during that time, she believed Jacob Sr. and the children's mother might be able to "get their lives back on track." So, the second juvenile court case plan provided for guardianship, and not termination of parental rights.

The guardian ad litem petitioned that Jeri and Dennis be appointed as the children's guardians. The county court appointed them as guardians in an order filed under the juvenile case docket number on April 1, 2004. DHHS closed its case file on the children. DHHS, the county attorney, Jacob Sr., and the children's mother all waived any notice or participation in any further court proceedings.

Jacob Sr. was admitted to drug court in 2005 and successfully completed the program in 2006. Jacob Sr.'s relationship with the children's mother ended at about the same time he entered the drug court program. In 2008, Jacob Sr. filed a motion in county court, under the juvenile case docket number, to terminate the guardianship. He alleged that the reasons the guardianship had been established had been ameliorated, because he had completed a drug court program and drug treatment, married, obtained gainful employment and suitable housing for the children, and "emotionally reunited" with the children. By the time of trial, Jacob Sr. had been working full time for 2 years and was also working part time at another job. His employment provided insurance for the children. In his motion, Jacob Sr. alleged that he was a fit and proper person to have exclusive care and custody of his children and that it would be in the children's best interests for him to resume custodial care. A November 2008 journal entry established a visitation schedule for Jacob Sr. and the children.

Much of the evidence presented at trial was directed at Jacob Sr.'s ongoing difficulties controlling his temper. In December 2008, Jacob Sr. was involved in an argument with his parents

at their home when he arrived to pick the children up for visitation. Jacob Jr. did not want to go, and Jacob Sr. became angry when he and his parents disagreed about how to handle the situation. Jacob Sr. admitted to other angry outbursts that had occurred during 2008: specifically, an argument with his wife and another argument with a store clerk. And he admitted that his children had witnessed such outbursts. There was conflicting testimony about whether, during his argument with his wife, Jacob Sr. had knocked items off of bookshelves or broken a piece of furniture.

In October 2009, Jeri and Dennis filed a motion to suspend visitation based on an incident during a counseling session involving Jacob Sr. and his mother that resulted in Jacob Sr.'s swearing at the children's counselor, Tracy Waddington, and slamming the door as he left. The motion was granted ex parte. Jacob Sr. admitted to the incident. But afterward, Jacob Sr. sought his own mental health treatment and engaged his own counselor to treat him for his anger control problems.

Janice Rockwell, a licensed independent mental health practitioner, testified that she had begun treating Jacob Sr. for anger management in October 2009. She said that she had observed Jacob Sr. and the children during joint counseling and said they seemed comfortable with him. She said that Jacob Sr. had learned coping skills to deal with anger appropriately and opined that Jacob Sr. did not have an anger control problem at the time of trial. She also said that she had no concerns about Jacob Sr.'s being any kind of threat to the children's safety, and that she had also jointly seen Jacob Sr. and his parents and that they had made progress in that relationship.

Jacob Sr. testified that he and Rockwell had discussed ways to interact with the children and to defuse conflicts with his parents. He said that he had not had a significant argument with his parents since December 2008. Jeri testified that Jacob Sr. had originally resisted participation in counseling. But Jeri said that she, Dennis, and Jacob Sr. had participated in some joint counseling with Rockwell that Jeri thought had gone well. When asked, Jeri admitted that while she still wanted the children to live with her and Dennis pursuant to the guardianship, she did not believe Jacob Sr. was an unfit parent.

Waddington, however, who had seen Jacob Sr. twice in the context of family therapy, opined that Jacob Sr. was deficient in addressing his relationship with Jeri and Dennis, which she felt was detrimental to the children's well-being. But when asked if she believed Jacob Sr. was an "unfit" parent, she said only that she had "concerns" about him. Essentially, the record reflects a difference of opinion between the family's counselors: Waddington believed that the relationship that should be addressed first was that between Jacob Sr. and his parents, while Rockwell thought that the relationship between Jacob Sr. and the children was more important.

Visitation had resumed regularly for Lakota after the interruption pursuant to the ex parte order, but Jacob Jr. stopped going to Jacob Sr.'s home for visitation in early 2010. Generally described, the evidence establishes that Jacob Jr. is a picky eater, and he can make himself vomit when he is given something that he does not want to eat. Jacob Sr. is less willing to accommodate Jacob Jr.'s picky eating than Jeri and Dennis, or Waddington, would prefer. Waddington explained that according to Jacob Jr., Jacob Sr. took a harder line with him on his eating preferences and that that was one of the primary reasons Jacob Jr. was reluctant to visit or live with Jacob Sr.

Evidence was also adduced at trial regarding Jacob Sr.'s use of alcohol. Jacob Sr. admitted drinking alcohol, but not to excess, and estimated that he drank about 12 beers a week. He did, however, admit that he had gotten drunk on his birthday 2 years before trial. Jacob Sr. seemed surprised when confronted at trial with an exhibit suggesting that, as a part of his drug court evaluation, he had been diagnosed with both drug and alcohol dependence. There was no evidence submitted at trial to suggest that Jacob Sr. drank to excess with any regularity, nor did any evidence establish that Jacob Sr. had gotten drunk more recently than 2 years before trial.

In summary, the evidence suggested that Jacob Sr. had serious substance abuse issues and emotional problems that he began to control after his drug court experience and associated substance abuse treatment. Although Jacob Sr. had a history of physical violence toward the children's mother, she testified that during her relationship with Jacob Sr., they had been

using drugs, and that any instances of domestic abuse between them took place before Jacob Sr. was admitted to drug court. And, she said, even before then, Jacob Sr. was good with the children. The record contains no evidence of any assaultive conduct by Jacob Sr. after his completion of drug court, nor does it contain any evidence that he was abusive to the children even before then. And while the record suggests that Jacob Sr. continued to struggle with anger control even after completing drug court, the evidence also establishes that he has certainly made substantial progress on that issue since beginning his own counseling.

After trial, on October 12, 2010, the county court entered an order finding that while the court was "concerned with the shortcomings" of Jacob Sr., the court did "not believe the evidence establishes the burden necessary to show that he is unfit and has, in fact, forfeited his parental rights." The court entered an order terminating the guardianship, effective January 1, 2011. Jeri and Dennis appeal.

ASSIGNMENTS OF ERROR

Jeri and Dennis assign that the county court erred in (1) incorrectly placing the burden of proof upon them instead of upon Jacob Sr. and applying the incorrect standard of proof in focusing upon parental unfitness instead of the best interests of the children and (2) terminating the guardianship and awarding custody to Jacob Sr.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[1]

ANALYSIS

Standard of Proof

As noted above, the county court terminated the guardianship based on its conclusion that Jacob Sr. was not an unfit parent. Jeri and Dennis argue that the court incorrectly required

[1] *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

proof of Jacob Sr.'s unfitness; instead, they argue, the court should have simply determined what was in the best interests of the children.

[2,3] But under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers to the parent-child relationship and the preferences of the child.[2] Therefore, unless it has been affirmatively shown that a biological or adoptive parent is unfit or has forfeited his or her right to custody, the U.S. Constitution and sound public policy protect a parent's right to custody of his or her child.[3] Absent circumstances which justify terminating a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.[4]

[4,5] Consequently, in guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.[5] In other words, an individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.[6]

Jeri and Dennis acknowledge those principles. But, they contend, this case is different because it began as an adjudication under the Nebraska Juvenile Code. They argue that unlike the guardianships at issue in cases such as *In re Guardianship*

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[2] See, *In re Guardianship of Robert D.*, 269 Neb. 820, 696 N.W.2d 461 (2005); *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004).

[3] See *In re Guardianship of D.J., supra* note 2.

[4] *Id.*

[5] *Id.*

[6] *Id.*

of Robert D.[7] and *In re Guardianship of D.J.*,[8] the guardianship in this case was established pursuant to the court's authority to place a juvenile adjudged to be under § 43-247(3) in "the care of some reputable citizen of good moral character" or "the care of a suitable family."[9] They point out that a juvenile court has jurisdiction over guardianship proceedings for a child over which the juvenile court already has jurisdiction under another provision of the Nebraska Juvenile Code.[10] So, they assert that Jacob Sr.'s motion to terminate the guardianship was in effect an objection to the case plan. They argue that the burden was therefore placed on Jacob Sr., under the statute in effect at the time, to prove "by a preponderance of the evidence that [DHHS'] plan is not in the juvenile's best interests."[11] (The statutory language upon which Jeri and Dennis rely has since been repealed,[12] but, for reasons that will become clear below, that is not significant.)

Jeri and Dennis' argument requires us to examine some aspects of the rather unusual procedural posture of this case. The case began, as explained above, as a juvenile adjudication and proceeded to disposition with the establishment of the guardianship, at which point, all of the interested parties save Jeri and Dennis waived further participation in the case. It is not clear from the record whether any further dispositional review hearings were held, but that is not surprising, because all the interested parties except the guardians had waived participation. And it is not even clear who would have participated in such hearings. In other words, after the guardianship was established, the case was treated much like an ordinary probate guardianship. But the case filings, including the order terminating the guardianship, continued to occur on the juvenile court docket. Therefore, although the proceedings were somewhat

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[7] *In re Guardianship of Robert D., supra* note 2.

[8] *In re Guardianship of D.J., supra* note 2.

[9] See Neb. Rev. Stat. § 43-284 (Reissue 2008).

[10] See § 43-247(10).

[11] See Neb. Rev. Stat. § 43-285(2) (Cum. Supp. 2010).

[12] See 2011 Neb. Laws, L.B. 648.

informal, the best understanding of the record is that the guardianship was established and terminated pursuant to juvenile court authority. So, for purposes of evaluating Jeri and Dennis' argument regarding the standard of proof, we assume that to be the case.

[6,7] In making their argument, Jeri and Dennis rely upon the Nebraska Court of Appeals' decision in *In re Interest of Eric O. & Shane O.*,[13] in which the court held that the parental preference doctrine is inapplicable when children are adjudicated and under the jurisdiction of a juvenile court. But the court's decision in *In re Interest of Eric O. & Shane O.* is inconsistent with our later decision in *In re Interest of Xavier H.*,[14] in which we held that even when children are adjudicated and under the jurisdiction of a juvenile court, the Due Process Clause of the U.S. Constitution demands some showing of parental unfitness if parents are to be deprived of their interest in the care, custody, and control of their children.[15] We reasoned that the showing of "unfitness" required by the Constitution was encompassed by a determination of the child's best interests.[16] We explained:

> Although the name of the "'best interest of the child'" standard may invite a different "'intuitive'" understanding, "[t]he standard does not require simply that a determination be made that one environment or set of circumstances is superior to another."[17] Rather, as we have explained, "the '"best interests" standard is subject to the overriding recognition that the "relationship between parent and child is constitutionally protected."'"[18] There is

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[13] *In re Interest of Eric O. & Shane O.*, 9 Neb. App. 676, 617 N.W.2d 824 (2000).

[14] *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007).

[15] See *id.* See, also, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978).

[16] See *In re Interest of Xavier H., supra* note 14.

[17] *In re Yve S.*, 373 Md. 551, 565, 819 A.2d 1030, 1038 (2003).

[18] *In re Guardianship of D.J., supra* note 2, 268 Neb. at 246-47, 682 N.W.2d at 245.

> a "rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent."[19] Based on the idea that "fit parents act in the best interests of their children,"[20] this presumption is overcome only when the parent has been proved unfit.[21]

[8] In short, even if Jeri and Dennis were correct in arguing that the "best interests" standard associated with juvenile adjudication somehow trumped our well-established law regarding the termination of a guardianship, the parental preference principle is still applicable, even to an adjudicated juvenile. To the extent that *In re Interest of Eric O. & Shane O.*[22] holds otherwise, it is disapproved. Jeri and Dennis' first assignment of error is without merit.

Parental Fitness

Jeri and Dennis' remaining argument is that the court erred in terminating the guardianship. They argue, based on the facts, that Jacob Sr. "did not prove by a preponderance of the evidence" that terminating the guardianship was in Lakota and Jacob Jr.'s "best interests."[23] As explained above, the correct standard of proof is actually whether there is clear and convincing evidence that Jacob Sr. is unfit. But even if we construe Jeri and Dennis' argument as questioning Jacob Sr.'s fitness as a parent, we find it to be without merit.

[9] We said in *Ritter v. Ritter*[24] that "in relation to child custody in a marital dissolution proceeding," parental unfitness "means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused,

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[19] *Id.* at 244, 682 N.W.2d at 243.

[20] *Troxel, supra* note 15, 530 U.S. at 68. See, also, *Parham v. J. R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

[21] *In re Interest of Xavier H., supra* note 14, 274 Neb. at 349, 740 N.W.2d at 25.

[22] *In re Interest of Eric O. & Shane O., supra* note 13.

[23] Brief for appellants at 14.

[24] *Ritter v. Ritter*, 234 Neb. 203, 210, 450 N.W.2d 204, 210 (1990).

or probably will result in, detriment to a child's well-being."[25] In *Ritter*, we were primarily concerned with emphasizing that evidence of unfitness should be focused upon a parent's ability to care for a child, and not any other moral failings a parent may have. It is equally worth emphasizing, however, that evidence of unfitness should be focused upon a parent's *present* ability to care for a child and that evidence of a parent's past failings is pertinent only insofar as it suggests present or future faults (although we note that in some instances, such evidence may be *very* pertinent). And we have analogized the quantum of proof necessary to prove unfitness to the proof necessary to terminate parental rights, reasoning that "[i]f the evidence of unfitness is insufficient to justify termination of parental rights in an action maintained under the Nebraska Juvenile Code," then "similarly deficient evidence of parental unfitness" would prevent a court from granting child custody "to one who is a stranger to the parent-child relationship."[26]

Applying those principles, we have found on several occasions that a parent is fit, despite a history of substance abuse, where the evidence showed that the parent had made progress in addressing those issues.[27] And we have found that parents who had previously been part of a mutually abusive relationship were not unfit where there was no evidence of abuse toward the children.[28] The evidence in this case is comparable. There is little question that had we been presented with the question of Jacob Sr.'s fitness as a parent in 2005, he would not have been found fit. But it is not 2005. The evidence proves beyond reasonable dispute that since completing the drug court

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[25] See, also, *Farnsworth v. Farnsworth*, 276 Neb. 653, 756 N.W.2d 522 (2008); *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).

[26] *Uhing, supra* note 25, 241 Neb. at 377, 488 N.W.2d at 373, citing *Marcus v. Huffman*, 187 Neb. 798, 194 N.W.2d 221 (1972).

[27] See, e.g., *In re Guardianship of D.J., supra* note 2; *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992); *Robertson v. Robertson*, 217 Neb. 786, 350 N.W.2d 576 (1984); *In re Interest of Hitt*, 209 Neb. 900, 312 N.W.2d 297 (1981). Cf. *In re Guardianship of Cameron D.*, 14 Neb. App. 276, 706 N.W.2d 586 (2005).

[28] See *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007).

program, Jacob Sr. has made substantial progress in establishing the stability in his life that is necessary to care for his children. While this does not wholly mitigate his history of drug use and abusive behavior, it does suggest that such conduct is unlikely to recur.

The only significant deficiency identified in Jacob Sr.'s ability to parent after 2006 is his problem with controlling his temper. But the record also establishes that Jacob Sr. has recognized that problem, sought treatment for it, and made substantial progress in that area as well. And there is no evidence to suggest that any of Jacob Sr.'s abusive or angry behavior was ever directed at the children, even before treatment. In fact, there was no witness at trial who was willing to opine that Jacob Sr. was an unfit parent.

In short, while we share the county court's concern about Jacob Sr.'s shortcomings as a parent, we are mindful of the fact that "'"[t]he law does not require perfection of a parent."'"[29] There is little question that the alleged deficiencies in Jacob Sr.'s present ability to parent would not have justified removal of the children from his home had those deficiencies been the bases upon which removal had been sought in the first place.[30] Therefore, on our de novo review of the record, we do not find the required clear and convincing evidence of parental unfitness that is necessary to oppose termination of the guardianship. We find no merit to Jeri and Dennis' remaining assignment of error.

CONCLUSION

The county court correctly applied the parental preference principle and reasoned that the guardianship should be terminated in the absence of clear and convincing evidence that Jacob Sr. was an unfit parent. And the court correctly concluded that given the evidence, Jacob Sr. had not been proved unfit. The county court's decision is affirmed.

AFFIRMED.

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[29] *In re Interest of Xavier H., supra* note 14, 274 Neb. at 350, 740 N.W.2d at 26.

[30] See *In re Interest of Xavier H., supra* note 14.