IN THE COURT OF APPEALS OF IOWA

No. 2-1092 / 12-0902
Filed February 13, 2013

Upon the Petition of

JOHN DAVID TROTTER,
Petitioner-Appellee,

And Concerning

KENNA LYNN BYERS,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

A mother appeals the district court's order denying her application to modify physical care and granting the father's application for temporary assignment of his physical care parenting time during the father's active duty military service. **AFFIRMED.**

Brendon D. Moe of Glazebrook & Moe, L.L.P., Des Moines, for appellant.

John David Trotter, Fort Polk, Lousiana, appellee pro se.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

BOWER, J.

A mother appeals the district court's order denying her application to modify physical care and granting the father's application for temporary assignment of his physical care parenting time during the father's active duty military service. We affirm.

I. Background Facts and Proceedings.

Kenna Byers and John Trotter are the parents of five-year-old X.B. Kenna and John were never married and X.B. is their only child. Kenna lives in Iowa.[1] X.B. was removed from Kenna's care in July 2008 pursuant to a juvenile court order.[2] X.B. was placed in the care of John's brother, then John's mother, until he was placed with John.[3] X.B. has resided with John since early 2010. The juvenile court proceedings regarding X.B. were closed in April 2010.

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[1] Kenna has three other children, ten-year-old A.B., seven-year-old K.B., and six-year-old D.B. None of Kenna's children are in her care. Kenna came to the attention of the Iowa Department of Human Services in 2007 when she and D.B., then two-years-old, tested positive for marijuana. Kenna disclosed to DHS that she had been using marijuana since she was approximately twelve-years-old. Kenna stated she also used methamphetamine at times, as recently as 2007. X.B., K.B., and D.B. were adjudicated children in need of assistance by an Appanoose County juvenile court. Kenna's oldest child, A.B., is in the custody of his father and was not part of the juvenile court proceedings.

[2] X.B. was removed from Kenna's care when Kenna attempted suicide by cutting her wrists while she and X.B. were residing at Clearview Recovery Center, an inpatient drug treatment program. Kenna was unsuccessfully discharged from the program. In July 2009, DHS completed a child abuse assessment with a determination of founded physical abuse of K.B. by Kenna.

[3] During this time, John, a member of the United States Army, was on active duty in Iraq or stationed in Hawaii. John provided financial support of $1000 per month to his brother while X.B. resided with him; he offered the same to his mother, but she would only accept $500 per month. John was able to speak on the phone to X.B. and his mother brought X.B. to Hawaii twice to visit. Despite X.B.'s sporadic relationship with John, X.B. bonded well with John and recognized him as his father.

John married Dolores in 2009, and they have a one-year-old daughter, P.T. John is a member of the United States Army and has been stationed in Hawaii, South Carolina, and Lousiana. John has also served three tours of duty in Iraq.

A decree entered in December 2010 by the district court provided for joint custody of X.B. with physical care with John, listing specific findings that "John has consistently provided a stable and nurturing home for X.B." and "John has shown a willingness to maintain Kenna and X.B.'s relationship." The court further found that X.B.'s stepmother, Dolores, "has taken an active and caring role in X.B.'s life" and that "[t]here is no indication of any concerning behaviors or criminal activity in Dolores's history," whereas Kenna resided with a paramour who was "currently on federal parole for a drug related offense." Kenna was required to make child support payments.[4]

In early 2012, John notified Kenna he was being deployed to South Korea in April 2012 until March 2013. In February 2012, Kenna filed an application for modification seeking permanent physical care of X.B., child support from John, and temporary physical care pendente lite. Kenna alleged a substantial change in circumstances had occurred in part because John would soon be deployed to South Korea for one year and that it was in X.B.'s best interests to be placed with her while John was deployed.

In March 2012, John, through an attorney, filed an answer to Kenna's application. John also filed an application for temporary assignment of his

[4] Kenna was required to pay $60 per month in child support. There is no indication in the record whether these payments have been made.

physical care parenting time pursuant to Iowa Code section 598.41D (2011) (allowing a parent granted physical care to "temporarily assign" physical care parenting time "to a family member of the minor child, as specified by the parent"). John alleged it was in X.B.'s best interests for John's physical care parenting time to be assigned to Dolores, X.B.'s step-mother, during John's deployment. Following an unreported hearing, the district court denied Kenna's application for modification, and granted John's application for temporary assignment of his physical care parenting time to Dolores. The court observed it had "not been presented with clear and convincing evidence that modification of temporary placement as requested by Kenna is in X.B.'s best interest," and found that "[i]t is in the best interest of X.B. for John's right of primary physical custody of X.B. to be assigned to X.B.'s step-mother, Dolores Trotter, during John's deployment." Kenna now appeals.[5]

II. Constitutional Issues.

Kenna contends Iowa Code section 598.41C is unconstitutional "as applied in this case," and that section 598.41D is unconstitutional "as applied in this case" and "on its face." We review constitutional issues de novo. *Lewis v. Jaeger*, 818 N.W.2d 165, 175 (Iowa 2012). Statutes are presumed constitutional, imposing on the challenger the heavy burden of rebutting that presumption. *State v. Tripp*, 776 N.W.2d 855, 857 (Iowa 2010); *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 8 (Iowa 2004). If a statute is susceptible to more than one construction, one of which is constitutional and the other not, we are obliged

[5] John did not file a brief on appeal.

to adopt the construction which will uphold it. *Santi v. Santi*, 633 N.W.2d 312, 316 (Iowa 2001). A facial attack on a statute, however, implies the statute is totally invalid and incapable of any valid application. *Id*.

Section 598.41C provides in relevant part:

> If an application for modification of a decree or a petition for modification of an order regarding child custody or physical care is filed prior to or during the time a parent is serving active duty in the military service of the United States, the court may only enter an order or decree temporarily modifying the existing child custody or physical care order or decree if there is clear and convincing evidence that the modification is in the best interest of the child.

Iowa Code § 598.41C(1)(a). Section 598.41D provides in relevant part:

> 2. Notwithstanding any provision to the contrary, a parent who has been granted court-ordered physical care or joint physical care of the parent's minor child may file an application for modification of a decree or a petition for modification of an order regarding child custody, prior to or during the time the parent is serving active duty in the military service of the United States, to temporarily assign the parent's physical care parenting time to a family member of the minor child, as specified by the parent. The application or petition shall be accompanied by an affidavit from the family member indicating the family member's knowledge of the application or petition and willingness to exercise the parent's physical care parenting time during the parent's absence.
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> . . . .
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> 4. a. The court may grant the parent's request for temporary assignment of visitation or physical care parenting time and any change in the visitation or physical care parenting time schedule requested if the court finds that such assignment of visitation or physical care parenting time is in the best interest of the child.

Kenna argues section 598.41C "allows for temporary modification of custody due to a parent's deployment," but that section 598.41D "acts as a shield, allowing the military parent to 'assign temporarily' his or her physical care parenting time to a family member of the minor child for the duration of his or her deployment." Kenna alleges that while section 598.41D specifies a number of

factors to consider in determining the best interests of the child, it "does not consider the rights and desires of the non-custodial, but perfectly fit, parent."

Kenna states the instant case involves a custodial dispute between a parent and a nonparent that implicates her fundamental liberty interest in parental autonomy and requires the strictest of scrutiny. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65, (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Santi*, 633 N.W.2d at 317 (observing the government is forbidden to infringe certain fundamental liberty interests at all, unless the infringement is narrowly tailored to serve a compelling state interest). Kenna argues the State does not have a compelling interest in enacting sections 598.41C and 598.41D. She alleges that "[w]ithout these statutes, military parents are left on the same footing as any other parent, with the same rights, privileges, and recourses." Kenna further states the statutes are not narrowly tailored, and that "with the enactment of these statutes, non-military parents are barred from using a long absence due to deployment, as a substantial change of circumstances, and are unduly saddled with Court ordered third party visitation while the military parent is deployed."

Even assuming, *arguendo*, this issue was preserved for our review,[6] we are not persuaded by Kenna's contentions. Sections 598.41C and 598.41D

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[6] It is not clear whether the district court or opposing counsel received notice of Kenna's constitutional claims. The court did not rule on the issues and Kenna did not file a motion to enlarge the court's findings or in any other manner have the district court address these issues. Error was not preserved on these issues. *See State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) ("Issues not raised before the district court, including

provide no authority for the proposition that a parent's request that a stepparent or other nonparent be permitted to provide care for a child should be imputed to the nonparent and treated as a request by the nonparent for parenting time. Accordingly, we do not find that application of these statutes implicates Kenna's fundamental rights. *See Santi*, 633 N.W.2d at 317 ("Because this heightened protection, known as strict scrutiny, applies only to those cases implicating fundamental rights, determining whether an asserted right is 'fundamental' is the first step in any substantive due process analysis.").

Because the right at issue is not fundamental, we are to apply a rational basis analysis to the alleged constitutional violation in this case to determine whether a reasonable fit exists between the government's purpose in enacting the statutes and the means chosen to advance it. *Id.* We find there is a reasonable fit between the provisions set forth in sections 598.41C and 598.41D and the State's interest in not penalizing military service people for their public service while deployed, avoiding a chilling effect on people volunteering for military service due to fear of losing custody of their children, and furthering the long-range best interests of children by maintaining stability and consistency for the children during a parent's temporary deployment. Because there is a rational basis for the provisions Kenna contests in sections 598.41C and 598.41D, we are not persuaded by her claim that the provisions violate her substantive due process rights.

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constitutional issues, cannot be raised for the first time on appeal."); *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002) (finding that a party must request a ruling from the district court to preserve error for appeal on an issue presented but not decided).

III. Temporary Modification.

Kenna argues the district court erred in denying her application for temporary modification and in granting John's application for assignment of his physical care time to Dolores, X.B.'s stepmother. Kenna contends she is "willing, fit, and able to care" for X.B. while John is away on deployment. Kenna states she is "the natural parent and joint custodian" of X.B., and "[a]s such, her claim to temporary custody is clearly superior to that of [Dolores], the minor child's stepmother."

Our review of a custody modification action is de novo. Iowa R. App. P. 6.907; *In re Marriage of Grantham*, 698 N.W.2d 140, 143 (Iowa 2005). In matters of child custody, the first and governing consideration of the court is the best interests of the child. Iowa R. App. P. 6.904(3)(o). "We recognize that the district court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998).

At the outset, it is important to note the district court treated this matter as a dispute between two parents regarding the arrangements for the care of their child during the custodial parent's parenting time, rather than a dispute between a nonparent seeking parenting time and a parent opposing it. Specifically, this dispute concerns John's physical care of X.B., and John's determination, as set forth in his application for temporary assignment of his physical care parenting time, that it would be in the best interest of X.B. to allow him to continue the usual physical care schedule, maintain his relationship with his stepmother and

stepsister, and not relocate several states away during John's temporary deployment.

Iowa courts recognize a presumption that fit parents act in the best interests of their children. *Spiker v. Spiker*, 708 N.W.2d 347, 358 (Iowa 2006). We further observe that a transfer of parenting time to a family member under section 598.41D does not assign legal rights. Iowa Code § 598.41D(11) ("As used in this section, 'parenting time' means actual time spent with the child as specified in a decree or order, but does not include any other element of legal custody, physical care, or joint physical care.")

Because this case concerns a dispute between a mother and father, the district court was correct in weighing the wishes of both and considering the other relevant factors[7] to determine what was in X.B.'s best interests. *See* Iowa Code § 598.41D(4)(b); Iowa R. App. P. 6.904(3)(o). The court listed specific findings that Dolores met the criteria for temporary assignment of parenting time, and concluded "[i]t is in the best interest of X.B. for John's right of primary physical

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[7] Specifically, in determining the best interests of the child under 598.41D, the court is directed to ensure the following:

> (1) That the specified family member is not a sex offender . . . .
> (2) That the specified family member does not have a history of domestic abuse . . . .
> (3) That the specified family member does not have a record of founded child or dependent adult abuse.
> (4) That the specified family member has an established relationship with the child and assigning visitation or physical care parenting time to the specified family member will provide the child the opportunity to maintain an ongoing family relationship that is important to the child.
> (5) That the specified family member demonstrates an ability to personally and financially support the child and will support the child's relationship with both of the child's parents during the assigned visitation or physical care parenting time.

Iowa Code § 598.41D(4)(b).

custody of X.B. to be assigned to X.B.'s stepmother, Dolores Trotter, during John's deployment." The court also stated it had "not been presented with clear and convincing evidence that modification of temporary placement as requested by Kenna is in X.B.'s best interest." Upon our de novo review of the record, we agree with the district court's findings. Accordingly, we affirm the order of the district court.

AFFIRMED.