

**IN THE COURT OF APPEALS OF IOWA**

No. 3-691 / 13-0189  
Filed August 7, 2013

**PATRICK HENRY SUTTON,**  
Plaintiff-Appellant,

**vs.**

**GERALDINE G. AVINO,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Black Hawk County, Andrea J. Dryer, Judge.

A father appeals a district court order awarding the mother of his twins physical care of the children. **AFFIRMED.**

Michael J. Lanigan, Waterloo, for appellant.

Gordon E. Allen of the Drake Legal Clinic, Des Moines, for appellee.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

**VAITHESWARAN, J.**

We must decide whether the district court acted equitably in granting a mother physical care of her twin daughters, where she parented her children with the significant assistance of an unrelated family.

***I. Background Facts and Proceedings***

Patrick Sutton and Geraldine Avino are the parents of twins, born in 2001. Sutton was involved in the children's lives for the first nine or ten months. In the ensuing six years, he had no contact with them, although he paid the Child Support Recovery Unit \$75 per month.

Sutton reinitiated contact with the twins in the summer of 2007. By agreement with Avino, he visited them every weekend, and, later, every other weekend.

Meanwhile, the Iowa Department of Human Services investigated reports that Avino was abusing drugs and denying the children critical care. The department initiated services to address the issues, the State filed a child-in-need-of-assistance action, and the twins were transferred to foster care.

The juvenile court eventually returned the twins to Avino's care, but the former foster parents continued to play a large assistive role. By 2010, they had agreed to house and care for the children five days a week and obtained permission to educate them in their school district.

In November 2011, Avino sought an increase in Sutton's child support obligation. Two months later, Sutton filed a petition seeking physical care of the now almost eleven-year-old children. Avino responded with her own petition for physical care.

Before the dueling petitions could be tried, the department again investigated Avino for drug use and issued a founded child abuse report against her. The department reinitiated services for the family, including supervised visits between the twins and each of their parents. This time, the State did not file a child-in-need-of-assistance petition in juvenile court. The attorney for the former foster parents attributed this decision to the fact that the children were largely in the care of his clients.

In the absence of a juvenile court action that would affect the district court's jurisdiction,<sup>1</sup> the custody petitions proceeded to hearing. Following the hearing, the court granted Avino physical care, subject to visitation with Sutton. Sutton appealed.

## ***II. Analysis***

Sutton contends the district court acted inequitably in granting Avino physical care. He specifically asserts (1) he “developed a relationship with the children for five years prior to the custody determination,” (2) “[t]he evidence did not establish that the girls had a stable placement with [the former foster parents],” and (3) he has “no interest in removing the girls from their relationship with Avino.” We will address each of these contentions, reviewing the record de novo and being mindful of the principle that “the first and governing consideration of the courts is the best interests of the child.” See Iowa R. App. P. 6.904(3)(o);

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<sup>1</sup> See Iowa Code § 232.3(1) (2011) (“During the pendency of an action under [the child-in-need-of-assistance chapter], a party to the action is estopped from litigating concurrently the custody, guardianship, or placement of a child who is the subject of the action, in a court other than the juvenile court.”).

*McKee v. Dicus*, 785 N.W.2d 733, 736 (Iowa Ct. App. 2010) (setting forth the standard of review).

As noted, Sutton did not develop a relationship with the girls until they were six years old. Sutton argues that his “absence in the early years of the children’s lives had everything to do with Avino and her personal issues and nothing to do with his ability to parent these young girls.”

It is true that Avino had “personal issues” that precipitated the department’s intervention. However, these issues did not prevent Sutton from parenting the children. To the contrary, the record suggests that Sutton’s decision to leave the family was entirely his own. When he reentered the picture in 2007, Avino facilitated his involvement with the twins. For these reasons, we are not persuaded that Avino was to blame for his absence.

We turn to Sutton’s assertion that the former foster parents did not provide a stable placement for the children. The overwhelming evidence of record contradicts this assertion. The foster parents came into the children’s lives in 2003 and co-parented the children to varying degrees from that point forward. The former foster mother characterized the parenting plan as a “team” effort and agreed that the two families “unite[d] together as a blood family would ordinarily.” She testified that Avino was “a huge part of the girls’ lives” and she “never in the nine years tried to take mom away from the girls.” At the same time, she helped Avino with parenting when Avino got stressed and stated that, in those situations, she was “the first person” Avino called. The former foster father similarly testified that Avino was capable of parenting the children “with [their] help.” A therapist confirmed that the former foster parents provided the needed stability. While

Sutton argues that Avino could arbitrarily remove them from children's lives, there is no indication that she would. As the district court stated,

Ms. Avino has . . . recognized her own limitations and entered into a cooperative arrangement with the [former foster parents] to raise the children. This arrangement is not a last-minute one made after Mr. Sutton filed the petition. This arrangement has been in effect for years, and by all accounts, the arrangement has provided for the children's emotional, social, moral, material, and educational needs.

There is simply no basis for concluding that the former foster parents are anything but a positive influence on the children or that the relationship is unstable or temporary.

This brings us to Sutton's assertion that he has "no interest in removing the girls from their relationship with Avino." This assertion is an acknowledgment that the children share a close bond with Avino. Both former foster parents confirmed the bond, as did others. For example, a therapist testified that Avino provided the children "with a lot of love" and another professional discussed the children's preference to live with her. While Sutton laudably did not express an intent to disrupt that bond, the record reveals a change in the physical care arrangement would have done just that.

The therapist opined that the arrangement Avino had resourcefully worked out to meet the children's needs was in their best interests, and a different arrangement "would be harmful to them." She noted that the children liked "the co-parenting relationship" and they felt "very rooted" at the home of the foster parents as long as they had "more time with" Avino. While a department social worker gave a contrary opinion, citing Avino's lengthy history with the department and the recent founded report of drug use, she acknowledged she had only been

on the case for two months, had not met Sutton, and had limited contact with Avino.

Given the bond between Avino and the children, the emotional toll of disrupting that bond, and Avino's consistent involvement in the children's daily activities, we agree with the district court's decision to grant her physical care, notwithstanding her difficulties parenting the children alone. As the court stated,

By availing herself of the support system that the [former foster parents] provide, Ms. Avino has ensured that the children enjoy a safer, stable environment that has allowed them to develop and pursue their interests. . . . Disrupting the existing arrangement would have a serious psychological and emotional impact upon the children and would not be in their best interests.

We affirm the court's physical care determination.

**AFFIRMED.**