IN THE COURT OF APPEALS OF IOWA

No. 3-902 / 13-0020
Filed October 23, 2013

Upon the Petition of
JOHN KIBET SOI,
Petitioner-Appellant,

And Concerning
BARBARA ADAMS SOI,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Mary Pat Gunderson, Judge.

Petitioner appeals the district court's rulings denying his motion to continue and granting his former wife physical care of their daughter. **AFFIRMED.**

Benjamin M. Clark of Sullivan & Ward, P.C., West Des Moines, for appellant.

Karen A. Taylor of Taylor Law Offices, Des Moines, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

John Soi appeals the district court's rulings denying his motion to continue and granting his former wife, Barbara Soi, physical care of their daughter. John contends the district court's rejection of his motion to continue was an abuse of discretion because it "resulted in a failure to substantially administer justice." He also contends it is in the best interest of the child to award him physical care of the parties' daughter, or, in the alternative, asks that we award joint physical care to the parties. Upon our review we conclude there was no abuse of discretion in denying a continuance, and the court did not err in awarding Barbara sole physical care of the parties' minor child. At Barbara's request we award her attorney fees. We affirm.

I. Background Facts.

John and Barbara Soi were married on September 23, 2009. Their only child was born on December 6, 2009. The parties separated in April 2011. Barbara testified she moved out of the couple's apartment after John physically attacked her. The parties agreed to joint physical care with alternating weeks of custody while the dissolution of their marriage was pending.

John also had a son with his former girlfriend, Moira Wendot. Wendot testified at trial that John had been verbally and physically abusive to her, both during and after their relationship ended. Wendot and John also share joint physical care with alternating weeks. Wendot testified regarding Barbara's strengths as a caretaker, noting she believed Barbara had been the primary caretaker of her and John's child during the times John had custody of him.

At the time of trial John was a full-time student attending Iowa State University. He was taking twenty credits and was not otherwise employed. He already had a degree as a licensed practical nurse and had worked in the medical field as a homecare nurse from October 2009 until approximately March 2012. Barbara was enrolled at Des Moines Area Community College and taking nineteen credits towards a liberal arts degree. She was also employed full-time by GCS Services cleaning office buildings. Her work schedule was from 2:00 p.m. to 10:00 p.m. each weekday.

At the time of trial, John's parents had recently moved to the United States and were living with him in his apartment. His mother admitted she was largely responsible for caretaking during the weeks when John had custody of his daughter. Barbara was living in an apartment with a female friend and co-worker, Randi Durrett, and her young child. The women testified they helped care for each other's children when the other is working.

II. Prior Proceedings.

John filed for a petition of separation though his attorney, Kathleen Hiatt, on December 11, 2011. Trial was scheduled for September 18, 2012.

On September 7, 2012, Hiatt filed petitioner's witness and exhibit list. The same day, and against the advice of counsel, John filed a pro se motion to continue after learning one of his witnesses would be traveling outside of the country during the trial. Upon learning this, Hiatt filed a motion to withdraw, stating that communications had broken down between herself and her client and

noting, "Mr. Soi has went [sic] against counsel's legal advice and filed a motion on his own behalf without the undersigned's knowledge or agreement."

On September 8, 2012, John filed an affidavit consenting to counsel's withdrawal, stating in part, "I understand the implications of proceeding without representation and request that I be allowed a continuance in this matter to obtain new counsel."

On September 10, 2012, the court granted Hiatt's motion to withdraw.

On September 11, 2012, the court denied John's September 7, 2012 motion to continue. The court determined the motion was "resisted and untimely."

The matter proceeded to trial on September 18, 2012, as scheduled. At the onset of trial, the court noted that a short hearing had been held on September 7, after Hiatt filed her motion to withdraw, in which the court had indicated that should Hiatt be permitted to withdraw, a continuance would not be granted. John then expressed to the court that he would like to make an oral motion to continue and that he had a second motion, from September 8, 2012, which the court had yet to rule on. Barbara resisted the motion. The court then denied John's motion to continue, noting that it was not ruling in regard to the witness being unavailable as that had already been denied. The court stated:

> Mr. Soi's attorney was prepared to proceed as recently as ten days ago. And Mr. Soi chose to go against his attorney's advice and filed a motion to continue and as such, his attorney withdrew. And at that time Mr. Soi had approximately seven days to contact an attorney. He chose not to do so in that time frame, and this matter has been set. There [is a child] involved. Resolution is important in dissolution cases, and the Court finds that this motion to continue, based on Mr. Soi's motion, is untimely.

The custody matter then proceeded to hearing.

The court, finding Barbara and her witnesses to be more credible, awarded the parties joint legal custody and awarded physical care to Barbara. John appeals.

III. Standard of Review.

The decision to grant or deny a continuance of trial rests within the discretion of the trial court. *Hawkeye Bank & Trust v. Baugh*, 463 N.W.2d 22, 26 (Iowa 1990). We will only reverse when that discretion has been abused. *Id*.

Our review of a custody order is de novo, and our primary consideration is the best interests of the child. *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). In assessing a custody order, we give considerable weight to the judgment of the district court, which had the benefit of hearing and observing the parties first-hand. *Id*.

IV. Discussion.

A. Motion to Continue.

John maintains the district court abused its discretion by denying his motion to continue. We measure the reasonableness of the court's decision by the rule stated in *State v. Birkestrand*, 239 N.W.2d 353, 360–61 (Iowa 1976): "Where a motion for continuance is filed without delay, alleging a cause not stemming from the movant's own fault or negligence, the court must determine whether substantial justice will be more nearly obtained by granting the request. The determination rests, however, in trial court's broad discretion."

Although the district court could have granted John's motion to continue, we cannot say it was an abuse of discretion to deny it. As the court noted, John had been represented by counsel who was prepared for trial. His attorney only petitioned to withdraw after John went against her advice and filed a pro se motion to continue. Furthermore, John consented to his counsel's withdrawal. His second motion to continue did not mention that his witness was unavailable, instead only stating he wished for more time to procure new counsel. In making its determination, the court also considered that the motion was made only ten days before the scheduled trial.

Although John cites Iowa Rule of Civil Procedure 1.911(1) to support his argument, we remain unconvinced. Rule 1.911(1) states, "A continuance may be allowed for any cause not growing out of the fault or negligence of the movant, which satisfies the court that substantial justice will be more nearly obtained. It shall be allowed if all parties so agree and the court approves." In this case, all parties did not agree to the continuance. Barbara "strongly resisted" the motion at trial and had stated her intention to do so before counsel was allowed to withdraw.

The district court did not abuse its discretion when denying John's motion to continue.

B. Physical Care.

John contends he should have been awarded physical care of his and Barbara's daughter. In the alternative, he asks that we award the parties joint physical care of the child.

"Our first and foremost consideration in determining custody is the best interest of the child involved." *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); *see* Iowa Code § 598.41(3) (2011) (listing factors relevant to determining what custody arrangement is in the child's best interests). The court may award joint physical care upon the request of either parent. Iowa Code §598.41(2)(a).

Although he had requested physical care of their child at trial, John expressed his willingness to share physical care with Barbara. In deciding whether joint physical care is appropriate, we consider four nonexclusive factors: (1) the stability and continuity of care-giving for the children; (2) the ability of the parents to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) the degree in which parents are in general agreement about their approach to daily matters. *In re Marriage of Hansen*, 733 N.W.2d 683, 696-700 (Iowa 2007).

Barbara was the primary caregiver of the child during the parties' marriage. Since the separation, the parties have spent alternating weeks caring for their daughter. However, there is some question whether it is John or John's mother who provides most of the caretaking for the child when she is in his custody. Furthermore, the parties are in continued conflict and struggle to communicate. They already disagree on several major issues regarding their daughter's upbringing including which school and daycare she should attend. They also disagree about her religious upbringing. We do not believe any factor supports an award of joint physical care.

Since joint physical care is not in the best interest of the child, we must determine which parent should be awarded physical care. We use the factors enumerated in Iowa Code section 598.41(3) and *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974), to determine which of the two parents is most likely to provide an environment that brings the children to health, both physically and mentally, and to social maturity. *See Hansen*, 733 N.W.2d at 695–96). In making our determination, gender is irrelevant and neither parent has a "greater burden than the other in attempting to gain custody in a dissolution proceeding." *In re Marriage of Bowen,* 219 N.W.2d 683, 689 (Iowa 1974).

As the district court stated, "Each parent can provide a suitable home for the child, and each parent is bonded with the child." However, the district court also found Barbara and Wendot to be credible witnesses when they testified about past instances of verbal and physical abuse in their relationships with John. This factor weighs heavily against awarding John custody of the child. Thus, we affirm the district court's award of physical care to Barbara.[1]

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[1] We note that John mentioned in his brief the court mischaracterized the amount of time he spent attending class as a "very part time basis." At least partially due to the court's characterization, it determined John could work and additional income was imputed to him to determine his child support obligation. Because John does not explicitly attack the imputed income, we decline to consider any such argument regarding child support. *See Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996) ("We will not speculate on the arguments [appellant] might have made and then search for legal authority and comb the record for facts to support such arguments."); *see also Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994) ("[The appellant's] random mention of an issue, without elaboration or supportive authority, is insufficient to raise the issue for our consideration.").

C. Attorney Fees.

Barbara asks this court to award her appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *In re Marriage of Oakland*, 699 N.W.2d 260, 270 (Iowa 2005). Factors to be considered in determining whether to award attorney fees include: "the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal." *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). Although John and Barbara had similar incomes at the time of trial,[2] Barbara was obligated to defend the district court's decision following John's appeal, and she was successful in doing so. Thus, we award Barbara $1000 in appellate attorney fees.

AFFIRMED.

[2] At the time of trial, John was receiving $415 weekly from Iowa Workforce Development through a retraining program, or $21,580 annually. The district court determined Barbara's income to be $22,880 annually.