IN THE COURT OF APPEALS OF IOWA

No. 6-745 / 06-0096
Filed October 25, 2006

Upon the Petition of
AMY BLEVINS,
Petitioner-Appellant,

And Concerning
DAVIS HEYWOOD, JR.,
Respondent-Appellee.

Appeal from the Iowa District Court for Fremont County, J.C. Irvin, Judge.

Mother appeals from a district court order, judgment, and decree that awarded physical care of a child to its father and changed the child's surname. **AFFIRMED.**

Jon H. Johnson of Johnson Law, P.L.C., Sidney, for appellant.

Michael Gallner, Council Bluffs, for appellee.

Heard by Sackett, C.J., and Zimmer, J., and Hendrickson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

ZIMMER, J.

Amy Blevins f/k/a Amy Neeman and Davis Heywood are the biological parents of Kassie Neeman n/k/a Kassie Heywood, born in 1997. Amy appeals from the district court order, judgment, and decree that awarded the parties joint legal custody of Kassie, placed the child in Davis's physical care, and changed Kassie's surname to Heywood. We affirm the district court.

I. Background Facts and Proceedings.

Amy and Davis have never been married to each other. Amy was Kassie's primary caregiver from the child's birth until the district court awarded Davis physical care. Davis initially had visitation with Kassie every other Saturday, but the visitation ceased after a few months. Shortly thereafter, Davis moved to Colorado. Other than one brief visit with Kassie when she was a year old, Davis did not have visitation with her until 2002. Amy contends Davis never contacted her to request visitation. Davis contends that Amy's frequent moves during the first few years of Kassie's life made it difficult to contact her regarding visitation and, moreover, that Amy ignored the requests for visitation she did receive.

Amy and Davis eventually began relationships with, married, and had children with other individuals. Amy married Michael Blevins in 2002, and they have three children together. Davis married Wendy Heywood in 2004, and they have two children together. Wendy also has two children from a prior marriage.

In 2001 Davis contacted Amy about resuming visitation with Kassie. In February of that year the Colorado District Court established a permanent child support obligation. The order, which listed Amy and Davis as co-petitioners,

stated that no request for back child support had been made. According to Davis, he was not required to pay back child support because he provided the court with proof that he had provided Amy monetary assistance for Kassie during those periods of time he had been able to ascertain her location.

Davis has complied with the terms of the child support order, including the requirement to provide health insurance for Kassie. However, after Amy experienced some initial difficulties with Kassie's doctors accepting Davis's insurance, she ceased taking advantage of the coverage and instead relied on Medicaid.

In 2002 Davis traveled to Iowa for a visit with Kassie. In 2003 Davis requested and received visitation with Kassie for seven weeks during the summer and one week during Christmas break. The visitation was spent in Colorado. In 2004 Davis requested and received approximately a month of summer visitation with Kassie, which was again exercised in Colorado. Davis also spoke with Kassie on the telephone once or twice a month. During at least part of the time Davis had to rely on Amy placing the phone calls, because Amy's home phone service has been shut off and she did not own a cell phone.

In February 2005 Amy filed a petition for determination of legal custody, physical care, and visitation. In the summer of 2005 Davis exercised approximately three months of visitation with Kassie. During this time a dispute arose over a doctor's appointment Amy had made for Kassie.

Kassie, who suffers from simple absence seizures, had been scheduled to see her neurologist on July 7. The parties dispute whether Davis refused to return Kassie to Iowa for the appointment or whether Amy simply did not provide

Davis adequate notice that Kassie needed to be returned for the appointment. In lieu of the July 7 appointment, Davis had Kassie evaluated by a neurologist in Colorado. After Kassie indicated that she did not always receive both doses of her seizure medication, the neurologist prescribed a one-dose form of the drug. Since the change, Kassie has experienced fewer seizures.

Amy's petition came before the district court in October 2005. At the time of trial Amy was twenty-seven years old, and her children with Michael were aged four years, twenty months, and one month. Amy was unemployed and staying home to care for the children, but had previously worked as a nurse's aide earning $11.50 per hour. Michael was employed as a forklift driver, earning $10 per hour. The family was also receiving government assistance in the form of food stamps and Medicaid. Amy's family was occupying a two-bedroom rental home, but was hoping to move in the near future. The new home would be the sixth residence Amy has occupied since Kassie's birth.

At the time of trial Davis was thirty years old. His children with Wendy were five years old and two years old, and Wendy's two children were ten years old and eight years old. Wendy and Davis were also certified foster parents and had the care of two foster children, then aged eight and five. However, the foster children were in the process of being adopted, and Wendy and Davis stated they would stop providing foster care if Davis received Kassie's physical care.

The family lived in a five-bedroom home Wendy and Davis purchased two years prior to trial. Davis was employed as a supervisor by an area apartment complex, a job he had held since 2000, earning $36,400 per year. He also operated a small construction business, which had not yet shown a profit.

Wendy, in addition to caring for the home and the children, worked as a house cleaner on a part- to full-time basis.

In its December 2005 order, judgment, and decree, the district court noted it was "clear" that Davis should be awarded Kassie's physical care. The court recognized Amy's role as Kassie's primary caregiver and the limited amount of time Davis had spent with the child. However, the court found Davis's early visitation had been limited, at least in part, because his requests for visitation "went unheeded" by Amy. The court was also troubled by the fact Michael had admitted to drug use as recently as 2004,[1] and that he had been convicted of domestic abuse against Amy for an incident in October 2003. In addition, the court focused on the fact that Amy, Michael, and the children had "lived in a number of residences . . . in a variety of locations."

The court determined Davis had demonstrated greater stability in his family life and his career and would be better able to provide for Kassie's emotional and economic needs. The court accordingly placed physical care with Davis, ordered that Kassie's last name be changed to Heywood, awarded Amy visitation, and ordered Amy to pay child support. The court directed the parties to pay their own attorney fees and taxed the costs of the action against Amy.

Amy appeals. She asserts the court erred in awarding Davis physical care of Kassie and in ordering that Kassie's last name be changed to Heywood. She asserts the court further erred by failing to award her trial attorney fees and in ordering her to pay the costs of the action.

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[1] Although Amy and Davis both abused methamphetamine at the time Kassie was conceived, the record credibly indicates neither has used drugs since Kassie's birth.

II. Scope and Standard of Review.

We conduct a de novo review of the district court's decision. Iowa Code § 600B.40 (2005); Iowa R. App. P. 6.4. We give weight to the court's fact findings, especially in determining witness credibility, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

III. Physical Care.

When considering the issue of physical care, our overriding consideration is Kassie's best interests. Iowa R. App. P. 14(6)(*o*). We are guided by the factors set forth in Iowa Code section 598.41(3), as well as those identified in *In re Marriage of Winter,* 223 N.W.2d 165, 166-67 (Iowa 1974). *See* Iowa Code § 600B.40 (providing section 598.41 criteria apply in an action between unmarried parents). The ultimate goal is to provide the child the environment most likely to bring her to healthy physical, mental, and social maturity. *See In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). The critical issue is which parent will do better in raising the child; gender is irrelevant, and neither parent has a greater burden than the other. *In re Marriage of Courtade,* 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996).

Amy admits that Davis is a "fit and proper parent" for Kassie, but points out that she has been Kassie's primary caregiver and that Kassie has done well in her care. Amy also points out that awarding physical care to Davis will separate Kassie from her three step-siblings. She contends these facts preponderate so heavily in her favor that she must be awarded physical care.

Although we give significant consideration to placing the child with the primary caregiver, it is not the singular factor in determining which placement

would best serve the child's interests. *In re Marriage of Wilson,* 532 N.W.2d 493, 495 (Iowa Ct. App. 1995).[2] Moreover, while courts do attempt to keep siblings and step-siblings together whenever possible, if the record indicates separation might "better promote the long-term best interests of the children, then a court may depart from the rule." *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa Ct. App. 1994). Here, the concern engendered by separating Kassie from Amy and Michael's children is somewhat dissipated by the young age of those children and the fact Amy points to no evidence that Kassie is closely bonded with her step-siblings. Moreover, other concerns lead us to conclude this is a case where the child's interests are best served by departing from the rule.

As the district court noted, Amy and Michael have been unable to maintain the stability Davis and Wendy enjoy. Amy and Michael have experienced severe financial difficulties, extended periods of unemployment, and have moved frequently. The insecurity created by these situations cannot help but have a destabilizing effect on Kassie. In contrast, Davis's employment, financial history, and living situation have been relatively stable over the years. Davis also appears to be somewhat more attentive to Kassie's medical needs.

In addition, we give weight to the district court's finding that Davis's lack of involvement in Kassie's early years was at least partially due to Amy's failure to heed Davis's requests for visitation. In fact, the record credibly indicates that

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[2] We reject Amy's unsupported suggestion that because she has been Kassie's sole or primary caretaker since birth we should in effect treat this matter as one for modification of a prior court-ordered custody and care determination and require Davis to prove "the most cogent reasons" exist for awarding him physical care. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983) (requiring a party seeking *modification of a prior physical care determination* to meet the heavy burden of showing a substantial and material change in circumstances, on the basis that once care has been *fixed by the court* it should be disturbed only for the most cogent of reasons).

Amy continues to obstruct, or at least makes little effort to facilitate, Kassie's relationship with her father. In contrast, Davis appears to understand the importance of ensuring Amy's involvement in Kassie's life.

Finally, like the district court, we are concerned by Michael's relatively recent history of drug use and the domestic abuse he perpetrated on Amy. Although Amy attempts to minimize the abuse and drug use by pointing out that neither happened in Kassie's presence and to testimony that neither has reoccurred, these events do have a detrimental impact on the home environment Amy is able to provide Kassie. We are also troubled because Michael's testimony reveals a somewhat dismissive attitude regarding his past drug use and the domestic abuse. For example, despite admitting to the abuse, Michael stated he did not feel there was any reason for him to participate in batterers' education classes.

We do not doubt Amy's love for Kassie, and despite Davis's assertions to the contrary, the record indicates Amy has been able to meet Kassie's day-to-day needs. We also acknowledge that Amy has been Kassie's primary caregiver and that awarding Davis physical care separates Kassie from Amy's other children. The key question, however, is which parent can provide Kassie with the environment most likely to bring her to healthy physical, mental, and social maturity. *See Murphy*, 592 N.W.2d at 683. In light of the totality of the record, and giving due weight to the district court's fact findings and credibility assessments, we agree that parent is Davis.

Although Davis's early contact with Kassie was limited, in the past few years he has successfully exercised extended periods of visitations that have

allowed Kassie an opportunity to bond with Davis, Wendy, and the other children. The record credibly indicates Kassie has done well during and enjoyed the visits. Moreover, Davis offers Kassie a home environment with greater structure and stability than Amy can provide. In addition, Davis offers a home which is free from the concerns raised by Michael's drug use and domestic abuse. It is a home environment that emphasizes education and extracurricular participation, an environment in which Davis's and Wendy's children and the foster children have thrived. We conclude the totality of the foregoing factors indicate Kassie's interests are best served by awarding Davis physical care.

IV. Name Change.

Amy also asserts the court erred when it ordered Kassie's last name changed to Heywood. The controlling question on this issue is whether the name change serves Kassie's best interests. *Montgomery v. Wells*, 708 N.W.2d 704, 708 (Iowa Ct. App. 2005). In answering this question we consider and weigh various factors particular to the individual case, including (1) whether it is convenient for Kassie to have the same name as Davis, (2) whether the name change will facilitate or detract from Kassie's identification as part of a family unit, (3) avoiding embarrassment, inconvenience, or confusion for Davis or Kassie, (4) the length of time Kassie's former surname has been used, and (5) whether the change will have a positive or an adverse effect on the bond between Kassie and either Amy or Davis, or Amy's and Davis's families. *See id*. at 708-09 (citations omitted). Upon review of these factors, we agree that Kassie's surname should be changed to Heywood.

V. Attorney Fees and Costs.

Finally, we address Amy's contention the court abused its discretion when it failed to award her trial attorney fees and ordered her to pay the costs of the proceedings. In support of her assertion, Amy cites to a case that governs an award of attorney fees in an action to modify a dissolution decree. *See, e.g., In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Such attorney fees are statutorily authorized. *See* Iowa Code § 598.36. This matter was brought pursuant to section 600B.40, which contains no such authorization.[3] The only other authority cited by Amy refers to the standards this court employs to determine if attorney fees should be awarded on appeal. *See, e.g., In re Marriage of Kunkel*, 555 N.W.2d 250, 254 (Iowa Ct. App. 1996). Such cases have no application to an award of trial attorney fees. We accordingly find no error in the district court's decision to require each party to pay his or her own attorney fees. Nor do we see any error in the court's decision to assess to Amy the costs of an action that she initiated and in which she did not prevail.

VI. Conclusion.

The district court did not err in awarding Davis Kassie's physical care or in ordering that Kassie's surname be changed to Heywood. Nor did the court err in ordering Amy to pay her own attorney fees and requiring her to pay the costs of the action. The district court's order, judgment, and decree is affirmed.

AFFIRMED.

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[3] Section 600B.25 does grant the district court discretion to award reasonable costs, including reasonable attorney fees, in certain circumstances. However, that section appears to apply only paternity judgments, and moreover only authorizes the court to award costs and fees to the prevailing party. Iowa Code § 600B.25(1).