IN THE COURT OF APPEALS OF IOWA

No. 1-117 / 10-0942
Filed March 30, 2011

DAVID L. HALE,
Petitioner-Appellant,

vs.

KELSY J. BAGRON,
Respondent-Appellee.

Appeal from the Iowa District Court for Poweshiek County, Annette J. Scieszinski, Judge.

Petitioner appeals the district court decision placing the parties' child in respondent's physical care. **AFFIRMED AS MODIFIED.**

Denise M. Gonyea of McKelvie Law Office, Grinnell, for appellant.

Kelsy Bagron, Ruidoso Downs, New Mexico, pro se.

Considered by Vogel, P.J., Tabor, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MAHAN, S.J.

I. Background Facts & Proceedings

David Hale and Kelsy Bagron are the unmarried parents of Ashton, who was born in March 2003. The parties lived together at the time of the child's birth and thereafter, except for brief periods, until September 2008. Kelsy was the primary caregiver until September 2008, when she moved out and left the child in David's care. Kelsy assumed physical care in April 2009 and greatly limited David's access to the child.

David filed a petition to establish custody on April 20, 2009. On May 21 the district court entered a temporary order placing the child in David's care. Kelsy was granted visitation on alternating weekends and ordered to pay child support of $200 per month.[1]

David was twenty-eight years old at the time of the custody hearing. He obtained a GED and had been working in construction since he was sixteen years old. He had lived in the same home, about two blocks from the child's elementary school, for about three years. David got Ashton involved in Boy Scouts and is his den leader. David testified he and Ashton read together every night and like to go swimming, fishing, hiking, and camping. David was arrested in July 2008 for driving while license suspended. He has since regained his driver's license.

David was involved in a romantic relationship with Meredith Doyle. David and Meredith were expecting a child together within a few days after the hearing.

[1] At the time of the custody hearing, May 11, 2010, Kelsy had made only two payments, and was $2000 in arrears on her child support obligation.

They maintained separate residences. Meredith has a troubled past in that she has felony drug convictions, for which she received a deferred judgment, and her other child was removed from her care by the Iowa Department of Human Services. Teri Hoffstetter, Meredith's social worker, testified Meredith has since turned her life around. Meredith's other child had been returned to her care, and Hoffstetter testified she had no safety concerns about Meredith. Hoffstetter testified that through working with Meredith she had seen David and gave the opinion he was doing an excellent job with his child, that he was "very patient" and "very consistent."

Kelsy was twenty-seven years old at the time of trial and has taken college classes. She has a history of excessive drinking and at trial, through her own questions, seemed to admit she was an alcoholic.[2] She was charged with public intoxication in August 2008. In August 2009, Kelsy was arrested for operating while intoxicated, and her driver's license was suspended. In February 2010, she was arrested for disorderly conduct and public intoxication. When Kelsy has been employed, it has been in the evenings at a drinking establishment. David testified Kelsy's former employer fired her because she became intoxicated on the job and vomited. Kelsy was unemployed at the time of the custody hearing.

Kelsy has caused two disturbances at the child's school. On the first day of school in 2009, Kelsy got into an argument with David about picking up the child and began swearing loudly in front of students. Also, Hoffstetter testified that Meredith asked her to pick up the child from school one day when Hoffstetter

[2] Kelsy, who represented herself, asked Officer Jepson, "Do you feel that the pending charges I have could be a result of my alcoholism . . . ?"

was picking up her niece. Kelsy was at the school and became very loud and angry that Hoffstetter was picking up her child.

Kelsy is in a relationship with Ronald Crawford-Hernandez. On October 14, 2009, Ronald was charged with domestic abuse assault, third offense, for committing domestic violence against Kelsy. A no-contact order was entered, which Kelsy and Ronald violated several times. Eventually, the criminal charge against Ronald was dismissed, and Kelsy admitted this could have been because she was not cooperating with the district attorney.[3] Kelsy was facing criminal charges for violating the no-contact order. Kelsy testified she did not believe Ronald was a threat in any way to her child.

David called officer Heath Jepson of the Grinnell Police Department as a witness concerning the times he had arrested Kelsy. Officer Jepson testified he believed Kelsy had a drinking problem, and stated, "with the exception of the few times that I've seen you with your child at [the elementary school], whenever I make contact with you, you are either in the process of drinking, intoxicated, or hung over." He stated he believed David had a much more stable situation. Office Jepson testified Kelsy presented a greater danger to the child due to her chemical issues, and due her association with Ronald, who he believed had rage issues.

Kelsy's mother testified Kelsy engaged in speech and cognitive therapy with the child when he was younger and that David did not have as much interaction with the child. Sara Jones, a friend of Kelsy's who did not have

[3] There was evidence Ronald was in the process of attending a batterer's education program.

custody of her own children, testified Kelsy was very good with her child. Jones also related an incident from July 2008 where David allegedly struck Kelsy and knocked her down.

The district court granted the parties joint legal custody of Ashton and awarded Kelsy physical care. The court found Kelsy was a "pathetic drunk," but questioned David's motivation for seeking physical care of the child. The court believed David was domineering and controlling. The court accepted Kelsy's explanations that she was not drunk, and Ronald was not violent, when the child was present. David was granted visitation and ordered to pay child support. David appeals the district court's order placing the child in Kelsy's care.

II. Standard of Review

Issues ancillary to a determination of paternity are tried in equity. *Markey v. Carney*, 705 N.W.2d 13, 20 (Iowa 2005). We review equitable actions de novo. Iowa R. App. P. 6.907. When we consider the credibility of witnesses in equitable actions, we give weight to the findings of the district court, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*).

III. Merits

David contends it was not in the child's best interests to be placed in the physical care of Kelsy. He points out her history of drinking, criminal behavior, and her relationship with Ronald. He admits Kelsy spent more time with Ashton when he was an infant, but points out he cared for the child a majority of the time since September 2008, when the parties separated. He has permitted additional visitation to that set out in the temporary order.

In determining physical care for a child, our first and governing consideration is the best interests of the child. Iowa R. App. P. 6.14(6)(*o*). When physical care is an issue in a paternity action, we apply the criteria found in Iowa Code section 598.41 (2009). Iowa Code § 600B.40. Our analysis is the same whether the parents have been married, or remain unwed. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988); *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa Ct. App. 1994). Our objective is to place the child in an environment likely to promote a healthy physical, mental, and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

On our de novo review of the record, we conclude the child should be placed in David's physical care. Ashton was in David's care from September 2008 through the time of the district court's decision of May 26, 2010, except for a short period of time in April and May 2009. At that time, Kelsy simply took Ashton and denied David any contact. The record shows Kelsy has a serious alcohol problem. We do not believe she can successfully separate her drinking from her care of the child. The fact that the child has not been negatively affected prior to this time is due to the fact he was primarily in David's physical care after the parties separated. There was no evidence Kelsy had taken any steps to address her alcohol problem, or had any plans to do so.

Furthermore, we do not believe that Kelsy will be able to consistently shield the child from the threat of physical danger presented by Ronald. The existence of domestic violence in the home is an important consideration in the determination of the physical care. *See* Iowa Code § 598.41(1)(d). "Domestic abuse is, in every respect, dramatically opposed to a child's best interests." *In re*

Marriage of Daniels, 568 N.W.2d 51, 54-55 (Iowa Ct. App. 1997). We note that Kelsy, who was representing herself at the custody hearing, attempted through her questions to raise the issue that she had been physically abused by David. David denied these allegations, and Kelsy did not directly testify on the issue. We conclude Kelsy has not presented any credible evidence of physical abuse by David.[4] *See* Iowa Civil Jury Instr. 100.4 (2010) (noting questions by lawyers are not evidence); *see also Kubik v. Burk*, 540 N.W.2d 60, 63 (Iowa Ct. App. 1995) ("We do not utilize a deferential standard when persons choose to represent themselves.").

On the other hand, the evidence showed David was a stable individual. Officer Jepson, who was an unbiased witness in this case, testified David had a much more stable situation than Kelsy. In addition, Hoffstetter, a social worker, testified David did an excellent job with the child. David's testimony showed he enjoyed spending time with his child, and that they had a good relationship. There was no evidence that any problems had arisen concerning David's care of the child during those times he had physical care. We find David has done more to promote Kelsy's relationship with the child than Kelsy has done to promote David's. David permitted Kelsy to have extra visitation while he had physical care, while Kelsy attempted to deny and restrict access when she briefly had the child in April and May 2009. Additionally, we note that Hoffstetter testified Meredith had turned her life around and she had no safety concerns about her. We conclude placement of Ashton with David will enable the child to be in an

[4] We question the credibility of Jones, who related an incident from July 2008. Jones stated she was aware of Kelsy's drinking problem, but stated she thought Kelsy was a "wonderful" mother.

environment most likely to promote a healthy physical, mental and social maturity.

We conclude the child should be placed in the physical care of David. We affirm the decision of the district court as modified and remand for consideration of the issues of visitation and child support. Costs of this appeal are assessed to Kelsy.

AFFIRMED AS MODIFIED.

Vogel, P.J., concurs; Tabor, J., dissents.

TABOR, J. (dissenting)

I respectfully dissent. I would affirm the district court's thorough and well-reasoned custody decree. While our court has de novo review in custody cases, we "pay very close attention to the trial court's assessment of the credibility of witnesses." *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). We do so because the trial court is "'greatly helped in making a wise decision about the parties by listening to them and watching them in person.'" *Id*. (citation omitted). By contrast, as an appellate court, we are "denied the impression created by the demeanor" of the live witnesses, and must rely on a printed record. *Id*. In my view, the majority decision does not accord sufficient deference to the district court's observation of "David's unsettling attitude and evasive answers in the courtroom."

I disagree with the majority's conclusion that David would be the better physical care provider because he has done more to promote Kelsy's interaction with their son than Kelsy has to promote David's relationship. The district court noted that David's "manner and method is to intimidate and control people" and that he "espoused an intent to continue to push Ashton into the middle of parental disputes." In support of its fact finding, the district court pointed to "profanity-laden rants" left by David as telephone messages for Kelsy, sometimes in the presence of their son. Not surprisingly, the district court found Kelsy to be "the more capable communicator" of the two parents. The parent awarded physical care is required to support the other parent's relationship with the child. Iowa Code § 598.41(5)(b) (2009); *In re Marriage of Hansen*, 733 N.W.2d 683, 700 (Iowa 2007). I agree with the district court that Kelsy is more capable of

supporting David's relationship with Ashton and less likely to thrust their son into the middle of parental clashes.

I also believe the majority opinion places too little emphasis on Kelsy's history of providing the day-to-day care for their son. The factor of approximation is entitled to considerable weight in the determination of which parent is awarded physical care. *Hansen*, 733 N.W.2d at 700. The district court appropriately found that Kelsy is the more experienced parent "in comprehensive caregiving, and has shown that she can balance that duty with the logistics of her schooling and employment."

Both the majority decision and the district court's decree recognize Kelsy's difficulties with alcohol abuse. The difference is that the district court determined that she has been able to compartmentalize her drinking-to-excess lifestyle from her responsible parenting role, while the majority predicts that Kelsy cannot "successfully separate her drinking from her care of the child." Although it is a close call, I would accept the district court's fact finding on this point.

Finally, the majority opinion gives weight to the domestic abuse perpetrated against Kelsy by her new paramour, but does not find evidence in the record supporting David's violent or controlling nature. I believe the district court's findings of fact are more accurate on this issue. The district court found that Kelsy "fled the family home in September of 2008, after being head-butted by David." This finding was supported by Kelsy's testimony that David "begged her to come home" and "said he was sorry for head-butting" her in the face. The district court found that David's relationship with Kelsy "has always been a domineering one and it was no different in the courtroom." I agree with the

majority that the existence of domestic violence is an important consideration in fixing physical care. But I would credit the district court's factual findings, particularly its observations of David's bullying behavior during the hearing, when weighing which parent would be the better care giver. *See In re Marriage of Daniels*, 568 N.W.2d 51, 55 (Iowa Ct. App. 1997) ("[E]vidence of untreated domestic battering should be given considerable weight in determining the primary caretaker, and under some circumstances even foreclose an award of primary care to a spouse who batters.").