IN THE COURT OF APPEALS OF IOWA

No. 2-311 / 11-1972
Filed July 25, 2012

Upon the Petition of
BRIAN Q. FERNANDER,
Petitioner-Appellant,

And Concerning
TAMMY WENNER,
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Kurt J. Stoebe, Judge.

A father appeals a district court order granting the mother sole legal custody of the parties' children and failing to create a visitation schedule. **AFFIRMED.**

Melissa Nine of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellant.

Kevin O'Hare and Dalton J. Kidd of Peglow, O'Hare & See, P.L.C., Marshalltown, for appellee.

Considered by Tabor, P.J., Bower, J., and Huitink, S.J.*

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

HUITINK, S.J.

I. Background Facts & Proceedings.

Brian Fernander and Tammy Wenner are the parents of two children, A.W., born in 1995, and B.W., born in 1997. The parents were never married. They lived together for a period of time, and separated finally in 1997 when A.W. was two years old and B.W. was three or four months old. Thereafter, the parties lost track of each other.

No child support order or paternity order was in place. Brian sporadically sent money to Tammy. For Christmas 2004, Brian sent a check to Tammy. Tammy used the address on the check to initiate child support proceedings. As a result of the child support proceedings, Brian paid $38,000 in back child support and has remained current in his child support obligation.

At about the time Tammy initiated child support proceedings, Brian requested to have visitation with the children. In early 2005, Tammy took the children to begin seeing a counselor, Paul Daniel, to help them reestablish a relationship with Brian because he had not seen them since the parties separated in 1997. Brian and the children communicated by means of telephone, e-mail and text messaging, but still did not have face-to-face contact.

On July 1, 2010, Brian filed a petition for joint legal custody of the children and requested the court to set forth a specific visitation schedule. A hearing on the matter was held October 26, 2011. Brian testified he lived in Longwood, Florida, with his wife and two children, who were ages fourteen and twelve.[1] He

[1] Brian also has other children from previous and subsequent relationships. He testified he has visitation with all of his other children.

works with the court system in Florida as a surety agent. Brian testified he believed Tammy was not supporting his request for visitation.

Tammy married in 2000, and she has two children with her current husband, who were ages twelve and three. Tammy is employed as a surveillance shift supervisor at a casino. She testified she believed Brian had had several years to establish a relationship with the children and he had not done so. She blamed Brian for the fact no visitation had occurred, stating he was unwilling to work within the guidelines recommended by Daniel.

A.W. and B.W. each testified with only the judge and the attorneys present. They both testified they were frustrated by the fact that although Brian stated he wanted to visit them, no visits had actually occurred. They stated they were not interested in visiting Brian or having contact with him at the present time.

The district court issued a decree on October 28, 2011. The court granted Tammy sole legal custody of the children, noting Tammy had provided most of the support and all of the care and parenting of the children throughout their lives. As to the issue of visitation, the court found it was in the children's best interest to establish some type of a relationship with Brian. The court ordered:

> [Brian] shall be permitted to have visitation with [A.W.] and [B.W.] These visits shall be supervised by Paul Daniel of Center Associates of Marshalltown, Iowa. [Brian] shall be responsible for any costs associated with the visits. The visits shall be supervised by Paul Daniel or his designee until he determines that they no longer must be supervised. Unsupervised visitation shall occur solely in the State of Iowa. Visitation with the petitioner outside the State of Iowa shall be permitted only as recommended by Paul Daniel and agreed by [Tammy]. Said agreement by [Tammy] shall not be unreasonably withheld. [Brian] shall be responsible for all transportation expenses associated with such visitation.

Brian filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), again asking the court to set forth a specific visitation schedule. He asserted that if a counselor was required to be involved, then he was requesting the court to name an additional and/or independent mental health professional, or a guardian ad litem, rather than permitting Daniel to solely direct the course of visitation. The court denied Brian's post-trial motion. Brian now appeals the decision of the district court.

II. Standard of Review.

Issues ancillary to a determination of paternity are tried in equity. Iowa Code § 600B.40 (2009); *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. Sole Legal Custody.

Pursuant to section 600B.40, in determining visitation and custody arrangements in paternity actions, we apply section 598.41, as applicable. Parents may have joint legal custody of their children. Iowa Code § 598.41(1)(a). A custody award must be reasonable and in the best interests of the children. *Id*. "In child custody cases, the first and governing consideration of the courts is the best interests of the child." Iowa R. App. P. 6.904(6)(o).

"The legislature and judiciary of the this State have adopted a strong policy in favor of joint custody from which courts should deviate only under the most compelling circumstances." *In re Marriage of Winnike*, 497 N.W.2d 170,

173 (Iowa Ct. App. 1992). If the court does not grant joint legal custody, the court must cite clear and convincing evidence that joint legal custody is unreasonable and not in the best interests of the children, to the extent that the legal custodial relationship between the child and the parent should be severed. Iowa Code § 598.41(2)(b); *In re Marriage of Holcomb*, 421 N.W.2d 76, 79-80 (Iowa Ct. App. 1991). In considering whether to grant joint legal custody, or sole legal custody to one of the parents, a court looks to the factors in section 598.41(3).[2]

On our de novo review of the record, and after careful consideration of the factors in section 598.41(3), we conclude the district court properly granted Tammy sole legal custody of the children. The children, who were ages sixteen and fourteen at the time of the hearing, had been in Tammy's care since they were born, with very little input from Brian. As the district court noted, "[Brian]

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[2] The factors found in section 598.41(3) are:

a. Whether each parent would be a suitable custodian for the child.

b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.

c. Whether the parents can communicate with each other regarding the child's needs.

d. Whether both parents have actively cared for the child before and since the separation.

e. Whether each parent can support the other parent's relationship with the child.

f. Whether the custody arrangement is in accord with the child's wishes and whether the child has strong opposition, taking into consideration the child's age and maturity.

g. Whether one or both the parents agree or are opposed to joint custody.

h. The geographic proximity of the parents.

i. Whether the safety of the child, other children, or the other parent will be jeopardized by the awarding of joint custody or by unsupervised or unrestricted visitation.

j. Whether a history of domestic abuse, as defined in section 236.2, exists.

has practically no personal knowledge of what is in the best interest of these children. It would be impossible for him to make informed decisions that a custodial parent must make." The court also noted that because Brian lived in Florida, it was unlikely he would be able to develop the understanding and knowledge necessary to enable him to make decisions in the children's best interests. For all of these reasons, we conclude the children should be placed in the sole legal custody of Tammy.

IV. Visitation.

Brian asks to have a specific visitation schedule. He asserts that due to the conditions imposed by the district court there is a very real risk that visitation may never occur. He points out he had attempted to "jump through the hoops" established by Tammy and Daniel, and five years later no visitation had occurred. For this reason, he believes specific visitation needs to be ordered by the court.

Section 598.41(1)(a) provides a court should award "liberal visitation rights where appropriate." When considering visitation rights, our primary consideration is the best interests of the children. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). Generally, liberal visitation rights are in children's best interests. *Id*. Unless there is a showing visitation will in some way injure a child, visitation will not be prohibited. *In re Marriage of Toedter*, 473 N.W.2d 233, 234 (Iowa Ct. App. 1991).

The district court ordered that Brian should have visitation with A.W. and B.W. The court, however, did not set forth a specific time when visitation should occur. If the visitation occurs in Iowa, then it would be supervised by Daniel, until

Daniel determines visitation no longer needs to be supervised.[3] The court did not place any limits on the visitation Brian could have with the children in Iowa, other than at first the visits would be supervised. Visitation outside of Iowa is permitted only if recommended by Daniel, and Tammy agrees to it.

The court obviously left it to the parties to arrange a time either for Brian to come to Iowa for a visit, or for Daniel and Tammy to determine the children could go to Florida to visit Brian there. In either event, it is clear the court determined visitation would occur. Under the district court's order Daniel and/or Tammy do not have the ability to deny visitation altogether. Brian's fears that visitation may not occur are premature at this time. We agree with the district court that the parties may work out a visitation schedule.

We affirm the decision of the district court.

AFFIRMED.

[3] In the case of *In re Marriage of Stephens*, 810 N.W.2d 523, 530 (Iowa Ct. App. 2012), we determined there had been an invalid delegation of judicial power when the court permitted a counselor to determine whether visitation should be increased. Brian asked the court to appoint someone instead of Daniel but did not claim the court did not have the authority to delegate to Daniel the decision of whether visitation should be supervised, or whether Brian could have visitation outside of Iowa. Because the issue of delegation was not raised on appeal, we do not consider it. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).