IN THE COURT OF APPEALS OF IOWA

No. 2-400 / 11-1391
Filed June 13, 2012

Upon the Petition of
TRAVIS W. BURLESON,
Petitioner-Appellee,

And Concerning
EMILIE FESSLER-BOYLAN,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Respondent appeals the custody, visitation, child support, and attorney fees provisions of a paternity decree. **AFFIRMED AS MODIFIED.**

Eric Borseth of Borseth Law Office, Altoona, for appellant.

Travis Burleson, Johnston, pro se.

Considered by Tabor, P.J., Bower, 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.

Travis Burleson and Emilie Fessler-Boylan are the parents of a child, born in March 2010. The parties were never married. When Emilie told Travis she was pregnant, he decided to move to Iowa from Arizona, where he had been living. The parties lived together for about six weeks during the pregnancy but separated prior to the birth of the child, and Travis moved back to Arizona. After the child was born, Travis returned to Iowa.

On April 23, 2010, Travis filed a petition seeking joint legal custody and visitation rights with the child. An order on temporary matters was filed June 23, 2010, giving Travis visitation twice a week. Pursuant to the parties' agreement, the temporary order was amended on March 2, 2011, to give Travis more visitation time.

A hearing on the paternity proceedings was held on May 16 and 17, 2011. At the time of the hearing, Travis was twenty-seven years old. He had completed more than a year of college in the area of fire science but had not completed a degree. In Arizona, Travis had been employed as an EMT ambulance driver. He was currently employed as a warehouse worker for ACCO Unlimited Corporation and earned $13.50 per hour. Travis worked Monday through Friday from 8:00 a.m. to 5:00 p.m., with occasional overtime. He was planning to move to a house in Johnston soon after the hearing. He had been treated for depression for a period of time but was not presently receiving medical treatment.

Emilie was twenty-three years old at the time of the hearing. She lived in a house in Des Moines she had purchased when she was nineteen years old.

Her mother and other family members lived nearby. Emilie had an associate's degree in liberal arts from Des Moines Area Community College. She was employed as a financial counselor for Mercy Medical Center, where she earned $15.00 per hour. Emilie works Monday through Thursday from 3:00 p.m. until 1:30 a.m. She is in good health.

The parties had a very acrimonious relationship and did not get along during the six weeks they lived together. Travis became very emotional at the time they separated, and this has caused Emilie to have concerns about his stability. Emilie sought a protective order under Iowa Code chapter 236 (2009) to prohibit Travis from having contact with her. Those proceedings were later dismissed because there was no evidence of an assault. Emilie asked Travis not to contact her.

After the child was born, Travis did not have visitation until the temporary order was entered on June 23, 2010. Because the parties were not really communicating, they decided to exchange a journal detailing information about the child each time Travis had visitation. The journal shows the parties' animosity and their failure to agree about even the most basic issues. Travis wrote in the journal that he would tell the child the truth about Emilie when he was older, and that "[the child] will be the judge when he is old enough to understand what is going on." Travis continually asked for more visitation time with the child, but Emilie insisted on following the temporary visitation order.[1]

[1] The district court found Emilie tried to limit Travis's contact with the child as much as possible. We note, however, Emilie did as much as she was legally required to do. Although Emilie could have displayed more generosity when Travis requested extra

Additionally, there was evidence of arguments when they would exchange the child for visitation, even though these exchanges took place in front of the Des Moines Police Department. At times, Emilie's mother, Frankie, brought the child for a visitation exchange. Travis admitted he had yelled profanities at Frankie. Travis testified he did not believe he needed to treat Frankie with respect because she was the child's grandparent and not a parent of the child. Obviously, the child was present during these exchanges and could hear the arguments. At the hearing, Travis admitted that he frequently referred to Emilie as a liar.

The district court issued a ruling on June 16, 2011. The court granted the parties joint legal custody of the child, with Emilie having physical care. Travis was granted visitation every Wednesday overnight, alternating weekends, alternating holidays, and four weeks of visitation in the summer. The court also provided, "In addition to the parenting time delineated above, [Travis] shall have first right of refusal to take care of the parties' minor child . . . while [Emilie] is at work and if [Travis] is not presently at work during those times." The court granted Travis an extraordinary visitation credit and ordered him to pay child support of $405 per month. The court determined each party should be responsible for his or her own attorney fees.

Emilie filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The court specifically granted Emilie four weeks of summer visitation, but otherwise denied her motion. Emilie now appeals.

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visitation time, she never denied Travis the visitation he was permitted under the temporary order.

II. Standard of Review.

Issues ancillary to a determination of paternity are tried in equity. Iowa Code § 600B.40; *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.

Emilie contends the district court should have granted her sole legal custody. She states the parties are unable to communicate concerning the child's care without a degree of animosity. She also states that Travis has not shown he supported her relationship with the child, pointing out that he wrote in the journal he would like the child to know the truth about her and he testified if the child asked, he would explain about his problems with Emilie. Emilie points out she has been the child's primary caretaker since birth. She also highlights the verbal abuse she and her mother have experienced from Travis.

Pursuant to section 600B.40, in determining visitation and custody arrangements in paternity actions, we apply section 598.41, as applicable. Under section 598.41(1)(a), a court may grant the parents joint legal custody of their child, or grant sole legal custody to one parent. A custody award must be reasonable and in the best interests of the child. Iowa Code § 598.41(1)(a). "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 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 child, 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*, 471 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, we find there is not clear and convincing evidence that joint legal custody is unreasonable, or that it would not be in the best interests of the child. We agree with the district court's conclusion that it is in the child's best interests that both parents be involved in raising him. While there is undoubtedly evidence of animosity between the parents, it is clear they both love

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[2] The factors listed 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.

the child and want what is best for him. Hopefully, upon mature reflection, the parties will come to realize neither party is going to "win" in their ongoing disputes and the only one they are really hurting is their child.[3]

IV. Visitation.

A. Emilie claims the district court should not have granted Travis the right of first refusal to care for the child when she is at work. The court ordered, "In addition to the parenting time delineated above, [Travis] shall have first right of refusal to take care of the parties' minor child . . . while [Emilie] is at work and if [Travis] is not presently at work during those times." Travis gets off work at 5:00 p.m. most days, while Emilie works from 3:00 p.m. to 1:30 a.m., Monday through Thursday. In effect, the court's order gives Travis the right to care for the child every evening from 5:00 p.m. until 1:30 a.m., Monday through Thursday, greatly increasing his visitation time and greatly increasing the number of visitation exchanges every week.

Section 598.41(1)(a) provides, that 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*.

We conclude the provision giving Travis the right of first refusal to care for the child if Emilie is working and he is not working should be eliminated. We find

[3] We recommend both parties attend Children in the Middle again. Their difficulties during visitation exchanges are very detrimental to the child. This is applicable whether the parents, or a designee, such as a grandparent, is present during the exchanges.

that under the circumstances of this case, which the district court described as "extreme animosity," this provision will only give rise to further occasions for disagreement. We also find the practical effects of this provision will be very difficult for a child of this age. Furthermore, the court did not grant joint physical care, finding it would be impractical "based upon the current status and feeling between the parties."

B. The district court granted Travis visitation every Wednesday overnight from 6:00 p.m. until 8:00 a.m. the next morning. Emilie asks that this be visitation on Wednesday evenings from 6:00 p.m. to 8:00 p.m. Travis begins work at 8:00 a.m. on Thursdays, and having visitation that ends at 8:00 a.m. is not practical. Furthermore, because the parties are unable to communicate, we believe once the child starts school it would be too disruptive to have overnight visitation one night every week. *See In re Marriage of Lacaeyse*, 461 N.W.2d 475, 477 (Iowa Ct. App. 1990) (noting mid-week visitation may be granted if it is not unduly disruptive to the custodial parent). We determine Travis should have visitation every Wednesday evening from 6:00 p.m. to 8:00 p.m. This is the same Wednesday visitation he had been having under the temporary order.

Travis was granted four weeks of visitation in the summer, to be exercised in two-week increments. Emilie asks to have this be two weeks until the child is eight years old, three weeks when the child is nine, and then four weeks each year thereafter. We affirm the award of summer visitation as set forth in the paternity decree. We note that in ruling on the rule 1.904(2) motion, Emilie was also awarded four weeks of summer visitation.

Travis was also granted winter break and spring break in alternating years. Emilie asks that this begin after the child begins school. We modify the decree to specifically provide that the provisions for spring break and winter break will begin when the child starts kindergarten.

Additionally, the court ordered, "Both parties shall be allowed to contact the minor child every day that they are in the other party's care." Emilie asks that this be specifically limited to telephone or electronic communication, not physical contact. We determine that in this provision the court was clearly referring to telephone or electronic communication. We determine Travis may telephone the child once each week, and otherwise communicate electronically.[4] We leave in place the provision, "[T]he minor child shall be able to call either parent at reasonable and proper times with neither parent unduly restricting said contact."

V. Child Support.

A. The district court granted Travis an extraordinary visitation credit pursuant to Iowa Court Rule 9.9. For a parent that has visitation of between 128 to 147 days each year, the parent is entitled to a fifteen percent reduction in a child support obligation. Iowa Ct. R. 9.9. "For the purpose of this credit, 'days' means overnights spent caring for the child." *Id.* Emilie asserts the court miscalculated Travis's visitation days to apply the credit.

Under the visitation schedule as modified above, we calculate Travis would have about eighty-seven overnight visits each year.[5] This number falls far

[4] This provision also applies to Emilie when the child is in Travis's care.

[5] This is calculated as 48 weekend days (26 weeks x 2 days = 52 days, less 4 days of Emilie's summer vacation), 24 days of summer vacation (4 weeks x 7 days = 28 days, less 4 days already credited to Travis for weekends), 10 holiday days (under the

short of the 128 days needed to apply the extraordinary visitation credit. We conclude the credit should not be applied in this case. Travis's child support obligation should be increased to $463.48 per month.

B. Emilie asks the court to order Travis to pay retroactive child support of $1200, representing $400 per month from the time of the child's birth until the temporary order was entered in June 2010. In the temporary order Travis was ordered to pay child support of $400 per month. The court did not address the issue of retroactive child support in the decree, and Emilie included this issue in her motion pursuant to rule 1.904(2). In ruling on that motion, the court denied her request for retroactive child support.

Section 600B.25(1) provides that in paternity proceedings, a court may order the father to pay an amount for past support and maintenance of a child. The Iowa Supreme Court has stated:

> Unlike a current child support obligation, the guidelines are not used to establish the amount of past child support. Instead, our legislature permits the court to order a parent to pay an amount "the court deems appropriate for the past support and maintenance of the child." Iowa Code § 600B.25(1). This standard permits the court to consider all the surrounding facts and circumstances to determine the amount in light of the purpose of child support and the duty of a parent to pay child support.

Markey, 705 N.W.2d at 24. The guidelines are not irrelevant in this situation and should be used as a starting point for determining a proper amount for past child

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decree Travis has 9 days in even years and 11 days in odd years, averaging 10 days each year—we have not discounted for times these holidays may fall on weekends Travis would already be having visitation), and 5 days for school breaks (it is unknown how many days may be included in school breaks in the future, how many of those days would already be included as weekends, or already credited to Travis as holiday days).

support. *Id*. We conclude Travis should pay $1200 for past child support, pursuant to section 600B.25(1).

VI. Attorney Fees.

A. Emilie first contends the district court abused its discretion by not awarding her trial attorney fees. Under section 600B.25(1), "The court may award the prevailing party the reasonable costs of suit, including but not limited to reasonable attorney fees." The decision to award attorney fees is within the sound discretion of the court and will not be disturbed on appeal absent an abuse of discretion. *Id*. at 25. Emilie earns slightly more income than Travis. We conclude the district court did not abuse its discretion by determining each party should be responsible for his or her own trial attorney fees.

B. Emilie also seeks attorney fees for this appeal. "An award of appellate attorney fees is within the discretion of the appellate court." *Id*. at 26. We consider the needs of the party making the request, the ability of the other party to pay, and whether the party seeking attorney fees was obligated to defend the district court's decision on appeal. *Id*. While Emilie has been successful on some issues, she has not been successful on others. We again note the parties have similar incomes, with Emilie earning slightly more. Based on these factors, we determine no appellate attorney fees should be awarded.

We affirm the decision of the district court, except for the provisions specifically modified in this opinion. We have eliminated the provision giving Travis the right of first refusal to care for the child if Emilie is working and he is not at work. We have also modified the mid-week visitation so it is now from 6:00 p.m. to 8:00 p.m. each Wednesday. We have made some visitation provisions

more specific. We have increased Travis's child support obligation to $463.48 per month. We have also determine Travis should pay $1200 in past child support. All provisions of the paternity decree that have not been specifically modified remain as in the district court decision. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.