

IN THE COURT OF APPEALS OF IOWA

No. 6-582 / 06-0162
Filed February 14, 2007

Upon the Petition of
NATHAN ALLISON LANGE,
Petitioner-Appellant,

And Concerning
CYNTHIA MICHAEL WALLACE,
Respondent-Appellee.

Appeal from the Iowa District Court for Adair County, Paul R. Huscher,
Judge.

Nathan Lange appeals the physical care provisions of the district court's
ruling. **AFFIRMED.**

David L. Jungmann of David L. Jungmann, P.C., Greenfield, for appellant.

James W. Ries of Howe Olesen Ries, P.L.C., Greenfield, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

Nathan Lange and Cynthia Wallace are the unmarried parents of Brooks, born in 2004. The district court ordered the parents to exercise joint physical care of Brooks. On appeal, Lange maintains the court should have awarded him physical care. He cites several factors: (A) Wallace's use of methamphetamine and marijuana and her exposure of Brooks to these substances; (B) Wallace's restriction of visitation; (C) Wallace's failure to provide him with "relevant information" and the opportunity to care for Brooks when she was unable to do so; (D) "[i]ndications of possible physical abuse and neglect" of the child; and (E) Wallace's "failure to provide appropriate care and attention to her children."

I. Analysis

We begin our analysis by noting that the criteria governing physical care determinations are the same whether the parents are dissolving their marriage or have never been married to each other. *Jacobson v. Gradin*, 490 N.W.2d 79, 80 (Iowa Ct. App. 1992). The determinative factor is Brooks's best interests. See *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). We turn to the factors cited by Lange, reviewing the record de novo.

A. Wallace's Drug Use.

Lange and Wallace dated for several months before Brooks was born. Lange broke off the relationship after learning that Wallace was using illegal drugs. At trial, Wallace confirmed that she used marijuana and methamphetamine before and after the child was born. When someone reported the drug activity to authorities, Wallace voluntarily placed herself in a residential

treatment facility. On completion of that program, she registered for outpatient treatment in her hometown.

Lange acknowledges that Wallace was “drug-free” for almost seven months, but contends “[t]here is always the possibility she will relapse.” The district court addressed this concern, stating:

There is no doubt that Cynthia’s use of illegal drugs is an important factor in deciding custody of Brooks. Exposure to such drugs not only has a negative effect on a child’s physical health, but the parent’s ability to parent the child in all other areas is also hampered. Past usage of drugs however does not end the inquiry. If it did, the goal in a majority of our child in need of assistance cases would not be to reunite the family, but would be to terminate parental rights. It is necessary to consider the current condition and attitudes of the parents.

The court continued,

Cynthia voluntarily sought in-patient treatment for her addiction. She successfully completed the in-patient treatment program and has willingly pursued aftercare. She ensured that Brooks was well taken care of during her treatment, even providing the foster parents with schedules in order to cause as little disruption of Brooks’ life as possible. While no one can assure that she will not relapse, her desire to remain drug-free seems sincere. Those who have been around her, including her ex-husband, have noticed the positive changes she has made. If a relapse should occur, her past actions indicate that Cynthia would be willing to do what is necessary to protect Brooks. Cynthia’s past drug usage cannot be condoned, but her sincere efforts to address the problem are laudable and should be commended.

We agree with this assessment. Wallace admitted her drug use at trial. She testified “[i]t was very wrong for me to use That’s why I’m changing my life now.” While she did not foreclose the possibility of a relapse, she stated she was attempting to recover and recovery was a daily process.

The district court had the opportunity to assess Wallace’s credibility. The court concluded her efforts at sobriety were “sincere.” We give considerable

weight to the court's judgment, given its unique ability to hear and observe the parties first-hand. *Ford*, 563 N.W.2d at 631.

B. Restriction of Visitation.

Lange contends Wallace denied him visitation with his son. The record reveals that Lange enjoyed visitation with Brooks during the early months of his life, sometimes seeing him three times a month, and other times on a more irregular basis. Later, Lange began visiting his son every other Wednesday and every other Saturday.

When Wallace learned that Lange was dating another woman, she restricted visitation for approximately two and one half months. During this period, Wallace allowed Lange to visit Brooks, but only at her home. Lange testified he felt uncomfortable with this arrangement and exercised the option infrequently. In time, Wallace relented and removed this restriction.

Lange also described an occasion when Wallace denied him visitation because he was five minutes late to pick up Brooks. While we do not condone these actions, we note they were short-lived. When Brooks was approximately sixteen months old, the district court entered a temporary order fixing an alternate-week joint physical care arrangement. At this point, visitation issues disappeared. We conclude Wallace's temporary restriction of visitation is not grounds for reversal of the joint physical care arrangement ordered by the district court.

C. Failure to Exchange Relevant Information.

Brooks was born without fully formed legs and hands and with holes in his heart. While Cynthia was involved with in-patient treatment, Lange and his new

girlfriend, Betsy, had Brooks fitted with a foot brace, which he was required to wear most of his waking hours. Lange contends “Cynthia remains uncooperative with [him] on important issues, such as the use of Brooks’s brace and his routine medical care.”

The record reflects that neither parent communicated effectively about the brace. Lange did not inform Wallace of his intent to obtain the brace. He acknowledged that Wallace “was upset because she didn’t have any say in it.” Once the brace arrived, Lange said he told Wallace how it worked. Wallace countered that she was given written instructions, but not the name or contact information of the person who prescribed it. While she essentially conceded that she did not consistently use the brace, the record suggests that this omission was unintentional. Specifically, Betsy corroborated Wallace’s testimony that Wallace misunderstood the number of hours it was to remain on Brooks.

Lange also contends that Wallace had Brooks placed in foster care before she entered treatment, rather than giving him an opportunity to care for him. Although there is evidence that Brooks was briefly in foster care before Wallace began in-patient treatment, there is no indication that Wallace intentionally deprived Lange of contact with Brooks during this period. Wallace entered a facility that allowed Brooks to stay with her. After she began the program, Lange testified he regularly visited Brooks at the facility, even though it required a round-trip drive of five hours.

We conclude both parents shared responsibility for miscommunication about Brooks’s health needs, including the brace, and about other matters. However, their level of communication was sufficient to effectively implement the

temporary joint physical care arrangement for seven months preceding trial. As neither parent presented evidence that the arrangement proved unworkable, we conclude this factor does not militate in favor of reversal.

D. Abuse and Neglect.

Lange next cites to “indications of possible physical abuse and neglect” by Wallace. This ground relates to Wallace’s drug use around Brooks. We have addressed this factor in Part A above. We reaffirm the district court’s findings on this factor, as they are fully supported by the record.

E. Wallace’s Care of Brooks.

Lange suggests that he can better care for Brooks than can Wallace. The district court addressed this factor, noting that Lange could indeed provide more material benefits, but material possessions were not enough to raise a child. The court noted that both parents loved the child and had proven themselves to be adequate caretakers who communicated with each other effectively, when necessary.

On our de novo review of the record, we are not sanguine about Wallace’s ability to maintain a joint caretaking role. As she conceded, she was recovering from drug addiction. In addition, there was evidence that Brooks’s half-brother, who was in Wallace’s care part of the time, missed significant amounts of school while in her care. There was also some evidence that Wallace’s home was less clean than Lange’s and Wallace provided less structure for Brooks than did Lange. Despite these concerns, we acknowledge countervailing considerations such as Brooks’s relationship with his half-brother, and, most importantly, the fact that Wallace made the joint physical care arrangement work for several months

prior to trial. The district court thoughtfully weighed these considerations and opted for joint physical care. On this record, the court's decision was equitable.

II. Disposition

We affirm the district court's ruling on Lange's petition to establish custody, visitation, and support.

AFFIRMED.