

IN THE COURT OF APPEALS OF IOWA

No. 9-351 / 08-1897
Filed July 2, 2009

DEREK J. HOYLE,
Plaintiff-Appellant,

vs.

KELLIE LEMON,
Defendant-Appellee.

Appeal from the Iowa District Court for Crawford County, Edward A. Jacobson, Judge.

Plaintiff appeals from a district court order awarding physical care and setting support for a minor child. **AFFIRMED IN PART AND REMANDED.**

Julie A. Schumacher of Mundt, Franck & Schumacher, Denison, for appellant.

Maura Sailer of Reimer, Lohman & Reitz, Denison, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Derek Hoyle appeals from a district court order setting custody, visitation, support, and the tax dependency exemption relating to the parties' minor child. We affirm in part and remand for determination of child support.

I. Background Facts and Proceedings.

Derek Hoyle and Kellie Lemon are the parents of James Lemon, born in March 2007. On June 15, 2007, Derek filed a petition to establish custody, visitation, child support, and the tax dependency exemption. On August 21, 2007, the district court entered a ruling on temporary matters awarding Kellie temporary physical care, subject to visitation by Derek as ordered; ordering Derek to pay \$350 per month in support; and ordering Derek to pay "\$400 in temporary attorney fees."

Hearing on Derek's petition was held on September 24, 2008. The following facts are supported by the hearing record. Derek and Kellie live within seven blocks of each other in Denison, Iowa. They were never married and were no longer seeing each other at the time of James's birth.

Derek, age thirty-one, has been married twice before and has a child with each former spouse: Timmy, age eight, lives in North Carolina and visits with Derek for one week in the summer and for a few days over the winter recess; and Gracie, age five, who lives about fifty miles away and stays with Derek every other weekend and six weeks in the summer. Derek pays \$453 per month for Timmy's support and \$425 per month for Gracie's support. He is in arrears on these child support obligations.

At the time of the hearing, Derek was living with his girlfriend, Tabby, in her home. Tabby has two children from her former marriage, ages eight and three, who live with Tabby and Derek every other day and every other weekend. Derek asked that he be awarded joint physical care of James — every other day and every other weekend — which would coincide with the time Tabby's children were present in the home. Tabby testified Derek has good parenting skills and that her children love him.

Derek attended “a few” prenatal appointments with Kellie. Derek did go to the hospital to see James the day he was born, but his name was not placed on the birth certificate. He did not contribute to James's medical expenses or to James's care financially before filing this petition. At the hearing Derek admitted that he had not paid the ordered temporary support or attorney fees. He also admitted that Kellie had allowed visitation beyond that ordered by the court.

Derek works at Farmland Foods as a livestock handler guaranteed forty hours per week at a rate of thirteen dollars per hour. He testified that he had also worked overtime and that his gross income could exceed the \$27,000 per year he had estimated to calculate child support based on overtime. He testified he previously worked at Farner-Bocken located in Carroll, Iowa, averaging fifty hours per week at a rate of \$15.59 per hour. He voluntarily changed employment to cut down on travel time and expenses and to receive better insurance benefits. He reported gross annual income of \$35,739 on his 2007 tax returns.

Derek testified that he had been convicted of harassment arising from several text messages he sent to an ex-wife and fifth-degree criminal mischief in relation to a smashed windshield. He does not allow his children to be in contact

with his two brothers, both of whom have sexually assaulted a minor. Derek testified he was raised by his step-father and only allowed his children to visit his biological mother if he was present.

Kellie, age twenty-eight, has a nine-year-old daughter, Kassie, from a previous relationship. Kellie testified that Tabby had provided day care services for Kassie before James's birth. Kellie receives \$452 per month in child support from Kassie's father. Kellie is purchasing her home and Kassie and James each have their own room. Kellie testified that Kassie and James were very close and that shared care would not be in James's best interests.

Kellie has an associate arts degree and is enrolled in Buena Vista University working on her degree in human services and psychology. She has taken courses in child welfare and is certified in CPR and first aid. She works as a family advocate for Head Start West Central Community Action forty hours per week at a rate of \$8.23 per hour. She claims a gross annual income of \$21,381.60.

Kellie admitted that she had worked as a stripper for about two weeks during the time she was seeing Derek and that with the money she earned she paid bills and purchased a ring for Derek. She also testified that she had modeled topless and noted that Derek had accompanied her on that photo shoot.

The district court entered its order to establish custody, visitation, child support, and the tax dependency exemption. The court wrote in part:

Although [Kellie] has not lived a perfect life, she believes that joint physical care is not in the best interest of the child and based upon its observation of Derek and his testimony, the court cannot help but agree.

In saying that, the court does not doubt that Derek loves all three of his children, that he enjoys spending time with them and that he provides adequate care for them when he is with them. The court's bigger concern is that Derek seems to want to be a father at his convenience . . . and if he happens to have the money he provides support and nurturing for his children. Kellie, on the other hand, is a parent who appears to be there for her two children everyday.

The court thus found it to be in James's best interests that Kellie be awarded physical care subject to reasonable visitation by Derek. The court set a visitation schedule, which it noted was "a minimum."

Derek's child support worksheets calculated his child support obligation at \$185 per month, based on \$27,040 annual income for him and \$17,118.40 for Kellie, with deductions for prior child support orders and medical insurance premiums. Kellie's child support worksheets calculated Derek's obligation at \$332.99 per month based on Derek's 2007 income of \$35,739, annual income of \$21,381 for herself, deductions for prior court-ordered child support, two deductions for additional qualified dependents for herself and for Derek, and no deduction for medical insurance premiums. The court ordered Derek to pay \$300 per month without indicating which income figures were utilized and what deductions were granted. The court ordered the tax dependency exemption to alternate between the parties. Derek was ordered to pay court costs and \$1250 toward Kellie's attorney fees.

Derek appeals. He contends the court erred in not awarding joint physical care, or in the alternative, expanded visitation. He also asserts the court erred in deviating from the child support guidelines and in ordering him to pay Kellie's attorney's fees.

II. Standard of Review.

This action for custody and visitation was filed in equity¹ and, therefore, our review is de novo. Iowa R. App. P. 6.4. “In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them.” Iowa R. App. P. 6.14(6)(g). Our governing consideration is the best interests of the child. Iowa R. App. P. 6.14(6)(o); *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995).

III. Physical Care.

In child custody cases where the parents have never married, our legal analysis is the same as child custody cases in dissolution of marriage proceedings. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988). We consider the factors listed in Iowa Code section 598.41(3) (2007)² and *In re Marriage of*

¹ Iowa Code § 600B.40 (2007) provides:

The mother of a child born out of wedlock whose paternity has not been acknowledged and who has not been adopted has sole custody of the child unless the court orders otherwise. If a judgment of paternity is entered, the father may petition for rights of visitation or custody in the same paternity action or in an equity proceeding separate from any action to establish paternity. In determining the visitation or custody arrangements of a child born out of wedlock, if a judgment of paternity is entered and the mother of the child has not been awarded sole custody, section 598.41 shall apply to the determination, as applicable, and the court shall consider the factors specified in section 598.41, subsection 3, including but not limited to the factor related to a parent’s history of domestic abuse.

² Section 598.41(3) provides in part:

3. In considering what custody arrangement under subsection 2 is in the best interest of the minor child, the court shall consider the following factors:

- 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.

Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). *Id.* Our objective is to place the child in the environment most likely to bring the child to healthy physical, mental, and social maturity. *Phillips*, 541 N.W.2d at 847.

Joint physical care is a viable option when it is in the child's best interests. Iowa Code § 598.41(5)(a); *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007). In considering whether joint physical care is in the best interests of the child, we consider the following factors: (1) approximation, which reflects the historical care-giving arrangement for the child; (2) the ability of the parents to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) the extent to which the parties agree on matters of routine, daily care. *In re Marriage of Hansen*, 733 N.W.2d 683, 700 (Iowa 2007); *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007).

"Generally, we give considerable deference to the district court's credibility determinations because the court has a firsthand opportunity to hear the evidence and view the witnesses." *Berning*, 745 N.W.2d at 92. The district court, which had the opportunity to view the parties, came to the conclusion that joint physical care was not in James's best interests. Kellie has been James's primary care-giver and provides consistent parenting and a stable home. On our

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 or 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.

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de novo review of the record, we affirm the district court's decision placing James in Kellie's physical care.

We also affirm the visitation awarded, noting as did the district court that the visitation outline is a "minimum." Testimony indicated that Kellie provided Derek with visitation beyond that ordered by the temporary visitation schedule. We assume Kellie will continue to agree to additional visitation at Derek's reasonable request and we encourage her to do so.

IV. Child Support.

Child support is to be calculated according to the uniform child support guidelines. See Iowa Code § 598.21B. Iowa Court Rule 9.4 states that the court "should determine the amount of support specified by guidelines." Support determined under the guidelines is presumed to be correct. Iowa Code § 598.21B(2)(c); Iowa Ct. R. 9.4. The district court did not determine child support for James according to the guidelines. Kellie acknowledges that the district court deviated from the child support guidelines, but contends the trial court's ruling is defensible assuming certain findings as to income and deductions.

We decline the invitation to defend the court's child support award. The parties' child support worksheets contain contradictory information (for example, differing amounts for the parties' incomes and dependency deductions and Derek's worksheet lists a deduction for health insurance premium that is in excess of the amount to which he testified) and we believe this matter must be remanded to the district court for further fact-finding and a calculation of child support under the guidelines. See *In re Marriage of McKenzie*, 709 N.W.2d 528,

533 (Iowa 2006) (stating “our courts are required to use the child support guidelines to determine a parent’s child support obligation”). However, the presumption that the child support resulting from the application of the guidelines is a just and appropriate amount is rebuttable. “If a strict application of the guidelines would be unjust or inappropriate, a court may adjust the guideline support amount upward or downward if such adjustment is ‘necessary to provide for the needs of the children and to do justice between the parties under the special circumstances of the case.’” *Id.* (quoting Iowa Ct. R. 9.4); see also Iowa Code § 598.21B(2)(d) (“A variation from the guidelines shall not be considered by a court without a record or written finding, based on stated reasons, that the guidelines would be unjust or inappropriate as determined under the criteria prescribed by the supreme court.”).

V. Attorney’s Fees.

A. Trial fees. Derek contends the trial court erred in awarding Kellie attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa Ct. App. 1983). “Whether attorney fees should be awarded depends on the respective abilities of the parties to pay.” *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). To overturn an award the complaining party must show that the trial court abused its discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). Because Derek was making more money than Kellie at the time of trial, we cannot say the district court abused its discretion. We affirm on this issue.

B. Appellate fees. Kellie also seeks an award of attorney’s fees on appeal. We consider the needs of the party making the request, the ability of the

other party to pay, and the relative merits of the appeal. *Id.* In light of the remand and each party's financial situation, we deny the request.

Costs of this appeal are assessed one-half to each party.

AFFIRMED IN PART AND REMANDED.