IN THE COURT OF APPEALS OF IOWA

No. 9-766 / 09-0436
Filed December 30, 2009

JENNIFER WIDDEL,
Plaintiff-Appellant/Cross-Appellee,

vs.

NATHAN KANNEGIETER,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Bremer County, Colleen D. Weiland, Judge.

Plaintiff appeals the district court's decision granting defendant physical care of their minor child, and defendant cross-appeals the visitation provisions of the paternity decree. **AFFIRMED.**

Teresa A. Rastede of Dunakey & Klatt, P.C., Waterloo, for appellant.

Dale E. Goeke of Goeke & Goeke, Waverly, for appellee.

Considered by Vaitheswaran, P.J., and Mansfield, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

ZIMMER, S.J.

Jennifer Widdel appeals from the district court's decision in a paternity action granting Nathan Kannegieter primary physical care of their minor child. She also contends she should have been awarded trial attorney fees. Nathan has cross-appealed seeking changes in the visitation provisions of the decree and a change in the child's surname. We affirm the decision of the district court.

I. Background Facts & Proceedings

Nathan Kannegieter and Jennifer Widdel lived together for a period of time, but never married. Jennifer became pregnant in the fall of 2007. Nathan reacted very negatively to the news that Jennifer was expecting. According to Nathan, he was upset because Jennifer stopped taking birth control pills without informing him of her decision. He testified that he and Jennifer had agreed they were not ready to have children and Jennifer would use birth control and not get pregnant while they were cohabitating. Jennifer was very hurt by Nathan's reaction to her pregnancy. The parties ended their romantic relationship and stopped living together in November 2007. The circumstances surrounding the parties' breakup have colored their subsequent interactions with each other. The parties continue to feel they cannot trust the other, and they have difficulty communicating.

After Nathan and Jennifer separated, Jennifer moved in with her mother in Waverly, while Nathan moved to Fort Dodge, about two hours away from where Jennifer was living. Nathan had limited involvement with Jennifer during the remainder of her pregnancy; however, he was present in the hospital when the

parties' daughter, Alisyn (Ali), was born in June 2008. Prior to Ali's birth, Nathan asked Jennifer to consider a shared physical care arrangement. His requests were rejected.

As the district court noted, both of these parents are "clearly infatuated" with Ali. Both parents provide Ali with excellent care. Both parents live in appropriate homes and have a stable lifestyle. Neither parent exposes Ali to unreasonable risks or health hazards. Both parents surround Ali with family and friends who assist with her care; however, neither parent delegates their primary caretaking responsibility to a third party.

After Ali was born, Nathan made requests for parenting time so his daughter could spend some time with him and his family. Jennifer either denied these requests or would only permit Nathan to visit the child in her home, while she was present. Jennifer was breastfeeding and stated the child could only go to Fort Dodge with Nathan if she accompanied them. As a result, Nathan's contact with the Ali was much more limited than he would have preferred. His requests for less restrictive visitation were denied.

On July 14, 2008, Jennifer filed a petition to establish paternity, custody, care, visitation, and support. Nathan's answer to the petition sought joint physical care of Ali. Jennifer stopped breast feeding her daughter about three weeks before a hearing on temporary matters was held on September 8. At the hearing, Jennifer took the position that Nathan's visitation should be supervised and requested that any visitation take place in her father's home.

On September 11, 2008, the district court granted the parties temporary joint physical care, with the parties alternating care on a weekly basis. The court concluded there was no evidence that Nathan was unsuited as a parent. The court further found "no evidence shows that Jennifer is especially experienced with babies other than her recent care of Alisyn. In whole, both parties appear to be responsible young people who are motivated to parent by a love for their daughter." Nathan was ordered to pay temporary child support of $529 per month.[1]

Jennifer is twenty-nine years old and in good health. She is employed at Allen Memorial Hospital in Waterloo as a medical secretary and phlebotomist. She recently received a promotion and will be working in the lab section of the Emergency Room, where she will receive $12.85 per hour. Jennifer continues to live in a mobile home with her mother. She shares a bedroom with Ali. Jennifer works several different shifts. The earliest requires her to leave home at about 4:30 a.m. The latest allows her to return home at about 5:00 p.m. Jennifer uses a childcare provider for her daughter during work hours. Jennifer's mother works at John Deere. She assists Jennifer in caring for Ali. She leaves for work at about 5:30 a.m. and usually drops her granddaughter off at her childcare provider before going to work.

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[1] Jennifer appealed the temporary physical care order to the Iowa Supreme Court, and sought a stay of the order. The supreme court determined a stay was not required. The court also denied Jennifer's request for an interlocutory appeal. Procedendo was issued. After the case was returned to district court, Jennifer filed a motion seeking the recusal of the judge that signed the temporary physical care order. That motion was denied.

Nathan is thirty years old and in good health. In October 2008, he accepted a position as a used car manager at a car dealership in Mason City. He earns $5000 per month, plus commissions. Nathan was still living in Fort Dodge at the time of trial, but planned to move to Clear Lake, a community near his employer. At Nathan's home in Fort Dodge his daughter has her own bedroom. Nathan is engaged to Sheena. Sheena is twenty-two years old and has a degree in dental hygiene. During the weeks Nathan had physical care of his daughter prior to trial, Sheena moved into his home to help care for the Ali. Sheena planned to move to the Mason City area with Nathan. Like Jennifer, Nathan uses a childcare provider for Ali while he is at work.

This case was tried to the court on February 11, 2009. Ali was seven and one-half months old at the time of trial. The district court issued an order on February 20, 2009, granting the parties joint legal custody of the child. The court determined joint physical care was not in the best interests of the child based on the geographical distance between the parties and "the continuing level of animosity and discordant communication between the parties."

In considering physical care of the child, the district court found "both parties are in almost every way appropriate and beneficial caretakers." We agree with this assessment. The court ultimately concluded that Nathan should have physical care because of Jennifer's continuing inability and unwillingness to support a parent-child bond between Nathan and Ali. The court found Nathan had made better and more generous attempts to communicate with Jennifer and that he better supported Jennifer's relationship with the child. The court

concluded that Jennifer's difficulty in overcoming the anger she feels toward Nathan has adversely affected her ability to communicate with him about Ali. We believe the record supports all of the district court's conclusions.

The court established a visitation schedule which provides that until the child attends preschool, Jennifer will have visitation every week from Friday at 7:00 p.m. until Wednesday at 10:00 a.m. If the child attends preschool, Jennifer's visitation will be reduced to three full days on alternating weekends. Once the child is in school, Jennifer will have visitation on alternating weekends from Friday at 7:00 p.m. until Sunday at 4:00 p.m. In addition, Jennifer may exercise visitation on any day from 8:00 a.m. until 7:00 p.m., in Nathan's residential area, provided she gives forty-eight hours noticed to him.[2] Jennifer was awarded visitation on alternating holidays. Also, once the child is in school, she may have visitation over one-half of the summer break and winter break, and all of spring break.

Jennifer was ordered to pay child support of $274 per month. The court refused Nathan's request to give the child the surname of Kannegieter, as opposed to Widdel, which is on her birth certificate. The court ordered each party to pay his or her own attorney fees.

Jennifer appeals the physical care provisions of the paternity decree. She also contends the court should have awarded her trial attorney fees, and she seeks appellate attorney fees. Nathan has cross-appealed, alleging the child's

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[2] Before the child attends preschool, and if she attends preschool, this visitation time may not be exercised on a Wednesday.

surname should be Kannegieter-Widdel. In addition, he asks to have the "any day" visitation provision in the decree eliminated or modified.

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 (2009). 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. Physical Care

Jennifer contends it would be in the Ali's best interests to be placed in her physical care. She claims Nathan had no real interest in the child until she stated she would be seeking child support. She states she was rightfully concerned about permitting Nathan to have visitation away from her home due to the limited interest he had exhibited before the child was born and immediately after the birth.

Jennifer also finds fault in some of Nathan's actions regarding the child, such as switching the child's formula, taking the child to have two haircuts, and arranging to have the child baptized.[3] Jennifer contends she is more stable than Nathan because he has changed jobs more frequently than she has, and he testified he would be moving soon after the paternity hearing. Jennifer also

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[3] Nathan invited Jennifer to attend the baptism. She initially accepted the invitation, but later objected to the event. After Jennifer protested the baptism, the event was cancelled.

asserts that Nathan's fiancé, Sheena, will probably bear the bulk of Nathan's child-caring responsibilities.

In determining physical care for a child, our first and governing consideration is the best interest of the child. Iowa R. App. P. 6.904(3)(*o*). When physical care is an issue in a paternity action, we apply the criteria found in Iowa Code section 598.41 (2007). 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). Some of the factors we consider are "[w]hether the parents can communicate with each other regarding the child's needs," and "[w]hether each parent can support the other parent's relationship with the child." Iowa Code § 598.41(3)(c), (e).

Upon careful review of the record, we find no reason to disagree with the district court's decision to award physical care to Nathan. Jennifer's bitterness about the circumstances surrounding parties' break-up continues to adversely affect her ability to communicate with Nathan about Ali. The record shows she has not been able to put aside her anger toward Nathan. Because of this she has not adequately supported the relationship between Nathan and his daughter.

While Nathan was not involved during Jennifer's pregnancy, he became a supportive and caring parent soon after Ali's birth. Unfortunately, Jennifer has resisted his attempts to establish a relationship with Ali from the time of her birth.

We agree with the district court that it was reasonable for Jennifer to limit the time her daughter was away from her while she was breastfeeding. However, as the district court noted, "Jenni's restrictions exceeded the scope and time period of that concern." For instance, at the hearing regarding temporary care held when the child was two and one-half months old, Jennifer took the position that Nathan should be allowed only supervised visitation at her father's home. At that time, Jennifer was no longer breastfeeding Ali. We find nothing in the record which suggests that Nathan was unable to provide good care for Ali by himself during that period of time. After the court ordered a shared care arrangement, Jennifer remained rigid and inflexible with regard to sharing Ali with Nathan. The record reveals that she finds Nathan's legitimate inquiries about Ali's health, appointments, routine, and development intrusive. She often responds inappropriately to Nathan's efforts to stay connected with Ali and her well-being. Jennifer remains unable or unwilling to accommodate Nathan's desire to become a part of his child's life.

Contrary to Jennifer's contention, we do not find that Nathan's efforts to better his economic circumstances show instability. Also, while Sheena provides significant care for Ali now, this will change once Nathan moves closer to his employment and no longer has a long commute to work.

After considering the evidence and the arguments of both parties, we affirm the district court decision to place Ali in the physical care of Nathan. We conclude this is in the child's best interests because Nathan has shown more of a willingness to communicate with Jennifer, and is better able to support Jennifer's

relationship with the child. In reaching this decision, we give considerable deference to the trial court's credibility assessments. This is because the trial court had the opportunity to hear the evidence and view the witnesses firsthand. *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007). It is apparent that the trial court gave careful and thoughtful attention to the issue of physical care and we find no reason to disagree with the court's conclusion.

IV. Visitation

Nathan asks to have the "any day" visitation provision in the paternity decree be eliminated or modified. The district court provided Jennifer could have visitation "any day for any time period between 8:00 a.m. and 7:00 p.m. upon 48 hours notice to Nate."[4] Nathan argues this provision is unduly disruptive because it gives Jennifer a "virtually unfettered right for visitation."

We determine the mid-week visitation will not be unduly disruptive. Jennifer must give forty-eight hours notice to Nathan. The visitation may only take place in his residential area, and Jennifer must drive to this location if she exercises visitation. The decree provides that visitation may not interrupt the child's school schedule. We conclude the visitation provision should be affirmed because it will "assure the child the opportunity for the maximum continuing physical and emotional contact with both parents . . . ." *See* Iowa Code § 598.41(1)(a). "When it is in the best interest of the child to do so, the court may consider maximum contact with both parents." *Callender v. Skiles*, 623 N.W.2d 852, 854 (Iowa 2001).

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[4] Prior to the time the child attends preschool, and if she attends preschool, the visitation provision is for any day except Wednesday.

V. Surname of Child

At trial, Nathan asked the court to change Ali's surname from Widdel to Kannegieter. In his brief on appeal, he now asks that the child's last name be changed to be Kannegieter-Widdel.

Jennifer named Ali, and the birth certificate lists the child's last name as Widdel. Nathan is not listed on the birth certificate. A mother does not have a unilateral right to name a child, and she does not gain any advantage in the naming of the child in doing so. *Montgomery v. Wells*, 708 N.W.2d 704, 706 (Iowa Ct. App. 2005). "[W]hen the court first entertains an action between the parents to determine their legal rights and relationships with each other and the child, the court may also consider the legitimacy of the child's original naming . . . ." *Id.* In determining the proper surname for a child, we consider the best interests of the child. *Id.* at 708. In *Montgomery*, we listed the following factors to be considered in making this determination: (1) convenience for the child; (2) identification as part of a family unit; (3) assurances the mother will not change her name if she marries; (4) avoiding embarrassment, inconvenience, and confusion; (5) the length of time the surname has been used; (6) parental misconduct; (7) community respect for the surname; (8) the possible effect of name change on a parental bond; (9) any delay in requesting different surname; (10) preference of the child; (11) motivation of the parent; and (12) any other factor in the child's best interest. *Id.* at 708-09.

In this case, little evidence was presented at trial regarding the issue of Ali's surname. In response to a question from his attorney regarding whether he

wanted Ali's name changed to Kannegieter, Nathan replied, "Yes, sir." There was no further discussion of the name change issue and the factors set forth in *Montgomery* were not directly addressed. In its paternity decree, the district court gave several reasons on its own for declining to change Ali's name from Widdel to Kannegieter. The court noted that Nathan did not object to the child having the surname of Widdel until trial proceedings. The child's birth certificate and medical records show the surname of Widdel. Jennifer and her family have that last name, and the child enjoys a close relationship with them. There was no evidence Jennifer planned to change her surname upon marriage, or for any other reason. The court also mentioned that the surname of Widdel reinforced the child's bond with Jennifer. In the absence of a more fully developed record supporting a change in the child's surname, we decline to overturn the trial court's decision.

VI. Trial Attorney Fees

Jennifer contends the district court abused its discretion by refusing to award her trial attorney fees. Section 600B.25 provides, "The court may award the prevailing party the reasonable costs of suit, including but not limited to reasonable attorney fees." Thus, in paternity actions, an award of attorney fees may only be made to the prevailing party. Iowa Code § 600B.25. Furthermore, any award of attorney fees rests within the sound discretion of the district court. *Bryant v. Schuster*, 447 N.W.2d 566, 568 (Iowa Ct. App. 1989).

Jennifer was not the prevailing party in the district court. We find no abuse of discretion in the district court's decision not to award her trial attorney fees.

VII. Appellate Attorney Fees

Jennifer seeks attorney fees for this appeal. "An award of appellate attorney fees is within the discretion of the appellate court." *Markey*, 705 N.W.2d at 26. We consider the parties' needs and ability to pay, and whether a party was obligated to defend the trial court's decision on appeal. We award no appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed one-half to each party.

AFFIRMED.