

IN THE COURT OF APPEALS OF IOWA

No. 17-1055
Filed November 22, 2017

TOBI JOHN BAILEY,
Petitioner-Appellant,

vs.

JORDYNN RINARD,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Jeanie K. Vaudt, Judge.

A father appeals from the custody determination in a petition to establish paternity, custody, visitation, and support. **AFFIRMED AS MODIFIED AND REMANDED.**

Patrick H. Payton of Patrick H. Payton & Assoc., P.C., Des Moines, for appellant.

Sally B. Frank, and Jessica Belman, Law Student Attorney of Drake Legal Clinic, Des Moines, for appellee.

Considered by Danilson, C.J., and Tabor and McDonald, JJ.

MCDONALD, Judge.

In July 2016, Tobi Bailey filed a petition against Jordynn Rinard (n/k/a Titus) to establish paternity, custody, visitation, and support for a then-unborn child. The petition averred Rinard told Bailey he was the father of the child. The petition further averred Rinard texted to Bailey that she intended to give the child up for adoption upon birth. Bailey disagreed with this decision. The child, A.B., was born in September 2016. Rinard did not attempt to give up the child for adoption. The matter came on for trial, and the district court established paternity of the child in Bailey, awarded the not-married parents joint legal custody of the child, and awarded Rinard physical care of the child with Bailey to have limited visitation. On appeal, Bailey requests the parties be awarded joint physical care of the child or he be awarded physical care of the child.

Our review of equitable proceedings is de novo. See Iowa R. App. P. 6.907; *Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001). We review the entire record and decide anew the factual and legal issues preserved and presented for review. See *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998). Although our review is de novo, we afford deference to the district court for institutional and pragmatic reasons. See *Hensch v. Mysak*, ___ N.W.2d ___, ___, 2017 WL 4050671, at *1 (Iowa Ct. App. 2017). In exercising our review, “[p]rior cases are of little precedential value, except to provide a framework for analysis, and we must ultimately tailor our decision to the unique facts and circumstances before us.” *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995) (citing *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992)).

This is an action to establish paternity, custody, and care of a minor child between unmarried persons filed pursuant to Iowa Code chapter 600B (2016). Our analysis with respect to who should have physical care of the child is the same whether the parents are married or unmarried. See Iowa Code § 600B.40 (providing the statutory criteria set forth in section 598.41, for dissolutions of marriage, shall apply the chapter 600B proceedings); *Draeger v. Barrick*, No. 15-1442, 2016 WL 1697083, at *3 (Iowa Ct. App. Apr. 27, 2016) (citing *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988)). Our guiding consideration is the best interest of the child. See *In re Marriage of Hoffman*, 867 N.W.2d 26, 32 (Iowa 2015).

We first address whether joint physical care, or shared physical care, of the child is appropriate under the circumstances. “Although Iowa Code section 598.41(3) does not directly apply to physical care decisions, we have held that the factors listed here as well as other facts and circumstances are relevant in determining whether joint physical care is in the best interest of the child.” *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007). *Hansen* set forth four primary considerations: (1) approximation, viz., the historical caregiving relationship between the parties; (2) the level of communication and respect between the parents; (3) the level of conflict between the parents; and (4) whether the parents are in general agreement on the approach to daily matters. *Id.* at 696–670.

Shared care does not appear to be a viable option under the circumstances presented. The district court found shared physical care was inappropriate because (1) the parents have difficulty communicating with each other, (2) the

parents reside in different counties, and (3) Rinard has been the primary caregiver and a change would subject A.B.'s life to instability. On appeal, Rinard strongly argues shared care is inappropriate. She argues the parents "do not respect each other" and have critical differences with respect to parenting and lifestyles. She rejects Bailey's contention that the communication between the parties has improved. Instead, she contends there is no indication the parties will overcome their disagreements. She thus concludes shared physical care "is wholly inadequate." On de novo review, we agree, and we see no reason to discuss the factors at great length.

When joint physical care is not appropriate, "the court must choose one parent to be the primary caretaker, awarding the other parent visitation rights." *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007). We are guided by the best interest of the child. *See Hoffman*, 867 N.W.2d at 32. "The critical issue is determining which parent will do a better job raising the child; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in an original custody proceeding." *In re Marriage of Decker*, 666 N.W.2d 175, 177 (Iowa Ct. App. 2003). Iowa long ago abandoned the inference that the best interests of young children are served if custody is awarded to their mother instead of their father. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974).

The factors relevant to the physical care determination are set forth in Iowa Code section 598.41(3) in addition to those developed over time in our caselaw. *See In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974) (setting forth and discussing the applicable factors). Relevant considerations include: (1) the

characteristics of the child; (2) the needs of the child; (3) the characteristics of each parent; (4) the capacity of each parent to provide for the needs of the child; (5) the relationship between the child and each parent; (6) the relationship between the child and any siblings; (7) the effect on the child of disrupting the existing custodial status; (8) the nature of the proposed environments; (9) the preference of the child; (10) any recommendations by the child's attorney or independent investigator; (11) available alternatives; and (12) any other relevant matters. *Id.* We consider the relevant factors below.

When we consider the characteristics and needs of the child, neither parent is favored over the other. A.B. was born in September 2016. At the time of trial, he was seven months old. Rinard reported the child does have sensitive skin and possible allergies to strong fragrances. Otherwise, he was healthy and developing appropriately for his age. A.B. has the standard needs of any infant: food, shelter, clothing, medical care, parental attention, and affection.

When we compare the characteristics and parental capacities of the parents, as we must, these factors tilt in favor of awarding Bailey physical care of the child. Specifically, Bailey has demonstrated greater personal and financial stability. Bailey and Rinard met in November 2015 and were in a month-long relationship from December 2015 until January 2016. Rinard found out she was pregnant on New Year's Eve of 2015 while she was still residing with Bailey, but she was uncertain as to the identity of the father. She moved out in January 2016. After Rinard moved out, she changed residences on several occasions. In June 2016, she began dating and cohabiting with another man, Shawn. Shawn and Rinard continued in a relationship for some period after the child's birth in

September. This was evidenced by a text message Rinard sent Bailey that stated Shawn was the only father the child had known. At some later point, Rinard and Shawn ended their relationship. Rinard then commenced another relationship with a different man, Lucas Titus, whom she married in January 2017. After the child's birth, Rinard was either cohabiting with Shawn or Lucas. Rinard would not tell her mother where she and the child were residing. Rinard's mother contacted Bailey and told him to call the department of human services because the child was not safe. In her text message, she stated, "[y]ou are not going to be able to protect this baby from [Rinard's] decision[s]." By the time of trial, Rinard resided with Titus in his parents' home in Altoona. She had been unemployed for a lengthy period of time but had just started a bartending job. In contrast, throughout this proceeding, Bailey resided in his home in Booneville with his girlfriend, Jordan Deutsch. Bailey worked full-time at his father's flooring company. He has reliable transportation. While both parents could meet the physical needs of the child, Bailey has demonstrated more personal and financial stability than Rinard.

The parents both have a good relationship with the toddler at issue. Rinard has exercised physical care of the child since the temporary order in November 2016. She has thus been more involved in the day-to-day care of the child over the course of his young life. However, Bailey sought to establish a relationship with the child from the outset. Litigation has been pending since prior to the child's birth. That his relationship with the child was relatively new at the outset of these proceedings need not be held against him now. See *In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa Ct. App. 1998) ("Temporary orders awarding physical custody create no presumption that parent is the preferred parent in a final custody

decision.”) Bailey has exercised all visitations with the child with the exception of two occasions, once due to inclement weather and once due to illness. Rinard, in a text message, acknowledged the child “loves [Bailey] to death.” Because the child is still so young, and because Bailey has been a consistent and regular presence in the child’s life, there would not be any significant disruption in the child’s life in continuing the present arrangement or in changing the present arrangement and awarding Bailey physical care of the child. See *In re Guardianship of Brown*, No. 01-2072, 2002 WL 31017807, at *2 (Iowa Ct. App. Sept. 11, 2002) (noting importance of consistent visitation and bond in determining appropriate caregiver for child).

The most salient consideration in this case is which parent would be most willing to encourage contact with the noncustodial parent. Iowa Code section 598.41(1)(c) requires this court to consider whether one parent will deny the other the opportunity for maximum contact with the child without cause. “[A] parent’s willingness to encourage contact with the noncustodial parent is a critical factor in determining custody.” *In re Marriage of Gartner*, No. 15-1370, 2016 WL 3002778, at *6 (Iowa Ct. App. May 25, 2016)); see *In re Marriage of Shanklin*, 484 N.W.2d 618, 619 (Iowa Ct. App. 1992); see also *In re Marriage of Will*, 489 N.W.2d 394, 399 (Iowa 1992); *In re Marriage of Abkes*, 460 N.W.2d 184, 186 (Iowa Ct. App. 1990); *In re Marriage of Gravatt*, 371 N.W.2d 836, 840 (Iowa Ct. App. 1985).

In this case, Rinard has demonstrated that she is not willing to support Bailey’s relationship with the child. Indeed, the evidence shows Rinard has actively worked to exclude Bailey as the father of the child. See *In re Marriage of Grabill*, 414 N.W.2d 852, 853 (Iowa 1987) (discussing mother withholding contact

with children, limiting visitation “so that her boyfriend . . . would be able to see the children instead” as significant facts). Prior to the child’s birth, Rinard falsely told Bailey she had performed a paternity test and Bailey was not the father. The communication was captured in text messages:

3 weeks ago I had my ex do a paternity test. I was with him before I met you. Turns out you are off the hook. My son is not yours see ya around . . .

. . . .

I have my s**t in order but you are no longer needed in my life or my sons sooo this is goodbye. You can delete my number. K thanks.

Bailey refused to walk away from the situation, replying: “I’m not going away till I have proof.” Rinard responded by stating she would “block him” and that Bailey would not know when the child is born. Despite knowing Bailey was a potential father, Rinard did not invite Bailey to the birth of A.B. However, she was dating two other men, one of whom was Titus, and invited them to the birth. Titus was not present at the time of delivery because he was working; however, Rinard had Titus sign the birth certificate as the child’s father even though she had been served with Bailey’s petition to determine paternity and even though she knew Bailey was a potential father. Rinard’s attempt to replace Bailey as the father continued after the child’s birth. On one occasion, Rinard texted, “Do you understand that [A.B.] has no idea who you are and all he knows as a father is Shawn. . . . You walked out before you even tried. That’s what you are good at is running. So this is what you deserve for running out on your child so early.” At trial, she testified she still objects to Bailey being identified as the child’s father on the birth certificate.

The record also demonstrates Rinard has limited Bailey's contact with the child to punish Bailey. See *In re Marriage of Downing*, 432 N.W.2d 692, 694 (Iowa Ct. App. 1988) (noting mother denying visitation and limiting contact was a significant factor in the custody decision); *In re Marriage of Kreager*, No. 10-0945, 2011 WL 1584293, at *3 (Iowa Ct. App. Apr. 27, 2011) (discussing father restricting children's access to mother as important fact). Rinard refused to give Bailey visits with the child until ordered to do so following mediation, telling Bailey he could "suffer." Rinard refused to authorize Bailey to pick A.B. up from daycare despite authorizing her new husband and his parents to do the same. Rinard also has unilaterally forfeited or limited Bailey's visitation. For example, when Bailey attempted to reschedule a visit due to an illness, Rinard was hostile and texted Bailey, "You are giving this day up. This day won't be made up." According to her trial testimony, it was never made up. On another occasion, Bailey and his girlfriend attempted to exercise visitation with the child, but Rinard refused to allow visitation with Bailey's girlfriend and made Bailey turn around on the thirty-minute drive and drop the girlfriend off at home before he could exercise visitation with A.B. When he acquiesced, she texted "B***h to your gf all you want I'm his mother. My house my rules." Rinard repeatedly told Bailey that his girlfriend could not be with him when he picks up the child.

Finally, Rinard has been hostile toward and critical of Bailey. See *In re Marriage of Kunkel*, 555 N.W.2d 250, 254 (Iowa Ct. App. 1996) (awarding physical care to "the parent with less primary care experience" because mother's "contentious disposition and hostile temperament [are] incompatible with the considerable rights and responsibilities attending an award of physical care.") For

example, Rinard rants about Bailey and his girlfriend. She told Bailey he better not have his girlfriend around or “[t]here will be problems. You’re messing with the wrong person Tobi.” A different time she texted “You want to know why [A.B.] is raspy you and your b**ch ass girlfriend are spraying him down knowing he’s f**king allergic to every fragrance.” Rinard repeatedly told Bailey his girlfriend could not be in the car when he picks up the child. On another occasion, Rinard asked Bailey to end his visitation early because she wanted the child to see Rinard’s sister. Bailey told Rinard he had family pictures scheduled but would try to complete them as quickly as possible to accommodate her request. Rinard replied, “My child comes before your fake family picture of you and Jordan and honestly I don’t care. You better be on your way.” The record is replete with additional examples of excessive criticism of Bailey.

In contrast to Rinard’s conduct, it appears Bailey would be able to support a healthy relationship between Rinard and the child. When Rinard criticizes Bailey, he does not lash out at her. Instead, he is largely conciliatory, stating he is “doing the best [he] can.” He is largely cooperative with Rinard. For example, when she told him she would be late for dropoff, he texted her, “no problem what time [will you be home].” In contrast, on one occasion when Bailey was late, he texted, “Ok well I might be a few minutes late,” Rinard replied, “I figured.” When he has visitation with the child, he sends pictures of the child to Rinard at her request to keep her updated. Bailey testified he would be supportive of Rinard’s relationship with the child, and the evidence supports his testimony.

When joint physical care is not appropriate, as is the case here, the court must determine which parent shall have physical care of the child. The law gives

no legal preference to the mother over the father. Instead, we must consider all relevant factors and act in the best interest of the child. It is in the best interest of the child to have maximum physical and emotional contact with both parents. Thus, one of the critical factors in making the custody determination is the degree to which the custodial parent will support the relationship of the noncustodial parent with the child at issue. In this case, the record reflects Rinard has not supported and will not support Bailey's relationship with A.B. She has attempted to legally exclude him as the father, denied visitation with the child, restricted and otherwise interfered with visitation when court-ordered, and demonstrated hostility toward the father. Her past behavior is the best indicator of her future parenting behavior. See *In re A.B.*, 815 N.W.2d 764, 778 (Iowa 2012) (noting a parent's past conduct is instructive in determining the parent's future behavior). Rinard has done nearly everything in her power to limit Bailey's time with A.B. This unwillingness to foster a positive relationship between Bailey and A.B., coupled with Bailey's extensive record of care for A.B. persuades us Bailey should be awarded physical care of A.B. with Rinard to receive liberal visitation.

For the foregoing reasons, we affirm the judgment of the district court as modified. We affirm the establishment of paternity in Bailey. We award physical care of the child at issue to Bailey. Rinard shall have the same visitation as the district court awarded Bailey. Rinard shall be required to pay support for the

minor child. We remand this matter for entry of a modified decree and calculation of child support pursuant to Child Support Guidelines.

AFFIRMED AS MODIFIED AND REMANDED.