IN THE COURT OF APPEALS OF IOWA

No. 0-397 / 09-1560
Filed July 14, 2010

JASON ELI ROSZELL,
Petition-Appellant,

vs.

JILLIAN ROSE RICHARDS,
Respondent-Appellee.

Appeal from the Iowa District Court for Fayette County, Richard D. Stochl, Judge.

Jason Roszell appeals from the district court order granting Jillian Richards sole legal custody of their son. **AFFIRMED AS MODIFIED.**

Jason E. Roszell, Sumner, appellant pro se.

Jeffrey E. Clements, West Union, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

TABOR, J.

Jillian Richards and Jason Roszell are the unmarried parents of T.H., who was born in September of 2006. Jason appeals from the district court's decree granting Jillian sole legal custody of their son. We modify the grant of sole custody to Jillian because the parties agreed to joint legal custody.

I. Background Facts and Proceedings

Jillian and Jason have never dated and were not well acquainted when they became intimately involved on a single occasion. In May of 2007, eight months after Jillian gave birth to T.H., paternity testing established Jason was his father. Jason received an order to pay child support.[1] After Jason became acquainted with his son, Jillian allowed him frequent contact. Jason lived in a trailer in Sumner with his girlfriend and her two children. Jillian moved from her home town to Sumner in August of 2007 so Jason could be closer to their son. The parents observed an informal visitation schedule for the next year, with Jason having T.H. every other weekend and other days as his schedule permitted. In February of 2008, Jason drafted a document entitled "Child Custody and Physical Care" which both he and Jillian signed memorializing their agreement as to the physical care of T.H. on holidays and during the summers.

In the summer of 2008, Jillian received a call from the Department of Human Services (DHS) checking on allegations that T.H. was no longer in her care and suggesting a change in custody would impact her state benefits. T.H. was visiting Jason at the time of the DHS inquiry and Jillian demanded his

[1] Jason owed delinquent child support in excess of $3000 at the time of the custody hearing.

immediate return. When Jason refused, Jillian called the police, who assisted her in regaining custody. After that incident, Jillian limited T.H.'s visits with Jason.

On August 14, 2008, Jason filed a petition seeking joint custody and an application for temporary custody and visitation. On October 20, 2008, the district court ordered temporary joint custody to the parties and temporary physical placement with Jillian. As part of the temporary order, the court granted Jason liberal and reasonable visitation including alternating weekend and midweek visitations with his son. On October 22, 2008, Jillian filed an answer to the petition, stating that it was "in the best interest of the parties' minor child to be placed in temporary and permanent joint legal custody of the parties with his temporary and permanent primary physical care and placement with Respondent subject to visitation to Petitioner."

The district court heard testimony concerning the most suitable custody arrangement at a hearing conducted on June 24 and 25, 2009. The evidence revealed both parents had criminal records and histories of substance abuse. Jillian acknowledged her struggles with methamphetamine as a teenager, but testified she had been "clean" for three years, earned her general education diploma, and was working as a certified nursing assistant. Jason testified to dropping out of high school during his senior year so he could work to support himself. He had convictions for assaulting a peace officer, driving while suspended, disorderly conduct, and public intoxication.

Both parents leveled complaints about the quality of the other's care of their son. Jillian complained her son often came home with bruises and bite marks inflicted by another child in Jason's household. She acknowledged contacting the DHS about potential neglect by Jason. Jason alleged that Jillian failed to provide their son with proper nutrition and hydration. Jason repeatedly took the child to medical providers to document perceived problems in his development. On June 5, 2009, Jason noticed redness under his son's penis during a diaper change. Jason took a photograph to preserve evidence of the condition and took his son to the emergency room. Jason raised suspicions of sexual abuse with the doctor, relaying his son's alleged statement that his mother hurt his "wee-wee." The emergency room report noted that infrequent diaper changes in the warm weather could have caused the reddened area between the child's penis and scrotum.

On September 21, 2009, the district court granted Jillian sole custody of T.H. The court expressed its first-hand view that Jason "came across as an immature and manipulative young man" during the hearing and found the father's evidence suggesting Jillian sexually abused their son was "either a blatant fabrication or a result of misguided thinking" on Jason's part. Jason challenges the custody ruling on two grounds. First he argues the district court erred in giving Jillian sole custody based on factors in Iowa Code section 598.41(3) (2007) when the parties agreed to joint legal custody. *See* Iowa Code § 598.41(4). Second, he claims the district court erred in considering a DHS report issued after the June custody hearing. We agree with Jason on the

applicability of section 598.41(4). Accordingly, we modify the district court's ruling to provide for joint legal custody with physical care granted to Jillian. We do not disturb the remaining provisions of the decree.

II. Scope of Review

We review custody decrees de novo. Iowa R. App. P. 6.907 (2009). We do so with the realization that the district court possesses the advantage of listening to and observing the parties and witnesses. *In re Marriage of Zabecki,* 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we credit the factual findings of the district court, especially as to the demeanor and believability of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*); *In re Marriage of Sullins,* 715 N.W.2d 242, 247 (Iowa 2006). To the extent Jason's claims of error rest upon statutory interpretation, our review is for correction of legal error. *See In re R.E.K.F.*, 698 N.W.2d 147, 149 (Iowa 2005). Our overriding concern is the best interests of the child. Iowa R. App. P. 6.904(3)(*o*).

III. Grant of Sole Legal Custody

Iowa Code section 600B.40 governs the determination of custody and visitation for children born out of wedlock. Under that section,

> 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 . . . .

Iowa Code § 600B.40. The district looked to the factors in section 598.41(3) and awarded sole custody to Jillian. The district court emphasized that Jason did not support Jillian's relationship with T.H. and, in fact, was attempting to destroy their relationship by perpetuating false claims that Jillian sexually abused T.H.

Jason contends the district court should have relied on section 598.41(4) rather than section 598.41(3) in determining the appropriate custody arrangement. Section 598.41(4) states that subsection 3 shall not apply when parents agree to joint custody. Jason relies on the parties' February 2008 signed agreement regarding the child's physical care and the court's October 20, 2008 order for temporary custody and visitation in asserting subsection 4 should override subsection 3. While we agree with Jillian that these two documents do not establish the parties' assent to joint legal custody, we do believe that Jillian's answer to the petition confirms her agreement to joint custody. The answer concluded with a prayer that T.H. be placed in "permanent joint legal custody of the parties with his . . . permanent primary physical care and placement" with Jillian, subject to visitation for Jason.

Our statutes express a preference for joint custody over other custodial arrangements. *In re Marriage of Bartlett*, 427 N.W.2d 876, 878 (Iowa Ct. App. 1988). The legislative preference is reflected both in section 598.41(2), which requires a court denying joint custody to cite in its decision clear and convincing evidence that joint custody is unreasonable and not in the best interest of the child and in section 598.41(4), which prioritizes the parents' agreement to joint custody. Because the parents agreed to joint legal custody, the district court erred in considering the factors in section 598.41(3). Iowa Code § 598.41(4); *see In re Marriage of Daniels*, 568 N.W.2d 51, 58 (Iowa Ct. App. 1997) (Huitink, J., dissenting) (noting that statutory scheme to decide whether sole custody is appropriate is not applicable when parties have agreed to joint custody).

Having determined the parties agreed to joint legal custody, we nevertheless share the district court's concern regarding Jason's unsupported accusations of sexual abuse against Jillian.[2] The decree stated: "The Department of Human Services has fully investigated his allegations and found them to be totally unfounded." Jason complains on appeal that the district court erred in basing its decision on a July 6, 2009 DHS report,[3] which was not made part of the record following the June 25, 2009 submission of the matter. While we believe it would have been preferable for the district court to formally reopen the record to consider the DHS report completed after the hearing, we do not find reversible error in the court's reference to the DHS findings in the decree. *See In re J.R.H.*, 358 N.W.2d 311, 318 (Iowa 1984) (holding that best interests of the child standard dictates that rules of procedure be liberally applied so that all probative evidence might be admitted). Jason raised the issue of the ongoing DHS investigation in his testimony at the custody hearing and his attorney asserted that because the matter was in equity, it was important for the court to "admit [the information] and use it." Having taken this position at trial, Jason does not stand on solid ground in his appellate argument that the court "did not have jurisdiction to make a ruling" using the DHS report. *See Clark v. Estate of*

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[2] The district court correctly observed that unfounded allegations of child abuse leveled by one parent against another can support a determination of sole legal custody in the absence of a parental agreement to joint custody. *See In re Marriage of Liebich,* 547 N.W.2d 844, 849 (Iowa Ct. App. 1996); *In re Marriage of Winnike*, 497 N.W.2d 170, 174 (Iowa Ct. App. 1992).

[3] Despite his contention that the DHS report is outside the record, Jason includes it in his appendix in contravention of Iowa Rule of Appellate Procedure 6.801.

Rice ex. rel. Rice, 653 N.W.2d 166, 172 (Iowa 2002) (stating appellant was foreclosed from changing theory on appeal).

The district court found Jason's pursuit of sexual abuse allegations left him unable to support Jillian's relationship with T.H. Giving weight to that finding, we believe it is in T.H.'s best interests to be placed in Jillian's physical care under Iowa Code section 598.41(5)(b).[4] *See In re Marriage of Hynick*, 727 N.W.2d 575, 580-81 (Iowa 2007) (finding joint physical care not feasible when one of the parents failed to respect or effectively communicate with the other in a mature manner). We believe Jillian will fulfill her legal responsibility as the parent with physical care to support Jason's relationship with T.H. It would be in T.H.'s best interest if Jason would similarly support Jillian's relationship with their son.

Jason does not challenge the visitation schedule or support provisions of the decree and we find no reason to modify them.

IV. Conclusion and Disposition

The parties in this case agreed to joint legal custody. Accordingly, the district court erred in applying the factors under Iowa Code section 598.41(3) to grant sole custody to Jillian. Giving weight to the district court's factual findings, we grant physical care to Jillian.

AFFIRMED AS MODIFIED.

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[4] Because both parties testified at trial they were seeking primary, not joint physical care of T.H., the district court was not required to make specific findings under Iowa Code section 598.41(5)(a). *In re Marriage of Fennelly*, 737 N.W.2d 97, 102 (Iowa 2007).

DOYLE, J. (writing separately)

I concur, but write separately to address deficiencies in the parties' appendix. It is noted that the appellant appears pro se, but pro se or not, parties to an appeal are expected to follow the applicable rules.[5] It has long been the rule that procedural rules apply equally to parties who are represented by counsel and to those who are not. Pro se parties receive no preferential treatment. *See Hays v. Hays*, 612 N.W.2d 817, 819 (Iowa Ct. App. 2000).

Iowa Rule of Appellate Procedure 6.905(2)(*b*)(3) provides that an appendix shall contain relevant portions of the pleadings, findings, conclusions, and opinion. Iowa Rule of Appellate Procedure 6.905(2)(*b*)(4) requires the appendix contain "[a] file-stamped copy of the judgment, order, or decision in question." The parties' relevant pleadings and the court's decree were not included in the appendix. Although the complete record is available to this court, it is much more convenient to have the relevant pleadings and the court's judgment, order, or decision in question readily at hand. Additionally, a file-stamped copy of the notice of appeal was not included in the appendix. Iowa R. App. P. 6.905(2)(*b*)(5). Although these infractions may seem trivial, compliance with the rules promotes judicial efficiency and aids this court in meeting its mandate to achieve maximum productivity in deciding a high volume of cases. *See* Iowa Ct. R. 21.30(1).

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[5] Iowa Rule of Appellate Procedure 6.905(2)(*a*) provides the appellant shall prepare and file the appendix.