IN THE COURT OF APPEALS OF IOWA

No. 0-583 / 10-0235
Filed November 10, 2010

CHRISTOPHER ALLEN WEBER,
Petitioner-Appellant/Cross-Appellee,

vs.

LISA MARIE OBRECHT,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Story County, Dale E. Ruigh, Judge.

Father establishing paternity appeals the court's order regarding custody, visitation, and retroactive expenses. **AFFIRMED.**

David A. Morse and Kristine M. Dreckman of Rosenberg and Morse, Des Moines, for appellant.

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, and Margaret M. Rhodes of Payer, Hunziker, Oeth & Rhodes, Ames, for appellee.

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

EISENHAUER, P.J.

Christopher Weber appeals a district court ruling denying his request for joint legal custody and placing legal custody of the parties' minor son with Lisa Obrecht. Chris also appeals the court's geographic restrictions on visitation and the court's award of retroactive child-related expenses. Lisa cross-appeals seeking an award of trial court attorney fees. We affirm and decline to award attorney fees.

I. BACKGROUND FACTS AND PROCEEDINGS.

Chris and Lisa, both twenty-seven at the time of trial, are the parents of Blake, born in September 2007. The parties were never married, have never lived together, and have not been able to sustain a stable relationship. After meeting at a community college, Chris and Lisa dated "off and on" from 2001 to January 2006. After her May 2006 graduation, Lisa moved to Florida for employment. Lisa visited Iowa for Christmas 2006 and in March 2007, discovered she was pregnant. Chris questioned his paternity upon being informed of Lisa's pregnancy and sporadic phone conversations occurred while Lisa continued to work in Florida.

In May 2007, Lisa decided to return to her parents' Zearing, Iowa home for family support. Lisa did not look for employment upon moving back to Iowa. Lisa's parents supported her by making some of the monthly payments for her COBRA insurance premiums. When Lisa's COBRA benefits expired, her parents helped pay her Blue Cross/Blue Shield premiums.

Chris lives near his parents in Minnesota. Chris rents a basement bedroom in the home his brother and cousin are purchasing. A friend of Chris's cousin also lives in the home. All four young men are in their mid-twenties and have regular, full-time employment. Chris and Lisa live over 200 miles apart and it takes approximately three and one-half to four hours of uninterrupted driving to reach the other's residence. During Lisa's pregnancy, Chris drove to Iowa to visit Lisa three times.

When Blake was born, Chris and his extended family travelled to the Ames hospital to see Blake. Chris generally travelled from Minnesota to Iowa every other weekend to visit Blake. Chris stayed at Lisa's parents' home during his visits. Lisa and Blake travelled to Minnesota three times to visit Chris.

After Chris refused Lisa's request to move to Iowa, Lisa concluded they would never be a "couple," and in early 2008, Lisa told Chris he could no longer stay overnight at her parents' home during his visits. Chris then had hotel and food expenses on the weekends he visited. During the visits, Lisa did not allow Chris to take Blake away from her parents' home. The trial court found:

> The personal relationship between the parties eroded after February of 2008, resulting in frequent arguments during [Chris's] visits. Many of those arguments concerned [Chris's] parenting skills and his interactions with Blake. In May of 2008, [Chris] requested that he be allowed to take Blake to spend a few days with his family in a cabin north of Minneapolis. [Lisa] refused to allow the visit, unless she went along. The visit did not take place. [Around] June 21, 2008, [Chris] and his parents traveled to Iowa to visit Blake for the day. The parties argued a great deal about the logistics of the visit. The visit ended badly and [Chris] thereafter had no visits with Blake until a temporary visitation order was entered . . . approximately six months later [January 2009]. Whether one party was more responsible for that situation than the other is difficult to determine from the evidence. Suffice it to say,

> both parties share in that responsibility. The parties' bad personal relationship contributed to the situation. Their anger toward each other precluded reasonable communication and compromises about Blake's needs. [Lisa] was overly restrictive in establishing the logistics of [Chris's] visits. [Chris] was unwilling to address [Lisa's] legitimate concerns about his parenting skills and knowledge.

In November 2008, Chris filed a petition to confirm paternity requesting joint legal custody and visitation. The parties agree Blake should continue to reside with Lisa. Chris regularly exercised the January 2009 court-ordered temporary visitation and also consistently paid his $350 per month temporary support obligation.

Both parties have a history of consuming alcohol and using controlled substances. Lisa currently has drinks with friends on social occasions. Chris's consumption and use is more extensive, more recent, and involves inappropriately providing alcohol or prescription medication to others on two occasions. The trial court found: "[Chris's] history of drug and alcohol use cannot be ignored when fashioning an appropriate custody and visitation order."

Lisa works three to four days per week for the McFarland Clinic in Ames and has flexible working hours. Lisa plans to continue residing with her parents and does not pay rent or living expenses. Chris has full-time employment as a legal assistant in Minnesota.

In January 2010, the court ruled the best interests of Blake require Lisa to have sole legal custody. The court established a detailed visitation schedule with geographic limitations that decreased over time and hourly limitations that

increased over time. Chris was ordered to pay Lisa $4708 for pre-2009 support and monthly child support of $475. This appeal followed.

II. SCOPE AND STANDARDS OF REVIEW.

Our review in this equity matter is de novo. *Jacobson v. Gradin*, 490 N.W.2d 79, 80 (Iowa Ct. App. 1992). Although not bound by the district court's fact findings, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 6.904(3)(*g*).

III. LEGAL CUSTODY.

Chris argues: "Lisa did not meet her burden of proving by clear and convincing evidence that the parties failure to communicate and animosity towards each other rose to the level that would preclude the award of joint legal custody." Because Chris sought joint legal custody, the trial court must order joint custody unless it cites clear and convincing evidence, based on the factors in Iowa Code section 598.41(3), that joint custody is unreasonable and not in Blake's best interest. Iowa Code § 598.41(2)(b) (2007).

Based on our de novo review of the record, we agree with the district court's findings concerning the parties' inability to communicate and lack of mutual respect for each other making joint custody unreasonable. First, the discord was readily apparent to the court during the temporary support hearing. The court admonished the parties:

> Further, the geographic distance separating these parties coupled with the child's tender age will necessitate a far greater level of cooperation between parents and grandparents than has been displayed thus far. All concerned must resign themselves to the fact that, given the child's creation, they will never be rid of one another. It will behoove all, and most importantly the child, if the

> adults learn how to cooperate and accommodate regardless of whether they like one another.

Second, after the paternity hearing, the district court ruled:

> [Lisa and Chris] have essentially no ability to jointly make important decisions regarding Blake's welfare. Their personal animus toward each other prevents reasonable communication and compromises, as does the geographic separation of their residences. The degree of animus far exceeds that which often attends custody disputes. Nothing in the record suggests that the parties will live in reasonable geographic proximity at any time in the foreseeable future. The parties have irreconcilable views of Blake's needs. They have very different parenting styles and are generally unwilling to see any merit in each other's parenting style. As noted above, the parties have never lived together under the same roof. As a result, they have had essentially no opportunity to discuss or fashion a consensus about parenting Blake. Since Blake's birth, [Lisa] has been almost totally responsible for his day-to-day care. The court is always hopeful that the conclusion of litigation will significantly improve parents' abilities to deal reasonably with each other concerning their child's needs. No reasonable cause for such hope exists in this case.

We defer to the district court's impressions of the parties gleaned from observing their testimony because it "had the parties before it and was able to observe and evaluate the parties as custodians." *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996). We adopt the analysis of the district court and affirm its award of sole legal custody to Lisa.

IV. Geographic Limitations on Visitation.

The district court established a detailed visitation schedule with specific and different provisions for 2010, 2011, 2012, 2013, and beyond. The court's schedule permits Chris more time with Blake and more flexibility in the visitation locations as Blake gets older. Chris argues "there is no logical reason that the

majority of [his] visits must take place in Iowa" and asks us to "remove all travel restrictions"[1] in the district court's visitation schedule.

In establishing a graduated schedule, the district court ruled:

> This schedule avoids requiring Blake to spend 7-9 hours in a car every other weekend traveling between his parents' residences. It also, however, allows Blake to spend time in Minnesota with [Chris] and his family from time to time as he gets a little older. . . . Requiring Blake, at any age, to travel back and forth between the Twin Cities and central Iowa every other weekend, however, would be contrary to his best interest. The court cannot change the fact that the parties live several hours apart. Any travel burdens associated with visitation must generally be shouldered by [Chris], not Blake particularly at the tender age of 2 years. . . . The increasing duration of the visits and the increasing flexibility in the locations for the visits will be in Blake's best interest, but only if [Chris] sees Blake regularly and has no significant lapses in his contact with Blake, as occurred during the above-described 6-month period in 2008.

We note the travel time between the parties' homes is a relevant consideration in crafting a visitation schedule in Blake's best interests. *See In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa Ct. App. 1991). We agree with and adopt the court's detailed and thoughtful visitation schedule.

IV. Retroactive Expenses.

Lisa asked the court to make an award of retroactive child support from the time of Blake's birth until the entry of the temporary child support order. The court ruled the record did not support Lisa's request for $6000 for sixteen months of retroactive child support. Instead, the trial court awarded Lisa $4707.84 for expenses Lisa *paid* prior to the January 2009 temporary support order: (1) one-

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[1] We do not consider Chris's objections to the testimony of Dr. Konar. The district court's opinion does not reference Dr. Konar's testimony when setting visitation and we likewise do not consider it.

half of the birth expenses ($1204.78); (2) one-half of health insurance premiums paid by Lisa ($1003.06); and (3) one-half of claimed child care expenses ($2500).

Iowa Code section 600B.25(1) provides in part:

> The court may order the father to pay amounts the court deems appropriate for the past support and maintenance of the child and for the reasonable and necessary expenses incurred by or for the mother in connection with prenatal care, the birth of the child, and postnatal care of the child and the mother, and other medical support as defined in section 252E.1.

Chris argues the court's $4707.84 award is inequitable because his income was very low throughout the duration of the pregnancy ($2138/2007 and $18,270/2008) while Lisa did not have to pay any living expenses upon her return to Iowa. Chris asserts Lisa's voluntary termination of her employment providing health insurance resulted in an unnecessary increase in health insurance expense. Additionally, Chris points out Lisa forced him to bear all costs of visitation, including travel and hotel expenses. We find the court's award of one-half the birth expense and one-half the health insurance premiums actually paid by Lisa (while excluding the premiums paid by her family) to be equitable.

Chris also argues "Lisa's claims of $5000 paid for child care were questionable." Chris points out: (1) neither check contains a notation indicating child care expense ($3000 August 2008 check memo "Feb-July = 6 months" and $2000 December 2008 check memo "Aug/Sept/Oct/Nov"); and (2) Lisa's January 26, 2009 worksheet seeking temporary child support indicates "zero" child care expense.

We balance Chris's arguments against Lisa's testimony the checks were for child care expenses and not payment for living expenses. It is undisputed Lisa's mother provided child care for Blake while Lisa worked. While neither check contains a child care expense notation, Lisa explained she started back to work in late January 2008 when Blake was four months old, and the August check's notation indicated her first six months of employment and "my mother and I understand how that works." Lisa's mother testified:

> Q. When you started providing day-care for Lisa, did Lisa offer to pay you for doing this? A. Yes, she did.
> Q. And has she paid you for providing day-care? A. She has paid me in the past. But ever since the trial came up with the cost of the lawyer, she hasn't paid me, but she has let me know that she will make up for it.
> Q. Okay, So she's a little bit past due? A. Yes.
> Q. Okay. But there is an understanding that she pays for day-care? A. That was—If I was going to baby-sit, that was something she wanted to do.
> Q. Okay. And Lisa's offered evidence of two checks that she's written to you in the amount—in the total amount of $5000. Is that the amount she's paid you so far? A. Yes.

Further, Lisa's January 2009 affidavit of financial status filed simultaneously with her temporary child support guidelines worksheet lists $500/monthly day-care expense. The failure to transfer the expense from Lisa's affidavit to her worksheet appears to be an error by her prior attorney rather than the worksheet proving Chris's claim no child care expense existed.

The trial court found Lisa and her mother credible in awarding Lisa one-half of her claimed child care expenses and we give deference to the court's credibility determinations. *See* Iowa R. App. P. 6.904(3)(*g*). Accordingly, we affirm.

V. Attorney Fees.

In her cross-appeal, Lisa argues the district court erred in failing to award her $5000 for trial attorney fees. Review of the district court's attorney fee decision is for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We discern no abuse of discretion. The parties' unwillingness to cooperate necessitated court intervention. Lisa has no rent or living expenses and Chris had limited income until recently. *See id.* (stating that whether attorney fees should be awarded is dependent on the parties' abilities to pay).

Lisa also requests appellate attorney fees. We decline to order Chris to pay any portion of Lisa's appellate fees. *See In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005) (noting award is within our discretion). Costs are taxed one-half to each party.

AFFIRMED.