IN THE COURT OF APPEALS OF IOWA

No. 0-601 / 10-0594
Filed October 6, 2010

COTY A. ALBERS,
Petitioner-Appellant,

vs.

WENDI J. BROAM,
Respondent-Appellee.

Appeal from the Iowa District Court for Kossuth County, Patrick M. Carr, Judge.

Petitioner appeals the district court decision placing the parties' child in the respondent's physical care. **AFFIRMED.**

Timothy M. Sweet of Beard & Sweet, P.L.C., Reinbeck, for appellant.

Ann M. Gales, Algona, for appellee.

Considered by Sackett, C.J., Potterfield, J., and Schechtman, S.J.*

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

SCHECHTMAN, S.J.

I. Background Facts & Proceedings

Wendi (Rutledge) Broam is the mother of Krayton, born on September 19, 2007. His father is Coty Albers. Wendi was twenty and Coty was nineteen at the time of Krayton's birth. When advised of Wendi's pregnancy, Coty responded with some vile text messages, while denying his role in it. Coty had no contact with Wendi while she was pregnant, or with his son during the early weeks of his life.

Wendi met Brandon Broam, an Oklahoma resident, in Algona, in April 2007, while she was pregnant. Brandon was employed as a pipefitter/welder for a renewable fuel plant contractor. This position required periodic moves to various construction sites in the Midwest. Wendi and Brandon quickly entered into a serious relationship. Brandon was present at Krayton's birth.

On December 10, 2007, when Krayton was about twelve weeks old, Wendi left him with Brandon to attend a night class at a local community college. About twenty minutes later, Brandon appeared at the college with Krayton. He stated, after feeding him a bottle, he stood up to put him in his crib, felt a tug and heard a pop; that Krayton's left leg somehow got caught between his stomach and groin. Brandon noticed Krayton's left leg was limp and he was "fussy." Krayton was taken to the emergency room at the local hospital, with a diagnosis of a mid-shaft spiral fracture to the left femur. The incident was reported to the Department of Human Services (DHS). Krayton was transferred to a Mason City

orthopedic surgeon for a closed reduction and casting. He has fully healed with no residuals.

The child protective worker timely intervened and investigated. Wendi and Brandon agreed that Brandon would have no contact with the child, with Wendi residing with her parents. Wendi believed that Brandon did not injure Krayton intentionally. However, a founded abuse assessment was completed on January 9, 2008, concluding "[t]he injury is of a non-accidental origin. Medical experts conclude that this was an inflicted injury and is child abuse. The explanation has no plausible possibility." Brandon was placed on the child abuse registry and formally charged with child endangerment-serious injury, which remains pending.

The surgeon had concluded that the fracture was "highly suspect for abuse." The regional director of the Child Protection Center labeled it as a non-accidental injury caused by the carelessness of Brandon; that it is a reasonable medical certainty that a spiral fracture to an infant is a result of a forceful twisting motion. Both agreed that Brandon's explanation was not plausible. After review of the medical records, an orthopedist, retained by Brandon for trial, opined that the injury was unintentional and its probable cause was the lifting, with applied pressure, while the leg was likely caught in the chair; "spiral fractures are most likely accidental and do not fit the profile of intent from an orthopedic standpoint."

A child in need of assistance (CINA) petition was filed on January 17, 2008, alleging the "failure of the child's parent . . . or other member of the household in which the child resides to exercise a reasonable degree of care in

supervising the child." *See* Iowa Code § 232.2(6)(c)(2) (2007). Notice of this filing spiked Coty's interest in the child and his custody.

Prior to or while this was occurring, Wendi and Brandon hastily married on January 4, 2008, being twenty and twenty-four years old respectively. They had consulted an attorney about an adoption and concluded marriage would facilitate the process. Although aware of the DHS investigation, the assessment had not been made. A further reason was to have a full-time father in the child's life. Since Coty chose not to be involved and questioned his paternity, Wendi had reasoned that a termination of his parental rights may be welcomed by him, which she discovered to be an incorrect assumption.

The juvenile court entered a CINA adjudication for Krayton under section 232.2(6)(c)(2). Krayton remained in the care of Wendi, subject to supervision by DHS. The juvenile court granted concurrent jurisdiction to the district court to determine custody, visitation, and child support.

As noted above, Coty was notified of the CINA proceedings. After a positive paternity test, he began to exercise visitation with the child. He enrolled in a parenting class. Coty quickly developed a relationship with Krayton and has enjoyed spending time with him. In April 2008, Coty filed a petition in district court seeking physical care of Krayton, or, in the alternative, joint physical care.

A temporary hearing was held on June 9, 2008. At that time Brandon was working in Chillicothe, Missouri. The district court granted the parties temporary joint legal custody, with Wendi awarded physical care. Coty was given visitation on alternating weekends and directed to pay child support.

Wendi participated in services with DHS. She had a psychological evaluation that found she "seems capable of being an adequate parent." Wendi submitted to a substance abuse evaluation that recommended extended outpatient treatment, which she has completed. She attended parenting classes in addition to those recommended by DHS.

Brandon also participated in services. He had a psychological evaluation which found he "does not give evidence on psychological evaluation of a propensity towards domestic violence." Brandon had a substance abuse evaluation that did not recommend any further treatment. He enrolled and completed parenting and anger management classes. In April 2009, the juvenile court agreed that Brandon could have supervised visits with Krayton.

The hearing on Coty's petition for custody was held on August 18-19, 2009. Coty was then twenty-one years old, employed, with a two-year college degree. He planned to move to a home near his parents in Wellsburg. His hobbies were hunting, racing, softball, and golf. Coty's parents and siblings expressed their support of his relationship with Krayton.

At the time of trial, Wendi was twenty-two years old. She and Krayton were living in the home of her parents in Algona. Wendi was attending Buena Vista University and expected to graduate with a degree in psychology and human services in December 2009. She was working part-time cleaning houses. Wendi and Brandon had not seen each other for several months, but had continued to communicate by telephone. Wendi stated she wanted to reunite with Brandon, but would continue to do as DHS required. She believed the injury

was an accident; that Brandon "was being careless." Wendi's parents were supportive of her, assisting with Krayton's needs and the exchange for visitation.

Brandon testified he did not intentionally hurt Krayton. He did not have any further explanation of the mishap. Though he had been convicted twice of operating while intoxicated prior to meeting Wendi, he did admit to infrequent use of alcohol. Brandon was then working in South Dakota, but he aspires to land a different job that does not involve as much travel. Brandon wants to reunite with Wendi and Krayton.

In its decree filed February 10, 2010, the district court determined "it [is] unlikely, and less than probable, that the injury was inflicted intentionally." The court concluded the injury was accidental, but careless; that Brandon had not physically abused Krayton.

The court observed that each parent had the skill and motivation to be the primary parent, though Wendi had the greater bond with the child. The court noted both parties had displayed immature behavior in the past. The court found, however, that Wendi had "fully invest[ed] herself in the resources made available to her through the juvenile court proceeding, with good benefit"; that due to his hobbies, Coty would probably heavily delegate the child's care to his parents. It did not applaud Wendi for the timing of her marriage to Brandon, but saw it as understandable as Brandon was her "only real constant" in a "trying" period of her life. The court concluded that Brandon, as stepfather, was a decent and sincere individual, with appropriate motivation to assume that role; that he

had no history of assaultive or aggressive conduct; and, that he has done everything asked of him by DHS and the juvenile court.

Krayton was placed in the parties joint legal custody, with Wendi awarded his physical care, and Coty extended liberal specified visitation privileges. Coty was directed to pay child support, back support, and provide health insurance for Krayton. The court found joint physical care was not appropriate because the parties did not respect or trust the other, lived two hours apart, and have had no significant relationship.

The court denied Coty's request to prohibit Wendi from moving with Krayton more than 150 miles from his residence, but did require Wendi to give Coty sixty days written notice before any similar contemplated move. The court dismissed Coty's request to require that Brandon only have supervised contact with Krayton. The court found, "[t]he juvenile court, guided by DHS, is best positioned to decide when and under what circumstances this will occur."

Both parties filed post-trial motions pursuant to Iowa Rule of Civil Procedure 1.904(2). The court amended the decree to provide the parties would share travel expenses. Coty was granted the ability to call trice weekly, and is able to pay the back child support in installments. Coty appealed the decision of the district court.

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

Coty contends the district court failed to recognize that a spiral fracture of the femur of an infant is a highly suspicious injury.[1] He contends the medical evidence shows the injury was not accidental. Coty asserts that he should be awarded physical care of Krayton because (1) Brandon injured him, and (2) Wendi's conduct placed her personal interest in Brandon over the child's safety, citing *In re Marriage of Decker,* 666 N.W.2d 175, 179 (Iowa App. 2003) (finding the background of an adult, with whom a parent seeks to reside, becomes a significant factor in a custody dispute).

In determining physical care for a child, our first and governing consideration is the best interest of the child. Iowa R. App. P. 6.14(6)(*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).

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[1] While a spiral fracture of the femur may be indicative of abuse, it does not show abuse occurred in all occasions. *See New York City Dep't of Soc. Serv. v. Carmen J.*, 619 N.Y.S.2d 65, 66 (N.Y. App. Div. 1994) (noting a spiral fracture by itself may not necessarily lead to a diagnosis of abuse, but abuse may be confirmed based on additional evidence).

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. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992); *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007). A district court decision "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). Appellate courts, on the other hand, must rely on the printed record in evaluating the evidence. *Id.* The trial court's ruling was thorough, analytical, and focused on the child's best interest. It deserves that deference.

The evidence clearly shows Wendi has a greater bond with Krayton than Coty. Wendi has cared for Krayton all of his life, and has involved herself in a number of activities with her child. Wendi took advantage of all of the services provided her by DHS and hastened to take steps to improve her parenting abilities. Wendi appears to have taken strides to become a mature and responsible parent. Coty only became involved with Krayton after the CINA proceedings were initiated. Although Coty enjoys spending time with his child, there was little evidence Coty could address the emotional and developmental needs of the child as well as Wendi.

Wendi's explanation of her decision to marry Brandon, in light of the pending allegations, though arguably immature, seems plausible. This did not place Krayton in any greater danger. At the time and hereafter, Brandon has had little contact with the child, with only supervised visitation by the maternal

grandparents. The juvenile court is still denying unsupervised contact. Both Wendi and Brandon have eagerly complied with its directives and agree to continue to do so, though stressful and cumbersome. Addressing the question of abuse, we defer to the adjudication of the juvenile court that Wendi failed to exercise reasonable care in her supervisory role. The juvenile court did not find that she had "physically abused or neglected the child or is imminently likely to abuse or neglect the child". *See* Iowa Code § 232.2(6)(b). There was no previous history of abuse or aggressive conduct by Brandon.[2] We perceive no reason to further explore this topic, as Brandon's exposure to Krayton is being measured by the juvenile court and criminal charges remain pending.

Pursuant to Iowa Code section 598.41(5)(a), we agree with the trial court that an award of joint physical care is not in the interest of the child. It is not only the logistics of residing hours apart; they have been unable to communicate, lack respect for the other, and have had minimal interaction. It would interrupt the continuity of primary caregiving afforded by Wendi and would not stabilize Krayton's life. See *Hanson,* 733 N.W.2d at 696-99, and factors recited therein.

Coty has accused Wendi of restricting his access to Krayton. Wendi did not afford Coty less visitation than that which he was entitled; she did not encourage him to have more than the amount required, perhaps due to misunderstanding the provisions of the temporary decree. We do not find Wendi has unreasonably denied Coty contact with his child. Into the future, the district

[2] Brandon has a school-age child through an earlier relationship and is complying with his support directives.

court specifically stated the visitation schedule set forth Coty's minimal visitation rights, and he should have "broad, reasonable and liberal visitation."

On our de novo review, we conclude Krayton should be placed in the physical care of Wendi. Looking at the best interest of Krayton, we determine Wendi is best able to place the child in an environment likely to promote a healthy physical, mental, and social maturity.

IV. Restrictions

Coty asserts the court should place a restriction on Wendi to prohibit her from moving more than 150 miles from Coty's residence. We agree with the district court that there is no need for such a restriction based on the present record. If Wendi does intend to move that distance, she must give sixty days notice of that intention, which allows Coty to contemplate a modification under those circumstances.

V. Attorney Fees

Wendi filed a motion seeking attorney fees for this appeal. 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. "An award of appellate attorney fees is within the discretion of the appellate court." *Markey*, 705 N.W.2d at 26. We determine Coty should pay $1000 toward Wendi's appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed to Coty.

AFFIRMED.