

IN THE COURT OF APPEALS OF IOWA

No. 1-208 / 10-1078
Filed August 10, 2011

**Upon the Petition of
TERRY COOLEY,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
JESSICA STEEL,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Dallas County, Darrell Goodhue,
Judge.

Terry Cooley appeals from the district court order granting physical care of
his daughter to her mother, Jessica Steel. **AFFIRMED.**

Jennie Lynn Wilson of Wilson Law Firm, Perry, for appellant.

Michelle Rae Mackel-Wiederanders of Iowa Legal Aid, Des Moines, for
appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

EISENHAUER, P.J.

Terry Cooley appeals from the district court order granting physical care of his daughter to her mother, Jessica Steel. He contends the trial court erred in limiting the number of witnesses and in determining the outcome before the close of trial. Terry also contends the child's best interests dictate he should be granted physical care. On cross-appeal, Jessica contends the court should not have awarded joint custody to the parties.

I. Background Facts and Proceedings. Terry and Jessica have never been married. They are the parents of Sophie, born in January 2009. Terry has two daughters from prior relationships. Jessica has a son from another relationship.

Terry and Jessica dated from the spring of 2007 and lived together from the fall of 2007 until May 12, 2009, when Terry was arrested for domestic abuse following an altercation between the parties. As a result of that incident, Terry pled guilty to domestic abuse assault, received a deferred judgment, and has since been discharged from probation. He completed a batterer's education program. A protective order remains in effect between the parties.

On June 15, 2009, Terry filed a petition to establish paternity, custody, child support, and visitation. He requested physical care of Sophie. In response, Jessica sought legal custody and physical care of the child. Trial was held on April 21 and 22, 2010. The trial court informed both parties they would be limited to five witnesses each, unless they could demonstrate the subject matter of their

testimony was not cumulative. At the close of Terry's evidence, the court informed him,

[S]o far I've seen none of the basic criteria that would justify giving you primary custody of this child. As far as I'm concerned, the rest of this case is about visitation, communication, and support. That doesn't mean you can't provide whatever further information you think is appropriate, but I'm sure that your counsel can tell you that one of the major things is who has been the primary caretaker of the child. Another major issue is the fact that you have not provided any financial support. No. 3, the element of abuse is in the background.

There is none of the factors that are turning in your favor as far the evidence that I've received. I'm just putting you on notice that that's the way the record is at this point.

At the close of trial, the court ruled from the bench, awarding the parties joint legal custody and placing physical care with Jessica. The court cited Jessica's role as primary caretaker, Terry's initial lack of interest in the child, Terry's decision to evict Jessica and the child when the child was only four months of age, and the parties' instability as factors in its determination of the issues. The court later entered a written order, memorializing its ruling.

II. Scope and Standard of Review. In this proceeding in equity, we review the trial court's decision de novo. Iowa R. App. P. 6.907. We give weight to, but are not bound by, the trial court's findings of fact. Iowa R. App. P. 6.904(3)(g). We give great weight to the trial court's express and implied credibility findings. *Id.*

III. Custody and Physical Care. Terry contends the court erred in granting Jessica physical care of Sophie, and Jessica contends the court erred in awarding joint custody of Sophie to the parties. Because these issues are intertwined, we address them together.

Terry seeks an award of physical care, arguing Jessica did not allow him the opportunity to care for the child. He also alleges he is the more suitable custodian as shown by his stability. Jessica argues the court was correct to award her physical care and she should be made sole legal custodian, because there is a history of domestic abuse. Terry claims the presumption against joint legal custody because of domestic abuse had been rebutted.

At the outset, we address Terry's concerns with the court's procedures at trial. First, we note the district court has the power to exclude relevant evidence where its probative value is substantially outweighed by "considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See Iowa Rule of Evid. 5.403. If Terry had shown he had additional witnesses to present whose testimony was not cumulative, those witnesses would have been allowed. Terry made no such showing. The district court was within its discretion to limit the testimony accordingly. *In re Marriage of Ihle*, 577 N.W.2d 64, 67 (Iowa Ct. App. 1998) ("It is generally recognized that matters relating to the course and conduct of a trial, not regulated by statute or rule, are within the discretion of the trial judge.").

Terry also complains the district court determined the outcome of the case at the close of his evidence. While we disagree, we note our review on appeal is de novo. Therefore, any error by the trial court in predetermining the outcome of this case is alleviated by our fresh look at the record.

We then turn to Terry's claim Sophie's best interests dictate he be granted physical care. 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 consider the factors found in Iowa Code section 598.41 (2009). 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). 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).

Among the factors to be considered in determining a child's best interests are the suitability of each parent as custodian, whether both parents have actively cared for the child before and since the separation, and whether a history of domestic abuse exists. *In re Marriage of Daniels*, 568 N.W.2d 51, 54, (Iowa Ct. App. 1997). Terry first argues he is a more suitable custodian for Sophie because he is more stable. While it is true Terry has remained with the same employer for more than a dozen years and has maintained the same residence for a decade, these factors do not deem him to be the more suitable caretaker.

Our examination of the record finds Jessica to be the more appropriate custodian. Jessica has been Sophie's primary caretaker from the time of her birth. Jessica testified Terry was not only disinterested in caring for his daughter during the first four months of her life while they lived together, he was often openly hostile. Although Terry disputes this claim, the evidence of his caretaking since that time does not cast him in a better light as a parent. Terry has not provided any support for Sophie, rationalizing that if he were to give Jessica or any of her family members money for her care, it would be considered a gift

rather than child support because no order requiring support was yet in place. He has never sent diapers or formula or clothing home with Sophie after visitation, although his aunt sent some clothes she bought the child to Jessica. Even with the short amount of time Terry was able to spend with Sophie following entry of a protective order, he needed prompting to change or feed the child.

Terry complains it is unfair to credit Jessica as Sophie's primary caretaker because she kept Sophie from him. More than primary caretaking, this court considers Terry's interest in assuming a parenting role in making its determination of physical care. Terry failed to demonstrate any meaningful interest in caring for his child when the parties were still together and has failed to provide financial support for her after their separation. His lack of interest coupled with his lack of knowledge in how to care for his daughter renders it in Sophie's best interests to place physical care with Jessica.

Finally, Terry argues domestic abuse should not be considered in making the custody determination. The trial court in its oral findings at the close of the evidence did not find a history of domestic abuse. Rather the court stated "there is some evidence of domestic abuse" and "[domestic abuse] has not been an important factor in the Court's decision in this matter." Section 598.41 lists a history of domestic abuse as a factor to consider in making custody determinations. Iowa Code § 598.41(3)(j). A finding by the court that a history of domestic abuse exists, when not rebutted, outweighs consideration of any other factor listed in section 598.41(3) in determining custody. *Id.* § 598.41(2)(c). Terry argues the domestic abuse allegations were rebutted. However we are

unable to determine a history of domestic abuse exists. The trial court made no mention of domestic abuse in its written decree.

After considering the factors set forth in the Iowa Code, we conclude the grant of physical care to Jessica is in Sophie's best interests. Accordingly, we affirm the district court's determination of physical care.

On cross-appeal, Jessica seeks sole legal custody of Sophie. "Legal custody" carries with it certain rights and responsibilities, including but not limited to "decision making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction." Iowa Code § 598.1(3), (5); *In re Marriage of Gensley*, 777 N.W.2d 705, 714 (Iowa Ct. App. 2009). When the parents are awarded joint legal custody, both parents have "legal custodial rights and responsibilities toward the child" and "neither parent has legal custodial rights superior to those of the other parent." Iowa Code § 598.1(3); *Gensley*, 777 N.W.2d at 714.

As with determinations of physical care, our primary concern in determining legal custody is the child's best interests. *Gensley*, 777 N.W.2d at 714. This court examines the factors set forth in section 598.41(3) in making that determination. *Id.* The award shall assure the child the opportunity for maximum continuing physical and emotional contact with both parents. *Id.*

We conclude joint legal custody is in Sophie's best interests. Having no finding of a history of domestic abuse and deferring to the trial court's opportunity to observe and hear the witnesses, we conclude there is insufficient evidence to overcome the statutory preference for joint legal custody. See Iowa Code

§ 598.41(2)(b) (requiring the court to cite clear and convincing evidence that joint legal custody is unreasonable and not in the best interests of the child if joint legal custody is not awarded). Accordingly, we affirm.

AFFIRMED.