

IN THE COURT OF APPEALS OF IOWA

No. 2-038 / 11-1487
Filed March 28, 2012

CALVIN VILLARREAL,
Petitioner-Appellant,

vs.

AMBER RUBATT,
Respondent-Appellee.

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

A father appeals a district court decree awarding physical care of his
daughter to the child's mother. **AFFIRMED.**

Thomas W. Lipps, Algona, for appellant.

Diane DiPietro Wilson, Iowa Legal Aid, Mason City, for appellee.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

Calvin Villarreal appeals a district court decree awarding Amber Rubatt physical care of the parties' daughter. Calvin contends the district court erred by not granting him physical care. We affirm.

I. Background Facts and Proceedings.

Calvin and Amber are the unmarried parents of a daughter, Dakota, born in August 2006. At the time Dakota was conceived, Calvin was twenty years old while Amber was only fifteen. See Iowa Code § 709.4(2)(c)(4) (2009) (setting forth an alternative for sexual abuse in the third degree). Because of her pregnancy, Amber did not finish high school; however, she was able to obtain her G.E.D. and driver's license when she turned eighteen.

When Dakota was born, Amber and Calvin initially lived together in Calvin's parents' house in Swea City. However, after three months, they moved into their own apartment in Algona. During this time, Amber cared for Dakota during the day while Calvin worked a full-time job. Calvin testified that even though Amber was at home all day, he still had to do a majority of the household duties when he got home. Amber admitted that Calvin helped with the housework, but disputed the extent of his help. Amber testified that she gave everything that she could in light of her age and her part-time employment at a nursing home overnight.

In July 2008, Calvin required that Amber move out of the apartment and take her mother (who had been temporarily staying with them). At first, Amber stayed in a motel with the financial assistance of vouchers from the police, but

was eventually able to move into an apartment. Amber continued to care for Dakota during the day, but Calvin did not allow Dakota to reside with Amber. Amber also worked nights as a cook at a restaurant in Algona.

In October 2008, Calvin was charged with operating while intoxicated after he was found to have a blood alcohol content of .192 following a single-vehicle accident. Calvin pled guilty to the charge in December 2008.

Also in October 2008, while Dakota continued to reside with Calvin in Algona, Amber moved to Cedar Rapids to further her education. She moved into an apartment that Christian, her boyfriend, shared with four male roommates. Facebook photos were entered into evidence showing Amber and Christian at parties with alcohol during this time period. In addition, Christian admitted to a significant history of alcohol-related charges, including one juvenile and one adult operating while intoxicated charge, a public intoxication charge, and several charges for possession of alcohol under the legal age. By July 2009, Amber and Christian had saved enough money to move into their own apartment. Since that time, there was no evidence of alcohol being a concern within their family.

Amber and Christian are both enrolled at Kirkwood Community College. Amber is scheduled to graduate with an associate of arts degree in human services in the spring of 2012. Amber had worked at a gas station, but after the couple had their first child in May 2010, she became a stay at home mother who attended class at night. Christian currently is not working, and is receiving unemployment benefits.

Amber testified that in September 2009 she and Calvin agreed to have Dakota live with her in Cedar Rapids. Amber testified Calvin was having problems because he had recently separated from his girlfriend, who was pregnant with his child. Amber further testified the arrangement was always meant to be long-term, and, except for a month long span from late-December 2009 until late-January 2010, Dakota remained in her care until the temporary matters order in October 2010. She further testified that she allowed Calvin to contact and see Dakota, but Calvin did not do so consistently. Calvin testified that Dakota did not go live with Amber in late-2009 and was only supposed to have a weeklong visit in January 2010, but Amber refused to return her. Calvin further testified that Amber then only allowed him to see Dakota twice until he initiated the court action. Calvin further testified he has a child with the girlfriend that was born in November 2009. Calvin does not have a set visitation schedule with this child, and sees her sporadically.

In May 2010, Calvin was fired from his job for excessive unexcused tardiness and absenteeism. Although Calvin testified he left by mutual agreement with his employer, an administrative ruling showed that he sought unemployment benefits claiming to have been fired.

In June 2010, Calvin filed a petition seeking physical care of Dakota and support. A hearing on temporary matters was held, and on October 21, 2010, the district court granted the parties temporary joint legal custody with Calvin receiving temporary physical care. Amber was ordered to pay temporary child support of \$145 per month.

In December 2010, Calvin married Brandi, a woman he had been dating for a year. Brandi has a child from a previous relationship who is only four months younger than Dakota. Calvin and Brandi live in a home in Wesley, and Calvin is currently employed at McNeese Tire in Britt.

The case came to trial on April 13 and April 26, 2011. At trial, the evidence seemed to focus on the parties' tense relationship and in particular, two visitation exchanges.

The first occurred over Easter weekend in April 2010. Amber was in Algona with Dakota visiting family, and Calvin had arranged to have Dakota come eat dinner with his family at a Pizza Ranch. Amber testified she was worried Calvin was not going to return Dakota after the dinner; therefore, when Calvin arrived to pick Dakota up, she requested he sign a document stating he would return Dakota that night. Amber testified that Calvin ripped up the paper and threw it in her face. He then pushed open the door, grabbed Dakota, and left. Amber testified that when Calvin pushed open the door, the door hit her in the face causing a mark. Amber called the police. Calvin testified that when he arrived Amber demanded he sign away his custody rights. He refused, and then Dakota ran to him, so he picked her up and left. Calvin denied pushing open the door or causing any injury to Amber. Calvin testified he heard Amber frantically calling the police as he walked away. Therefore, he drove to the police station a block and a half away. Both parties spoke with the police, after which a solution was reached where Calvin was allowed to take Dakota for an hour.

The second incident occurred in March 2011. Amber testified that Calvin agreed to allow her to have an extra visit while she was in Algona visiting family. The site where Amber was to pick up Dakota was moved a couple of times by Calvin. When Amber made a sarcastic response about picking a location, Calvin started to get upset and raise his voice. Amber testified that Calvin then told her, "If you want to piss me off, then you don't need to see her." Calvin then hung up the telephone and refused to answer any of Amber's calls. At this time, Amber and her sister were already at the outskirts of Wesley, and decided to drive around and find the restaurant where Calvin said he would be with Dakota. When they found the restaurant, Amber's sister went in to see if Calvin would allow her to take Dakota. Calvin refused, and told Dakota to go give the sister a hug and to tell her she could not go with her. Amber then entered the restaurant. Amber testified that during the exchange inside the restaurant, Calvin said to Dakota "tell your mommy to stop crying. She needs to be a big girl. She needs to be an adult." Calvin eventually allowed Amber to take Dakota. Amber testified that she left flustered and forgot to put on Dakota's coat, and as she was leaving Calvin yelled across the restaurant, "You think maybe you'd put a coat on your daughter before you take her out in the cold?" Amber testified that she thought this was humiliating and unnecessary.

Calvin testified that initially the exchange was to occur in Algona, but since Amber was in Burt, they moved it to his house in Wesley since it was on her way home. Calvin then changed the location to a restaurant down the street because he was meeting his family for ice cream. Calvin testified that Amber then began

to get upset, and he decided if she was going to make it a big deal, then he did not have to allow her to have this extra time. Calvin admitted he told Amber, "You blew it. Don't call me back." Calvin then testified that Amber came to the restaurant and was very upset and crying. Calvin admitted that he told Dakota to give Amber a hug and tell her to stop crying, but he did so as a good gesture in an attempt to comfort Amber and calm her down. Calvin stated this "may have been a mistake, but I don't believe it was." Calvin testified that as Amber frantically walked out with Dakota, he asked if she thought Dakota needed her coat. Calvin testified he did this because it was cold outside and he was concerned about Dakota's well-being.

On August 15, 2011, the district court entered a decree awarding physical care of Dakota to Amber. The district court found both parents were capable of performing the minimum tasks necessary to care for Dakota on a day-to-day basis. The court further recognized that Calvin had historically been more stable and mature, but dismissed this due to Amber's young age when Dakota was born (fifteen) and the attendant circumstances of not having a driver's license and working minimum wages jobs. The court instead focused on Amber's recent maturity including her long-term relationship with Christian (which is longer than Calvin's current relationship with Brandi), maintaining adequate housing, and attending and doing well in school. The court also credited Amber's testimony regarding the two tense visitation exchanges, and found these incidents showed that Calvin would be less willing or able to promote Amber's parental role in Dakota's life. In sum, the district court found: "After considering all this together,

the Court concludes that Dakota's long-term best interests require a placement with her mother, [Amber]."

Calvin now appeals, arguing the district court erred when it did not award him primary physical care of Dakota.¹

II. Standard of Review.

We review a custody order de novo. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). Because the district court had the opportunity to listen to and observe the demeanor of the parties and witnesses, we give weight to its findings, especially with respect to credibility, but we are not bound by them. *Id.* Our primary consideration and paramount concern is the best interests of the child. *Id.*

III. Physical Care.

In making a physical care determination, the district court is guided by the factors enumerated in Iowa Code section 598.41(3), as well as other nonexclusive factors enumerated in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The ultimate objective of a physical care determination is to place the child in the environment most likely to bring her to healthy physical, mental, and social maturity. *Murphy*, 592 N.W.2d at 683. As each family is unique, the decision is primarily based on the particular circumstances of each case. *In re Marriage of Hansen*, 733 N.W.2d 683, 699 (Iowa 2007).

Calvin contends that he should have been granted physical care of Dakota because he is more stable and mature, he has a larger support network near his

¹ Calvin does not challenge the visitation schedule entered by the district court or the award of child support.

residence, and the district court is gambling on Amber being able to make continued improvements in her life. Calvin also argues the trial court accorded improper weight to the two tense visitation exchanges.

Although Calvin claims to be more stable and mature, this alleged advantage is largely gained by the relative age of the parties when Dakota was born: Amber was fifteen and Calvin was twenty. As the district court recognized, in the time since Calvin ejected Amber from the home in which the two of them had lived with Dakota, Amber has

secured her G.E.D. and a driver's license, and is herself now in a stable, but unmarried, relationship of longer duration than [Calvin's] relationship with his present wife. She has a stable place of residence for a period of more than two years. She is pursuing schooling and doing well in her studies. After considering the point at which she began her march to maturity, she has made much more progress than has [Calvin] over the past four years. The Court contemplates that she will continue on this path.

We agree with these findings, and find the evidence shows that Calvin and Amber are both suitable caregivers, and have actively participated in Dakota's upbringing. See Iowa Code § 598.41(3)(a), (d).

However, the parents have struggled in their communication with each other, and there is significant concern that this will result in neither parent being able to promote the other parent's relationship with the child. See *id.* § 598.41(3)(c), (e); see also *In re Marriage of Leyda*, 355 N.W.2d 862, 866 (Iowa 1984) (discussing the importance of one parent supporting the child's maintenance of a meaningful relationship with the other parent). Calvin describes Amber as overly dramatic and emotional, while Amber describes

Calvin as having a quick temper and as being sharp and demeaning towards her.

The district court found:

After observing the parties testify in person, the Court finds [Amber's] version more persuasive. Although perhaps not to the extreme she claims, [Calvin] has a tendency to make demeaning comments about [Amber], and may do so in a way that may prove troubling to Dakota. The Court is, as a result, concerned about his ability to promote [Amber's] parental role in Dakota's life.

In addition, we are particularly concerned about Calvin's deliberate act of placing Dakota in the middle of the dispute between the parties during the second tense visitation exchange at the restaurant. Requiring that Dakota become an active participant in attempting to humiliate her mother ("tell your mommy to stop crying . . .") is evidence of manipulative behavior that is likely to cause the child significant confusion and mental or emotional distress. We further agree with the district court that this shows Calvin "has used his status as temporary physical caregiver in this case to exercise a degree of control over, and seek a degree of retribution from [Amber]." This is persuasive evidence that he would not support Amber's relationship with Dakota, and he would likely continue to undermine her parental authority. See Iowa Code § 598.41(3)(e).

Viewing the record as a whole, we conclude the district court carefully weighed the evidence before it and established a suitable care arrangement that is in Dakota's best interests. In affirming the district court's findings, we give considerable weight to the sound judgment of the trial judge who had the benefit of hearing and observing the parties and other witnesses first hand. *In re Marriage of Vrban*, 359 N.W.2d 420, 423-24 (Iowa 1984).

AFFIRMED.