

IN THE COURT OF APPEALS OF IOWA

No. 2-873 / 12-0507
Filed October 17, 2012

JOSE MANUEL ALVAREZ,
Petitioner-Appellant,

vs.

PATRICIA GONZALEZ,
Respondent-Appellee.

Appeal from the Iowa District Court for Tama County, Stephen B. Jackson Jr., Judge.

A father appeals the district court's grant of primary care of their child to the child's mother. **AFFIRMED.**

Melissa A. Nine of Kaplan, Frese & Nine, LLP, Marshalltown, for appellant.

Patricia Gonzalez, Estherville, appellee pro se.

Jennifer Allison, Assistant Attorney General, Child Support Recovery Unit, Marshalltown, attorney for intervenor.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

VOGEL, P.J.

Jose Alvarez appeals the district court's ruling which granted physical care of his and Patricia Gonzalez's minor child to Patricia. While we appreciate the many factual assertions made by Jose on appeal, we decline to modify the well reasoned district court decision.

Jose and Patricia had a short relationship, resulting in the birth of J.A. in December 2008. Patricia informed Jose of the birth and brought the child to see him either in January or February 2009. Jose completed a voluntary paternity affidavit in May 2009, but it was not filed for another year, which Jose claims was the fault of Patricia. Also in May, Jose was incarcerated for possession of marijuana, released to a halfway house in November, and fully released in April, 2010. A petition to establish paternity was filed by Jose in July 2010.

DNA testing, while resisted by Patricia, was ordered by the court in August 2010 and completed in the autumn after Jose filed a contempt action seeking to hold Patricia in contempt for failing to comply with the court's orders concerning DNA testing. Jose was confirmed as J.A.'s father as a result of these tests. Jose filed a petition to establish custody in March 2011. Attempts with visitation were resisted by Patricia, who was fearful for the safety of J.A. because of Jose's criminal history and rumors that he would abscond to Mexico with the child.

On August 5, 2011, a temporary order was entered granting the parties joint legal custody of J.A., primary care to Patricia, subject to Jose's visitation, which had been previously and successfully mediated. Jose was also ordered to pay child support. Patricia was found to be in contempt on November 18, for failure to comply with the temporary visitation order. On January 24, 2012, the

matter came on for trial, and the district court, after hearing testimony and receiving exhibits, determined that J.A.'s best interests would be served if the parties were granted joint legal custody, and physical care with Patricia.

We conduct a de novo review of decisions regarding custody and physical care. Iowa R. App. P. 6.907; *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). We give deference to, but are not bound by, the findings of the district court. *In re Marriage of Sires*, 506 N.W.2d 813, 814 (Iowa Ct. App. 1993). In determining which parent should be granted physical care, our overriding consideration is the child's best interests. *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). The parent who has been the primary caretaker of the child during the child's life will not necessarily be designated the primary caretaker at the time of custody determination. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992). The role of primary caretaker is, however, critical in the development of children, and careful consideration is given in custody disputes to allowing children to remain with the parent who has been the primary caregiver. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995).

Jose raises two issues on appeal: (1) that physical care should have been granted to Jose, due primarily to Patricia's interference with the father-son relationship; and (2) affirming physical care with Patricia "validates" her past behavior and makes the standard for a future modification "a near-impossibility."

On our review of the record, we note the strengths and weaknesses of both parties, as did the district court. Neither has a stellar resume to assume the role of primary physical care of J.A., but both have demonstrated their love for

J.A. and their ability to adequately care for him. To repeat the pros and cons for each so as to re-create a parental ledger would serve no useful purpose. We do find the district court's well reasoned opinion to be very persuasive, when read against the trial transcript. In particular we repeat some very telling portions of the ruling:

Regardless of who may be to blame for Jose's limited contact with [J.A.], the fact remains he simply has not had enough contact with [J.A.] such that [J.A.]'s life should be uprooted from his current home and the only home he has known and transferred to living with Jose. The court finds both parties have suitable homes and would be suitable caretakers for [J.A.], however, given the fact that Patricia has been [J.A.]'s primary physical caretaker to date, the court will order Patricia to continue to have [J.A.]'s primary physical care.

.....

The court warns Patricia that she must continue to comply with the court orders concerning visitation. As she was warned by [the prior contempt order], a failure to comply with the court's orders concerning visitation will be seriously considered as evidence to support a future modification of the physical care arrangement with respect to [J.A.]. Further, future contempt and failure to promote Jose's relationship with [J.A.] could result in a jail sentence for Patricia and/or a change in physical care.

Especially by these portions of the ruling, we affirm that physical care was most appropriately placed with Patricia and in J.A.'s best interests. However, it is also clear that Patricia has been firmly and fairly warned that compliance with the court's ruling is not a matter of whim, but a mandate. *See In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993) ("If visitation rights of the noncustodial parent are jeopardized by the conduct of the custodial parent, such acts could provide an adequate ground for a change of custody.").

The district court noted the increased cooperation of the parties with regards to visitation and communication. It is clear from the record that both

Jose and Patricia were beginning to move past their distrust of each other. We echo the district court's optimism that Jose and Patricia "will continue to work together and support [J.A.'s] relationship with both parents." We affirm.

AFFIRMED.