

**IN THE COURT OF APPEALS OF IOWA**

No. 3-270 / 12-1661

Filed April 24, 2013

**MELISSA K. BOLANDER,**  
Petitioner-Appellee,

**And Concerning**  
**MICHAEL A. LETVIN,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Jefferson County, Myron L. Gookin,  
Judge.

A father appeals the district's court order placing physical care of his child  
with the mother. **AFFIRMED.**

Diana L. Miller of Whitfield & Eddy, P.L.C., Mount Pleasant, for appellant.  
Cynthia D. Hucks of Box and Box Attorneys at Law, Ottumwa, for  
appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

**DOYLE, J.**

Michael Letvin appeals the district's court order placing physical care of his child with Melissa Bolander. We affirm.

**I. Background Facts and Proceedings**

Michael and Melissa are the unmarried parents of K.L., who was born in June 2008. Melissa also has a child from a previous relationship, P.S., who was born in December 2004. Michael and Melissa met in 2006 and began dating. Melissa became pregnant with K.L., and she and P.S. moved in with Michael in the spring of 2008. K.L. was born a few months later. In September 2008, when K.L. was three months old, Michael and Melissa separated.

K.L. remained in the care of Melissa after the parties' separation. The parties agreed Michael would have visitation with K.L. on the weekends except those he worked. The parties shared holidays with K.L.

In August 2011, Melissa filed a petition to establish custody, visitation, and support. The district court entered a temporary order in October 2011, placing K.L. in the physical care of Melissa, with Michael having visitation on alternating weekends.

A hearing was held in July 2012. Melissa and Michael both sought physical care of K.L. Melissa, age 31, is not employed and stays home to care for K.L. and P.S. She receives approximately \$740 per month in supplemental security income<sup>1</sup> for each K.L. and P.S., plus child support. She intends to

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<sup>1</sup> K.L. was born with a cleft palate that he has gone undergone surgeries to correct. He will undergo several more surgeries to finish to process. He is susceptible to upper respiratory infections due to his cleft palate. In addition, K.L. has been diagnosed with

further her education when K.L. begins school full-time. Melissa lives with K.L. and P.S. in Fairfield in a two-bedroom apartment, where they have lived for four years.

Michael, age 26, has an associate degree and is employed as a machine worker at Agri-Industrial Plastics, where he has worked for eight years. He works 4:00 p.m. to midnight, but has the option to change to the 8:00 a.m. to 4:00 p.m. shift. He earns approximately \$31,000 per year and provides health insurance coverage for K.L. through his employment. Michael owns a house in Fairfield where he lives with his fiancée, Shannon.

The district court issued a decree in July 2011, ordering joint legal custody of K.L. to Melissa and Michael and awarding Melissa physical care. The court noted Melissa had established herself as K.L.'s primary physical caretaker and had shown she was capable of meeting all the child's needs. The court noted the strong bond between Michael and K.L. and ordered Michael to have visitation on alternating weekends from Thursday to Sunday, alternating overnights on Wednesdays, alternating holidays, and four weeks in the summer. The court ordered Michael to pay child support of \$452.68 per month. Michael appeals.

## **II. Standard of Review**

Issues ancillary to a determination of paternity are tried in equity. Iowa Code § 600B.40 (2011). We review equitable actions de novo. Iowa R. App. P. 6.907. When we consider the credibility of witnesses in equitable actions, we

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disruptive behavior disorder. Melissa's other child, P.S., has been diagnosed with attention deficit disorder and mild autism.

give weight to the findings of the district court, but are not bound by them. Iowa R. App. P. 6.904(3)(g).

### **III. Analysis**

Michael requests physical care of K.L. be given to him. In determining physical care for a child, our governing consideration is the best interests of the child. Iowa R. App. P. 6.904(3)(o). Our analysis is the same whether the parents have been married, or remain unwed. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1998). 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).

When physical care is an issue in a paternity action, we apply the criteria found in Iowa Code section 598.41. Iowa Code § 600B.40. We also apply the factors found in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). *Lambert*, 418 N.W.2d at 42.

Michael claims the factors weigh in favor of ordering physical care of K.L. with him. After carefully reviewing the evidence, however, we agree with the district court's ultimate resolution of this case.

The district court described Michael and Melissa as "suitable caregivers" who love K.L. and "can provide for his day-to-day care." The guardian ad litem also acknowledged them as such, and we agree. Michael contends Melissa undermines his relationship with K.L. and makes false allegations against him and his fiancée, Shannon. Although it is clear Michael's relationship with Shannon has stifled the communication and cooperation between the parties, we

commend Michael and Melissa's ability to work together for the four years since their separation to allow K.L. to spend quality time with both parents.

Michael raises several claims in regard to Melissa's alleged lack of credibility and lifestyle choices, including her use of alcohol and smoking. The district court had the opportunity to observe the witnesses firsthand. The court observed Melissa's admission that she "drinks beer occasionally at home and, when not in charge of the children, she goes out with friends and drinks with them" and noted her testimony that she "has recently quit smoking." However, the court found the evidence was insufficient to conclude that Melissa's use of alcohol or evidence of smoking "prevents her from adequately performing her responsibilities as a parent," or rises to a level of concern about the long-term best interests of K.L. Indeed, the court noted that "[t]o the contrary, several credible witnesses testified to Melissa's care and proficiency as a parent."

The court also noted K.L.'s close relationship with his half-sibling, P.S. The court observed that K.L. and P.S. are "only three years apart in age," have lived together with Melissa their entire lives, and are "significantly bonded to one another." The guardian ad litem also noted the "strong sibling bond" between K.L. and P.S. "There is a presumption that siblings should not be separated." *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). "The principle has also been recognized as having application to half siblings." *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993). Michael claims that here, "[t]he policy of keeping siblings together is outweighed by the child's need for a stable, smoke free, nurturing, wholesome environment." We disagree and find no

“[g]ood and compelling reasons” exist for a departure from the sibling presumption in this case. *See id.*

Michael also alleges the guardian ad litem failed to perform her statutory duties when “she endorsed a custodial arrangement that serves to undermine, rather than promote, [K.L.’s] best interests.” *See* Iowa Code § 598.12 (setting forth duties of guardian ad litem). The guardian ad litem recommended K.L. remain in the same care arrangement he has known his whole life where there are “no compelling reasons” to upset his schedule and routine. It is clear Melissa has been K.L.’s primary caretaker since birth. She has proactively cared for the child’s medical and development needs. And significantly, she has furthered K.L.’s relationship with Michael. As the court noted, “Although this custody dispute has certainly caused some conflict in the relationship between Melissa and Michael, the record shows they have had a good relationship in the past, they communicated well, and there is no concern that either of them would deny the other parent the opportunity to have meaningful contact and a loving relationship with [K.L.]” We agree.

We conclude it is in the child’s best interest to be placed in the physical care of Melissa.

#### **IV. Attorney Fees.**

Melissa seeks attorney fees for this appeal. In paternity actions, “[t]he court may award the prevailing party the reasonable costs of suit, including but not limited to reasonable attorney fees.” *Id.* § 600B.25(1). “An award of appellate attorney fees is within the discretion of the appellate court.” *Markey v. Carney*, 705 N.W.2d 13, 26 (Iowa 2005). “Factors to be considered in

determining whether to award attorney fees include: the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal.” *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005) (quotation marks omitted). We decline to award any appellate attorney fees to Melissa.

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

**AFFIRMED.**