

IN THE COURT OF APPEALS OF IOWA

No. 6-724 / 06-0700
Filed November 16, 2006

Upon the Petition of
GAVIN L. CURTIS,
Petitioner-Appellee,

And Concerning
ELIZABETH BRODERSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Muscatine County, Mark D. Cleve,
Judge.

The respondent appeals from the district court's order granting physical
care of their minor child to the petitioner. **AFFIRMED.**

Anna Moyers and John E. Beasley, Iowa City, for appellant.

Neva Rettig-Baker of Baker Law Office, Muscatine, for appellee.

Heard by Huitink, P.J., and Vogel, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206
(2005).

VOGEL, J.

Elizabeth Broderson appeals from the district court's order pursuant to Iowa Code chapter 600B (2005) establishing paternity, custody, visitation, and child support for her daughter, Jocelyn. Following our de novo review of the record and arguments on appeal, see Iowa R. App. P. 6.4, we concur with the district court's placement of Jocelyn in the physical care of her father, Gavin Curtis.

Background Facts and Proceedings.

Jocelyn was born in June 2005 to Elizabeth and Gavin, after the couple had a brief relationship during the summer and fall of 2004. Elizabeth and Gavin were never married, and Gavin filed a petition ten days after Jocelyn's birth to establish paternity, custody, visitation, and support pursuant to Iowa Code chapter 600B.

At the time of trial in January 2006, Gavin was twenty years old and a high school graduate. For the previous sixteen months he had worked full-time as a machinist for Allsteel in Muscatine, Iowa. He lives in a nearly new three-bedroom mobile home in Muscatine with his fiancée Courtney Davis, who works full-time as a certified nurse's aide (CNA) and is attending college to obtain a bachelor's degree in nursing. Gavin and Courtney dated for an extended time in high school before he dated Elizabeth, and they reunited after Gavin's relationship with Elizabeth ended. They plan to marry sometime in the near future.

Elizabeth is twenty-one years old and enrolled full-time at Muscatine Community College, where she is studying towards a bachelor's degree in human services through Wesleyan College. Since December 2005, Elizabeth

has lived in a two-bedroom apartment in Muscatine. Elizabeth lived primarily with her maternal grandmother or father and stepmother in Muscatine during the pregnancy and the six months following Jocelyn's birth. In August 2005, without Gavin's consent, she took Jocelyn to Las Vegas, Nevada, intending to reside with her mother. After a couple of weeks Elizabeth decided to move back to Muscatine. Shortly thereafter, Elizabeth proposed sending Jocelyn back out to Las Vegas, to live with her mother for a few months. When Gavin offered to instead have Jocelyn live with him, Elizabeth refused, as Gavin would not commit to returning Jocelyn to Elizabeth when Elizabeth felt she was able to care for her. Elizabeth worked about fifteen hours a week providing child care at the Muscatine County YMCA for approximately eighteen months prior to trial, but pared down her schedule to ten hours a week with her return to school full-time.

The record discloses substantial discord between the parties, regarding the care of their daughter. Elizabeth alleged at trial that Gavin did not want her to have the baby, denied paternity, and was lax on his responsibilities after Jocelyn's birth by not providing her with necessary supplies or voluntarily paying child support. Gavin testified that after Jocelyn's birth, he became increasingly concerned with Elizabeth's drinking and social activities and their effect on Jocelyn's care. Gavin also alleged Elizabeth withheld visitation and only granted him visitation at her discretion.¹ Although his visits did not follow a set schedule, Gavin was able to see Jocelyn on average at least once a week with frequent overnight visits. The record reflects that Gavin did voluntarily support Jocelyn to

¹ Neither party requested temporary orders regarding custody, visitation, or child support prior to trial.

a limited extent, by supplying diapers, clothing, and other items Elizabeth specifically requested. He made four voluntary child support payments of \$79.65 according to the appropriate guideline level between mid-December 2005 and trial in February 2006.

At the time the petition was filed in June 2005, Gavin requested joint legal custody and visitation upon his intention that physical care should be granted to Elizabeth. However, Gavin changed his position in September 2005 by amending the petition to request physical care of Jocelyn. The parties stipulated that Gavin was the biological father of Jocelyn and joint legal custody should be granted. The trial on the contested issues of physical care, visitation, and child support was held in February 2006. The district court ruled that physical care of Jocelyn be placed with Gavin with liberal visitation to Elizabeth. Elizabeth filed a motion for new trial and a motion to enlarge under Iowa Rule of Civil Procedure 1.904(2), which were both denied except for the clarification of two small points.

Elizabeth appeals, arguing the district court erred in determining (1) that Gavin is better able to meet Jocelyn's needs and daily care and (2) that Jocelyn's best interests are served by granting Gavin physical care.

Physical Care of Jocelyn.

Gavin filed the petition under Iowa Code chapter 600B to establish custody, physical care, and visitation, and the evidence at trial and record on appeal concerning physical care should be evaluated using the following factors:

1. The characteristics of each child, including age, maturity, mental and physical health.
2. The emotional, social, moral, material, and educational needs of the child.

3. The characteristics of each parent, including age, character, stability, mental and physical health.
4. The capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child.
5. The interpersonal relationship between the child and each parent.
6. The interpersonal relationship between the child and its siblings.
7. The effect on the child of continuing or disrupting an existing custodial status.
8. The nature of each proposed environment, including its stability and wholesomeness.
9. The preference of the child, if the child is of sufficient age and maturity.
10. The report and recommendation of the attorney for the child or other independent investigator.
11. Available alternatives.
12. Any other relevant matter the evidence in a particular case may disclose.

In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). See also *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981) (stating that the criteria for determining custody should be the same whether the parents are dissolving their marriage or are unwed).

If joint physical care is not awarded under paragraph "a", and only one joint custodial parent is awarded physical care, the parent responsible for providing physical care shall support the other parent's relationship with the child. Physical care awarded to one parent does not affect the other parent's rights and responsibilities as a joint legal custodian of the child. Rights and responsibilities as joint legal custodian of the child include, but are not limited to, equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction.

Iowa Code § 598.41(5)(b).

"Physical care" refers to the right and responsibility to maintain the principal home of the minor child and to provide for routine care of child. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). In determining physical care we look at each case on its own facts to decide which parent can "minister more

effectively” to the long-range interest of the children. *Winter*, 223 N.W.2d at 166. The critical issue in determining the best interest of the child is which parent will do better in raising the child; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in an initial proceeding. *In re Marriage of Roberts*, 545 N.W.2d 340, 342 (Iowa Ct. App. 1996). The objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). While due consideration should be given to the fact that one parent has been the historical primary care giver, that fact is not controlling, *Roberts*, 545 N.W.2d at 343, and does not assure that parent will be awarded physical care of the child. *In re Marriage of Wilhelm*, 491 N.W.2d 171, 172 (Iowa Ct. App. 1992).

Elizabeth’s main contention on appeal favoring placement of Jocelyn in her physical care is that she has been Jocelyn’s primary caregiver and that Jocelyn should remain with her to promote her stability. That consideration, however, is only one of many we look to in determining which parent is capable of caring for Jocelyn more effectively. See *Winter*, 223 N.W.2d at 166-67. The district court was concerned about the maturity of the two parents and the life styles each led. Of primary concern was the amount of alcohol each consumed and other “socializing” that may impact Jocelyn’s care. The district court found:

Although a number of these occasions took place while Jocelyn was in the care of [Gavin], the Court finds that [Elizabeth’s] testimony constitutes a very minimal estimate of the frequency of such incidents, and that many or most of them have taken place at times other than when [Gavin] was caring for Jocelyn. Although this pattern of behavior may not be atypical for many 21 year olds, the Court determines it is and should be for a person of that age

who is the primary physical caretaker of an infant child. The Court also has reservations about [Elizabeth's] general level of judgment in her personal affairs, as is reflected in the evidence.

We conclude that the district court's findings are supported by the record. Although we are not bound by the findings of the district court, we give deference to them, particularly regarding issues of credibility, given the district court's opportunity to directly observe witness demeanor. *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997). The district court clearly believed that Elizabeth's prior inability to communicate and work with Gavin in the best interests of Jocelyn placed Gavin in a better position to minister to Jocelyn's needs. This is especially evident in Elizabeth's decision to move to Nevada with Jocelyn less than two months after her birth without any significant input from or notice to Gavin, even though the petition in this case was pending at that time. In addition, Elizabeth's mother, Cathy Mousavinasab, testified that Elizabeth has seemed overwhelmed at times and perhaps depressed since Jocelyn's birth. Cathy did testify that Gavin had been receptive prior to trial to reducing tension between Elizabeth and himself regarding scheduling visitation, to provide Jocelyn as much contact with both parents. The testimony at trial also reflected that Elizabeth on several occasions altered or terminated Gavin's visitation with Jocelyn, oftentimes for no asserted reason. The district court found that Elizabeth "has used the issue of voluntary child support as a quid pro quo for visitation with [Jocelyn], and that she has at times canceled o[r] changed the terms of scheduled visitation without good cause."

In contrast, the testimony and evidence presented at trial demonstrates that Gavin has done well to organize his life and become a reliable parent for

Jocelyn. The district court specifically found Gavin to be generally more credible than Elizabeth in his account of events. He has consistently been employed full-time and secured adequate housing to care for her needs. Alcohol consumption is much less of a concern at Gavin and Courtney's home. He has consistently shown flexibility and a willingness to work with Elizabeth to support her relationship with Jocelyn and provide her with maximum time and exposure to both parent's care. We do not minimize the position Elizabeth was in after Jocelyn's birth. She was young, and overwhelmed with her responsibilities, needing a place to live, a job, and more education. Gavin was simply more settled at that point in his life, with a good job and from the district court's perspective, more maturity. As the district court noted:

Jocelyn has clearly bonded with both parents, and they both unquestionably love and are concerned about the welfare of their child. This is clearly not a case where either party is an unfit parent. Instead, the Court must determine which parent can provide the child with superior care, in an environment most likely to serve the long-term best interests of the child. Based on the evidence presented at trial and the previously-articulated facts, the Court determines that [Gavin] has demonstrated the stability, maturity and parenting capabilities which better enable him to provide the primary home environment for Jocelyn during her childhood.

With deference to the district court, which observed the parties first hand, we agree that Jocelyn's best interests are served by placing her physical care with her father, Gavin, with liberal visitation to Elizabeth.

AFFIRMED.