

IN THE COURT OF APPEALS OF IOWA

No. 7-160 / 06-1852
Filed June 13, 2007

**Upon the Petition of
DUSTIN S. DELEHOY,
Petitioner-Appellant,**

And Concerning

**VENESSA M. KERBY,
Respondent-Appellee.**

Appeal from the Iowa District Court for Wapello County, Daniel P. Wilson,
Judge.

Dustin Delehoy appeals from the district court order granting Venessa
Kerby physical care of their child. **AFFIRMED AS MODIFIED.**

Cynthia D. Hucks of Box & Box, Ottumwa, for appellant.

Jeffrey R. Logan of Curran Law Office, Ottumwa, for appellee.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

Dustin Delehoy and Venessa Kerby are the unmarried parents of Dominick, born in 2002. When Dominick was three years old, Dustin filed a petition seeking physical care of his son. The district court found both parents capable of raising Dominick, but granted Venessa physical care. The court afforded Dustin bi-monthly visitation during the school year and three weeks during the summer.

On appeal, Dustin contends the court should have (1) granted him physical care of Dominick or, in the alternative, (2) given him more visitation and required Venessa to share transportation costs. Our review of the record pertaining to these issues is de novo. Iowa R. App. P. 6.4.

I. Background Facts

Dustin had a job as a railroad employee. He met Venessa in Ottumwa, where he was temporarily posted. They had a six-week relationship and Venessa became pregnant.

At the time of Venessa's due date, Dustin was living in Davenport. He traveled from Davenport to Ottumwa for his son's birth. At that time, the parents agreed that Dustin would have Dominick for four to six weeks every three months, once he was old enough to travel.¹

Meanwhile, Dustin moved to a town in Illinois that was about an eight-hour drive from Ottumwa. Despite the distance, he and Venessa exchanged Dominick as agreed, meeting at a location between Ottumwa and Illinois.

¹ Dustin determined that travel with the child would not be advisable until he was one year old.

Both parents became involved in other relationships. Venessa reconnected with an old boyfriend named Travis. They got married and had a child, but were estranged at the time of trial. Dustin met and began living with a woman named Yolanda and her two children from a prior relationship.

Both parents had job concerns. Venessa did not obtain stable employment until 2006. Dustin was injured on the job in 2004 and began receiving disability payments that were significantly lower than his employment income. Both parents also had concerns relating to the stability of their new companions. The district court considered these and other factors in the physical care determination.

II. Physical Care

The district court concluded Venessa should serve as Dominick's physical caretaker. The court reasoned as follows:

- a) Dominick has been in Venessa's primary physical care since his birth and appears to be thriving;
- b) Venessa and Dustin have cooperated in the past to afford Dustin significant contact with Dominick, and the evidence indicates this will likely continue in the future;
- c) Much of the past instability in Venessa's life was due to her relationship with Travis Kerby. That relationship is now concluded, but for the formal legal realities of dissolution of the marriage and dealing with issues concerning their child Lillian;
- d) Venessa has a stable residence and stable employment and intends to continue on her present course;
- e) Venessa has supportive family members in the area, primarily her mother Niya Hager, to help with child care during her times of employment and otherwise; and
- f) Although Venessa's siblings appear to have their share of problems, the evidence did not establish that Dominick will be around Venessa's siblings on any regular/extended basis, thereby being adversely affected by them.

On our de novo review, we agree with this reasoning. Several facts supporting the reasoning are noteworthy.

First, the court appropriately considered Venessa's relationship with Travis. See *In re Marriage of Malloy*, 687 N.W.2d 110, 113-14 (Iowa Ct. App. 2004) ("If a parent seeks to establish a home with another adult, that adult's background and his or her relationship with the children becomes a significant factor in a custody dispute."). That relationship was tumultuous and marred by domestic abuse. However, Venessa asked Travis to move out in December 2005 and stated she intended to divorce him when she saved enough money to do so. While Dustin predicts that Venessa will continue to interact with Travis because he is the father of her youngest child, the record reveals that Travis only visited Venessa about five times after they separated. In addition, although Venessa had a history of breaking up and reconciling with Travis, Travis had met another woman and was expecting a child with her. See *Northland v. Starr*, 581 N.W.2d 210, 213 (Iowa Ct. App. 1998) (stating a parent's past immaturity cannot be taken into account when it is not a present risk).

Second, the district court recognized in its fact findings that Yolanda made efforts to control her instability. She testified that she had a major depressive disorder and bipolar disorder not otherwise specified. In years preceding the year of trial, these disorders were untreated. Between 2002 and 2005, Yolanda twice attempted suicide, was an inpatient at a mental health treatment facility for six weeks, and temporarily moved out of the home she shared with Dustin. At the time of trial, however, she was taking medication and seeing a counselor. She recognized that she would be serving as Dominick's caretaker when Dustin

returned to work and she further recognized that his job might take him away for up to two overnights per week. She stated she viewed Dominick as another son and was willing to take on these added duties. Just as we concluded that Venessa addressed the concerns posed by Travis's presence in her home, we conclude that Dustin and Yolanda addressed the concerns posed by Yolanda's mental health disorders. Therefore, the physical care determination turned on whether it was in Dominick's best interests to stay with Venessa the majority of the time or move to Illinois and spend the majority of the time with Dustin.

On this question, we agree that Venessa made efforts to stabilize all pertinent aspects of her life. She secured a rental home outside Ottumwa with room for Dominick to play. She had him enrolled in pre-school and made arrangements for his elementary education. Her mother, who ran a licensed day care center from her home, cared for Dominick in the evenings, when Venessa worked. And, as noted, Venessa separated from the man who caused a large share of the turmoil in her life. Finally, Venessa afforded Dustin extensive visitation with Dominick and facilitated the visitation by meeting Dustin midway. These efforts support the district court's placement decision.

In reaching this conclusion, we recognize that Venessa and other members of her family have criminal records. In particular, Venessa was convicted of forgery and driving without a license. However, as of the time of trial, Venessa appeared to have put her criminal past behind her. As for her siblings, she testified that Dominick's contact with them was limited.

Based on our de novo review of the record, we conclude the district court acted equitably in granting Venessa physical care. That said, we fully concur in

the district court's statement that the physical care decision "in no way denigrates Dustin's ability to care for Dominick, nor his desire to do so."

III. Visitation and Transportation Costs

Dustin was granted visitation every other weekend, one week in each of the months of June, July, and August, Father's Day, and alternating holidays. He was ordered to bear all transportation costs. Dustin seeks "at least a one-month period in the summer, the child's school breaks" and "overnights (where possible) in the holiday visitation scheme." We believe these requests are reasonable and will serve Dominick's best interests. See Iowa Code § 598.41(1)(a); *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). Commendably, Venessa recognized the advantages to extended visitation with Dustin, stating:

I would like to see [Dustin] have him in the summer. I mean he's his Dad. And I would like for him to see him as much as possible, as much as he can. You know, granted, he's not in school.

Finally, Dustin requests that Venessa be ordered to assist in the transportation responsibilities by traveling to the exchange point that the parties had been using. Venessa agrees to this modification.

IV. Disposition

We affirm the portion of the decree granting physical care of Dominick to Venessa. We modify the visitation portion of the decree to provide for at least one month of summer visitation, visitation during school breaks of more than two school days, and overnight visitations on holidays, if feasible, and if agreed to by the parties.

We also modify the portion of the decree requiring Dustin to bear all the transportation costs for visitation. Venessa shall assist in transportation responsibilities for visitation by driving Dominick to the agreed location of Bowling Green, Missouri.

Costs of the appeal are assessed to Dustin.

AFFIRMED AS MODIFIED.