

IN THE COURT OF APPEALS OF IOWA

No. 8-1050 / 08-0896
Filed March 11, 2009

DONALD JAMES JIRAN,
Petitioner-Appellee,

vs.

KRISTY KAY PETERSEN,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Patrick Grady, Judge.

Kristy Petersen appeals the district court ruling on Donald Jiran's petition for adjudication of paternity, custody, visitation, and support concerning the parties' child. **AFFIRMED AS MODIFIED.**

Steven E. Howes of Howes Law Firm, P.C., Cedar Rapids, for appellant.

Jacob R. Koller of Simmons Perrine, P.L.C., Cedar Rapids, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

Kristy Petersen appeals the district court ruling on Donald Jiran's petition for adjudication of paternity, custody, visitation, and support concerning the parties' child, Carter. She contends the court erred in awarding Donald five weeks of summer visitation and erred in the manner in which it allocated health insurance costs. Donald seeks an award of appellate attorney fees. We affirm as modified.

Donald and Kristy are the biological parents of Carter, born in May 2000. The parties were never married but lived together in Stanwood, Washington, from 1997 to 2004. Donald has lived in the Stanwood area his entire life except for four years when he was on active duty in the military, and at the time of trial lived there with his girlfriend. His extended family, including his mother, stepfather, sister, brother-in-law, niece, and nephew, also lives in that area. Donald has worked at Davis Construction since 2000 and at the time of trial was superintendent of field operations and purchasing a twenty percent interest in the company.

Following the parties' separation in 2004 Kristy took Carter to her parents' home in Cedar Rapids, Iowa. Kristy was then employed for a short time in Chicago, Illinois, but from 2005 until the time of trial she has lived and worked in Cedar Rapids, Iowa. At the time of trial Kristy and Carter were sharing a home in Cedar Rapids with Kristy's parents, grandfather, and niece, and she was working as a marketing manager for Panera Bread.

Until shortly before the filing of the current action, no formal order had been entered concerning Carter. Donald voluntarily paid monthly support to Kristy and the parties resolved visitation questions on an informal basis. However, this arrangement came to an end in the summer of 2007 when they were unable to agree on how long Carter would have visitation with Donald that summer. Kristy told Donald Carter could spend only six days with him that summer, instead of the approximately three weeks he had spent with him each of the two previous summers. Her rationale was twofold, that Carter was busy with extracurricular activities and she wanted him back a few weeks before school started in order to get him back on schedule. Toward the end of the six-day visit Donald called Kristy and told her he was keeping Carter for an additional week. Kristy refused, became very upset, and threatened to file kidnapping charges against Donald if he did not return Carter. The next day Donald and his stepfather began driving Carter back to Iowa, which took two to three days. Upon arriving in Cedar Rapids Donald met with an attorney and filed his petition on August 8, 2007.

Trial to the district court was held April 10, 2008. The significant dispute at trial was over the frequency, timing, and duration of Donald's visits with Carter. The court entered a written ruling on May 13, 2008, giving the parties joint legal custody of Carter and placing his physical care with Kristy. The order provided that Donald would have, at minimum, visitation for five weeks during the summer, every spring break, alternating winter breaks, and other reasonable times, including times when Donald is in Carter's state of residence. In ruling on the

visitation issue, the court found Kristy had given the court no reason to hesitate in giving Donald extended summer visitation and such extended contact was “clearly in Carter’s best interests.” It further specifically found “no harm in Carter spending significant time with Donald’s relatives if Donald must work part of the time Carter is in his care. Kristy has not hesitated to use her family in the same way.” The court also ordered Donald to provide medical and dental insurance for Carter, and ordered that in the event he failed to provide such insurance Kristy could purchase a policy and Donald would be required to reimburse her for one-half of the premium costs.

Kristy appeals the district court order, claiming the court erred in awarding Donald five weeks of summer visitation and erred in the manner in which it allocated health insurance costs. More specifically, she argues Carter’s best interests require that his summer visitation not exceed two weeks because Donald only has two to three weeks vacation in the summer to spend with Carter, and any longer visitation would disrupt Carter’s summer extracurricular activities. Kristy further argues the court’s order should be modified to provide that if Donald fails to provide medical and dental insurance she would be allowed to purchase the policies and assess all of the costs to Donald.

A proceeding to determine custody or physical care of a child born to unmarried parents is in equity, so our review is de novo. *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995). In our de novo review we examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the

fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). In deciding custody and physical care issues, “[p]rior cases have little precedential value, except to provide a framework for analysis, and we must base our decision on the particular facts and circumstances before us.” *Id.*

A court, insofar as is reasonable, in the best interest of the child, and appropriate, is to order liberal visitation rights that will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents. Iowa Code §§ 598.1(1) and 598.41(1)(a) (2007). Generally, Iowa courts consider liberal visitation rights to be in the best interest of a child. *In re Marriage of Stepp*, 485 N.W.2d 849, 850 (Iowa Ct. App. 1992). Despite the fact that parents live a substantial distance apart a court can nevertheless provide for “maximum continuous physical and emotional contact” with both parents through means other than a traditional alternating-weekends visitation schedule, for example, by ordering “extended visitation during summer vacations and school breaks and scheduled telephone contact.” *In re Marriage of Thielges*, 623 N.W.2d 232, 238 (Iowa Ct. App. 2000); see also Iowa Code § 598.21D (allowing court to require “extended visitation during summer vacations and school breaks and scheduled telephone contact” when a caretaker parent relocates a child more than 150 miles from the residence of the child at the time custody was determined).

Here Donald and Kristy live approximately 2,000 miles apart, making a traditional liberal visitation schedule impossible. Donald lived with Carter for the first four years of Carter's life, and thus they clearly know each other well and are closely bonded as father and son. Furthermore, we find no evidence in the record before us that Carter was or is at any risk of physical or emotional harm during his visits with Donald. Donald has no criminal record, no history of child abuse, and no other issues that cause us any concern regarding his ability to care for Carter or provide for Carter's safety and well being while in his care. We also agree with the district court that there is no harm in Carter spending significant time with Donald's relatives in Washington if Donald must spend some time working during part of Carter's summer visitation. Carter knew and had established a bond with his paternal grandmother, aunt and uncle, and cousins before Kristy moved him to Iowa. Additionally, as the court noted, Kristy has not hesitated to rely greatly on her extended family for help in caring for Carter, especially during the time she was working in Chicago.

Based on the significant distance between the parties, the established bond between Carter and Donald, and the fact there is no evidence in the record of any risk to Carter while in Donald's care we, like the district court, find no reason to restrict Donald's summer visitation to the very short time Kristy suggests. We conclude five weeks of summer visitation is appropriate and is in Carter's best interest. We further note that a child's extracurricular activities, while entitled to consideration when determining visitation, should not be

considered to be more important than encouraging and reinforcing a parent-child relationship.

Kristy also claims the district court's order should be modified to provide that if Donald fails to provide medical and dental insurance she would be allowed to purchase the policies and assess all of the costs to Donald. She argues in part that the court's assessment of medical support costs is inequitable because there is no incentive for Donald to provide the insurance.

Donald would arguably be in contempt if he did not provide medical and dental insurance for Carter as ordered by the court. He can currently provide such insurance at no cost to him because it is provided by his employer. Thus, contrary to Kristy's assertion, it will be advantageous to Donald to cover Carter under his employer's plan rather than to reimburse Kristy for one-half the premium costs she would incur to provide the coverage. Donald therefore has no incentive to not provide insurance for Carter.

However, we agree in part with Kristy's position on this issue, believing the district court's order should be modified to provide that if Donald fails to provide medical and dental insurance coverage for Carter then Donald shall reimburse Kristy for whatever it costs her to provide such coverage for Carter alone.

Donald seeks an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in the appellate court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We consider the needs of a party seeking an award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* The district court found, and the parties do not

dispute, that Donald's income for 2007 was \$56,800 and Kristy's was \$30,740. Taking into consideration the relevant factors, we conclude each party should be responsible for his or her own attorney fees on appeal and deny Donald's request.

Based on our de novo review, and for the reasons set forth above, we affirm the district court's award of five weeks of summer visitation, finding it is proper, reasonable, and in Carter's best interest. We modify the court's assessment of medical support costs to provide that if Donald fails to provide medical and dental insurance coverage for Carter then Donald shall reimburse Kristy for (1) what it costs Kristy if she purchases policies covering only Carter, or (2) the incremental costs of covering Carter if she purchases policies covering not only Carter but an additional person or persons as well. We deny Donald's request for an award of appellate attorney fees. Costs are taxed two-thirds to Kristy and one-third to Donald.

AFFIRMED AS MODIFIED.