IN THE COURT OF APPEALS OF IOWA

No. 8-788 / 08-0369
Filed January 22, 2009

MATT D. HEBERLING,
Petitioner-Appellee,

vs.

MARY L. GABEL,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

A mother appeals from the district court's award of physical care and refusal to interview and appoint a guardian ad litem for her child. The father cross-appeals seeking appellate attorney fees. **AFFIRMED.**

Carrie Coyle, Davenport, for appellant.

Jennie Clausen and Catherine Cartee of Cartee & Clausen Law Firm, P.C., Davenport, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Potterfield, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Matt Heberling and Mary Gabel are the parents of a child who was born in 2000. Heberling and Gabel resided together in Davenport from 1997 until 2005 when their relationship ended. During the time of their cohabitation, Gabel was primarily responsible for supporting the family financially. She worked roughly sixty hours per week as the general manager at Hooter's while Heberling, a self-employed carpenter, was able to decrease his work schedule to around fifteen hours per week so that he could care for the child. Gabel later obtained a job at Front Street Brewery, where she was able to decrease her workweek and spend more time with her child. However, Heberling claims that Gabel was out late and often intoxicated, and therefore he was the primary caregiver for the child. Heberling testified that he was responsible for bathing, feeding, playing with, and caring for the child. Gabel testified that Heberling was the primary caregiver for the child for the first one and one-half years of the child's life.

Heberling and Gabel separated in 2005 when Gabel began a relationship with another man, Joe Cunningham. Cunningham is manager and part-owner of a ranch resort in Missouri, about nine hours away from Davenport. Gabel plans to move to Missouri to live with Cunningham. She expects to work roughly twenty hours per week on the ranch. Gabel hopes that Heberling will maintain his close relationship with the child. Gabel testified that she would provide transportation once per month to allow Heberling to see his daughter. Gabel also testified that she would be flexible regarding visitation around holidays.

Heberling continues to live in Davenport, where both of the parties' extended families currently reside. He has increased his work hours since the child began school. He testified that he now works roughly thirty-five hours per week and is otherwise available to care for the child. In addition, he claims that his family and Gabel's family are willing to help care for the child when he cannot. Heberling testified that he would be flexible regarding visitation, but did not feel that it was his duty to provide transportation for the child to Missouri. However, he stated that he would have no problems allowing Gabel to see the child if she could arrange transportation.

The record establishes that both parents have been supportive and caring and are bonded with their child. Both parents see the child regularly, attend special events, and facilitate her participation in extracurricular activities. Both parties testified that the other parent was a good parent to the child. Both Heberling and Gabel want to have physical care of the child.

On May 18, 2007, Heberling filed a petition to establish paternity, custody, and visitation. The court set a trial date of December 11, 2007. On November 21, 2007, Gabel filed a motion to have the district court appoint a guardian ad litem to protect the interests of the child. Heberling filed a resistance to the motion, arguing that the parties' attorneys could sufficiently represent the child's interests and that Gabel's motion would unnecessarily delay the trial. The district court denied the motion for appointment of a guardian ad litem for the child. On December 7, 2007, Gabel filed an application requesting that the court interview the seven-year-old child in camera prior to the trial. The district court denied that motion as well.

The district court awarded physical care of the child to Heberling. Gabel appeals, arguing that: (1) placing physical care with Heberling is not in the best interests of the child; (2) the district court erred in awarding physical care of the child to Heberling partially based on its erroneous finding that he was the primary caretaker of the child; (3) the district court erred in refusing to appoint a guardian ad litem on behalf of the child and in refusing to allow the child to be interviewed in camera. Heberling cross-appeals seeking an award of appellate attorney fees.

II. Standard of Review

Because this is an action in equity, our review is de novo. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995). We give weight to the district court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. *Id.* at 278. Child custody "is ultimately decided by determining under the whole record which parent can minister more effectively to the long-range best interests of the children." *In re Marriage of Bowen*, 219 N.W.2d 683, 687-88 (Iowa 1974).

III. Best Interests of the Child

Gabel argues that the district court erred in finding that it was in the child's best interests to award physical care to Heberling. The court considers many factors in determining which parent would best serve the child's interests. Gender is irrelevant in custody considerations. *In re Marriage of Wessel*, 520 N.W.2d 308, 310 (Iowa Ct. App. 1994). The court does consider stability and continuity of caregiving as important factors, though a parent's prior role as the primary caregiver does not necessarily render that parent the primary caregiver permanently. *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007); *In re*

Marriage of Fennell, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992). We also consider the characteristics of the child, the needs of the child, the characteristics of each parent and his or her capacity to provide for the needs of the child, the relationship between the child and each parent, the nature of each proposed home environment, and any other relevant matters. *In re Marriage of Winter*, 223 N.W.2d 165, 166-167 (Iowa 1974).

We find that Heberling will best be able to provide the child with stability. Both parties admit that Heberling was the primary caregiver of the child for the first one and one-half years of her life. The record supports the district court's finding that this status continued well beyond the first one and one-half years. Heberling has continued his relationship with the child since the parties have separated. Heberling will continue to reside in the Quad Cities, where the child has lived her whole life. The child has a close relationship with extended family members, all of whom live in the Quad Cities area. If Gabel were awarded primary physical custody, the child would not only be separated from her entire family, but she would also be forced to transfer to another school. The district court's decision to award physical care to Heberling provides the child with stability and the opportunity to maintain her relationships with her extended family.

We also find that the record supports Heberling's assertions that he will encourage the child's relationship with Gabel. While he will not provide transportation for the child to Missouri, he has expressed that he will be flexible as far as visitation when Gabel is visiting the Quad Cities area, which Gabel testified she planned to do at least once per month. Heberling stated that he

would support "very liberal visitation" and expressed a willingness to allow the child to see Gabel during the summers, on weekends, and on specific holidays. We agree with the district court that Heberling will facilitate contact between the child and Gabel and Gabel's side of the family.

We also agree with the district court that Heberling is financially able to care for the child. He testified that he works thirty-five hours per week and charges roughly twenty dollars per hour. Flexibility in his work schedule allows him to care for the child nearly any time she is not in school. When he cannot be with her, he can rely on his extensive family to help care for the child. While we do not doubt that Gabel has been active and involved in the child's life, we find that, for the reasons evaluated above, it is in the child's best interests that physical care be granted to Heberling.

IV. Primary Caretaker

Gabel argues that the district court awarded physical care of the child to Heberling based in part on its erroneous belief that Heberling was the primary caregiver for the first four years of the child's life. While the court is not required to award physical custody to the historical primary caretaker, the court is to consider which parent was the primary caregiver as one of many factors in deciding custody. *Hansen*, 733 N.W.2d at 696.

We find that the record supports the district court's conclusion that Heberling was the primary caregiver for the first four years of the child's life. We agree with the district court's findings that Heberling participated in doctor appointments, bathing, feeding, and other care of the young child while Gabel was at work. Gabel's work schedule required her to work many hours, often late

at night. After Gabel changed jobs, she admits that she still worked late nights and also stayed out on occasion with Cunningham. Though Gabel eventually reduced her work hours and became closer to the child, Heberling continued his active parenting to the extent Gabel permitted following the separation of the parties. In addition, the record demonstrates that, while the district court considered which parent was the primary caretaker, it also evaluated and weighed other factors established by the evidence. We find that the district court properly considered many factors in determining to whom it should award physical care.

V. Guardian Ad Litem and In Camera Interview

Gabel also argues that the district court erred in refusing to appoint a guardian ad litem to represent the child. Iowa Code section 598.12(2) (2007) provides "[t]he court may appoint a guardian ad litem to represent the best interests of the minor child . . . of the parties." This code provision allows, but does not require, the district court to appoint a guardian ad litem. Whether to appoint a guardian ad litem is within the district court's discretion. *See In re Marriage of Teepe*, 271 N.W.2d 740, 744 (Iowa 1978).

We cannot find that the district court abused its discretion in refusing to appoint a guardian ad litem for the child. Gabel did not request an attorney for the child until six months after Heberling filed his petition to establish paternity, custody, and visitation. She filed her motion to appoint a guardian ad litem roughly three weeks before the trial was scheduled. The appointment of a guardian ad litem at that time almost certainly would have delayed the trial.

More importantly, a guardian ad litem was not necessary in these circumstances, where the parents had a history of communication and cooperation regarding the child's best interests. A thorough review of the record establishes that the interests of the child were fully represented without the appointment of a guardian ad litem.

Gabel argues that the district court erred in failing to consider the child's wishes as to where she wanted to live and that the district court erred in refusing to interview the child in camera outside the presence of the parties. The court is to consider the preferences of the child only "if the child is of sufficient age and maturity." *Winter*, 223 N.W.2d at 167. The record establishes that the district court did not consider the child, who was barely seven years old at the time of the trial, to be of sufficient age and maturity. An in camera interview would have served no purpose other than to place the child unnecessarily in the middle of the custody battle. We do not find that the district court erred in refusing to interview the child.

VI. Attorney Fees

Heberling argues that he should be awarded appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's sound discretion. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). The court considers the needs of the party making the request, the ability of the other party to pay, and whether the party making the request is obligated to defend the trial court's decision on appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). Based on the parties' respective incomes, we decline to

award appellate attorney fees.

AFFIRMED.