

IN THE COURT OF APPEALS OF IOWA

No. 9-344 / 08-1593
Filed June 17, 2009

**Upon the Petition of
JAMIE ALLEN FERGUSON,**
Petitioner-Appellee,

**And Concerning
KRISTINE BERNICE FERGUSON,**
Respondent-Appellant.

Appeal from the Iowa District Court for Benton County, Douglas S.
Russell, Judge.

The respondent appeals from the district court's order denying her request
for attorney fees. **AFFIRMED.**

John Mossman of Mossman & Mossman, L.L.P., Vinton, for appellant.

D. Raymond Walton of Beecher Law Offices, Waterloo, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

This case concerns the award of attorney fees in a paternity/custody action under Iowa Code chapter 600B (2007). The question on appeal is whether the district court properly denied attorney fees to Kristine Ferguson after determining she was not the prevailing party in the litigation. Kristine asserts the district court's original decision to award her attorney fees, which it later reversed, was correct. Jamie Ferguson contends that because Kristine did not prevail in the litigation as a whole, the court appropriately declined to award her attorney fees under chapter 600B. We agree with Jamie and affirm.

I. FACTS AND PROCEDURAL HISTORY

Jamie and Kristine were married in 1998 and then divorced in 2003. Subsequently, they rekindled their relationship, which lasted from 2004 to 2007, before finally separating again. During this time, Kristine was also involved in a relationship with another man, Michael Dolphin Jr. In 2006, Kristine gave birth to Nicolette. Jamie, believing he was the father, initiated a proceeding for joint legal custody of Nicolette, requesting that questions of physical care, visitation, and child support be decided as well. Kristine responded with an application to establish paternity, asserting Dolphin was Nicolette's father. By order of the court, both men were tested. The results established that Jamie was the father of Nicolette and Dolphin was not. Thus, the issue of paternity was settled before trial, and was no longer a disputed issue.

The contested issues at trial were custody and physical care, visitation, child support, health insurance, tax exemptions, and attorney fees. Under a temporary consent order, the parties had agreed to alternate weeks with

Nicolette, an arrangement that probably could not work in the long run because, by the time of trial, Jamie was living and working in Missouri. Accordingly, the trial centered on which parent would have physical care of Nicolette, and the other consequences flowing therefrom.

Following trial, the court entered final judgment on August 15, 2008, awarding physical care of Nicolette to Jamie. In addition, the court ordered Jamie to pay \$10,000 of Kristine's attorney fees, citing Iowa Code section 598.21. Jamie timely filed a motion to amend the findings and judgment pursuant to Iowa Rule of Civil Procedure 1.904, asserting the court erred in awarding attorney fees under that chapter. Because the suit was not a dissolution of marriage action, but rather a paternity/child custody action, Jamie maintained Iowa Code chapter 600B should have been applied rather than chapter 598. Upon consideration of Jamie's motion, the district court agreed section 600B.25(1) was the correct statute to be applied, and attorney fees could only be awarded to the prevailing party under that petition. The district court then found Kristine was not the prevailing party and reversed its decision as to attorney fees, striking the award from the record.

Kristine appeals. She argues that the district court had the power to award her attorney fees under its general equitable powers, or alternatively that she prevailed on a number of issues and therefore, is entitled to fees under section 600B.25(1).

II. STANDARD OF REVIEW

Generally, we review paternity actions and questions ancillary to paternity actions de novo. *Markey v. Carney*, 705 N.W.2d 13, 25 (2005). However, a

district court's decision on whether to award attorney fees in a paternity action "rests within the sound discretion of the court" and will be reviewed only for abuse of discretion. *Id.*

III. LEGAL ANALYSIS

Two separate provisions of Iowa Code chapter 600B grant the district court discretion to award attorney fees to a prevailing party. Iowa Code §§ 600B.25(1), 600B.26. Section 600B.25(1) seems to be the relevant provision where, as here, the proceeding is commenced as a paternity action but subsequent determinations are rendered in the same case as to physical care and child support. See *Markey*, 705 N.W.2d at 25 (applying section 600B.25(1)). Section 600B.25(1) appears to be on point when paternity has been decided in a prior proceeding and the current proceeding seeks modification of the prior custody or visitation arrangements. Regardless, the two provisions are worded similarly, and our ruling does not depend upon which of them is applied. What is clear is that one of them must be applicable.

Prior to trial, the parties stipulated that Jamie was the biological father and each sought physical care of Nicolette. The district court gave careful consideration to all facts and circumstances presented and awarded Jamie physical care, also requiring Kristine to pay child support to Jamie. Thus, on the central trial issue, Jamie prevailed. Nonetheless, the district court originally awarded \$10,000 in attorney fees to Kristine.

After receiving Jamie's rule 1.904(2) motion, the district court reconsidered its prior ruling on attorney fees. The court noted that it had mistakenly applied the law applicable to dissolution proceedings, rather than paternity proceedings.

In dissolution proceedings, the district court has considerable discretion in awarding attorney fees. Whether attorney fees should be awarded largely depends on the respective abilities of the parties to pay. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006); *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). The record here shows Jamie's income was substantially greater than Kristine's. Thus, if this had been a dissolution action, the district court's original award might well have been appropriate.

However, as the district court correctly concluded on reconsideration, the law applicable to paternity actions is different. The district court's discretion to grant attorney fees in paternity cases may only be exercised on behalf of the "prevailing party." See Iowa Code §§ 600B.25(1), 600B.26. Because Jamie was the prevailing party, the district court properly revisited and reversed its original decision to grant attorney fees to Kristine.

Kristine also contends the award of attorney fees was within the court's general equitable power and should be reinstated. As discussed above, this litigation was governed by Iowa Code chapter 600B, which covers the entire arena of paternity dispute questions. Chapter 600B contains two express provisions regarding attorney fees—sections 600B.25(1) and 600B.26. We believe it would undermine the express statutory language contained in those provisions if a non-prevailing party could recover attorney fees under a court's general equitable power. See *W.P. Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 66 (Iowa 2003) (stating attorney fees are not allowable unless authorized by statute or contractual agreement). Accordingly, the district court did not err in

denying fees to Kristine. Certainly, its refusal to award attorney fees did not amount to an abuse of discretion.

Kristine has also requested attorney fees on appeal. For the reasons we have already discussed, we believe an award of appellate attorney fees is also inappropriate.

We affirm the district court's judgment.

AFFIRMED.