

**IN THE COURT OF APPEALS OF IOWA**

No. 9-665 / 09-0481  
Filed November 25, 2009

**IN RE THE MARRIAGE OF ROBERT E. MALLOY  
AND KELLI JOYCE MALLOY**

**Upon the Petition of  
ROBERT E. MALLOY,**  
Petitioner-Appellee,

**And Concerning  
KELLI JOYCE MALLOY,**  
Respondent-Appellant.

---

Appeal from the Iowa District Court for Henry County, William L. Dowell,  
Judge.

Kelli Joyce Malloy appeals from the decree dissolving her marriage to  
Robert E. Malloy. **AFFIRMED IN PART, REVERSED IN PART, AND  
REMANDED WITH DIRECTIONS.**

Timothy K. Wink of Schweitzer & Wink, Columbus Junction, for appellant.

Constance Peschang Stannard of Johnston, Stannard, Klesner, Burbidge,  
& Fitzgerald, P.L.C., Iowa City, for appellee.

Heard by Vogel, P.J., and Doyle and Mansfield, JJ.

**DOYLE, J.**

Kelli Joyce Malloy appeals from the decree dissolving her marriage to Robert E. Malloy. She contends the district court erred in failing to return her to her former name and in awarding Robert primary physical care<sup>1</sup> of the child born of their marriage, hereinafter referred to as B. Additionally, Kelli maintains the injunction within the decree preventing Kelli from communicating with B. in any manner regarding her biological father or allowing her biological father to have any relationship or contact or visitation is unreasonable and should therefore be cancelled. Robert requests an award of appellate attorney fees. Upon our de novo review, we affirm in part, reverse in part, and remand with instructions.

***I. Background Facts and Proceedings.***

Robert and Kelli dated each other briefly in approximately 1993-1994. Thereafter, Robert joined the Marine Corps and moved away from Iowa. He married and has two daughters from that marriage who were born in 1997 and 1998. Robert served four years and was honorably discharged from the Marine Corps in 1998. He and his first wife returned to Iowa thereafter and later divorced in 2001. Robert has primary physical care of his daughters and shares joint legal custody. In that divorce, Robert was awarded the marital home where he and his daughters resided. Robert is employed as a quality manager and had worked for his employer for ten years at the time of trial.

Kelli also has two daughters, born in 1995 and 1998 before the parties' marriage. Kelli's eldest child lives with Kelli but over the years lived for

---

<sup>1</sup> Although the term "primary physical care" is not used in Iowa Code chapter 598 (2007), we nevertheless use the term in this opinion since it was used by the parties and the district court.

substantial periods of time with Kelli's grandmother. In September 2003, Kelli was arrested for possession of methamphetamine. In October 2003, she pled guilty, received a deferred judgment, and began rehabilitation. That same month, the father of her child born in 1998 filed a petition for custody of the child, alleging among other things that Kelli was addicted to and regularly used crystal methamphetamine. Kelli did not answer the petition, and the district court in February 2004 entered an order establishing custody and support by default against Kelli. The court granted the father physical care of the child with reasonable visitation by Kelli, and ordered Kelli to pay child support. Kelli normally has visitation with this child once during the week and every other weekend.

Robert and Kelli began dating again in December of 2003 while Kelli was in rehabilitation. After the two began dating, Robert found out that Kelli was pregnant. Robert was aware that he was not father of the child. Kelli was pretty sure the child's father was S.R. S.R. has a lengthy history of substance abuse and had three convictions for operating while intoxicated and two drug felony convictions as of July 2008. When Kelli told S.R. he might be the father of this child, S.R. was very clear he wanted nothing to do with Kelli. Robert expressed that he would be willing to assume the role of being the child's father. Robert knew of Kelli's past arrest and drug use. Kelli, trying to clean up her life, found that Robert offered her a home and stability and accepted Robert's offer.

Robert and Kelli were married in April 2004. This was Robert's second marriage and Kelli's first marriage. In July 2004, Kelli gave birth to B. Robert signed B.'s birth certificate as her father. Robert cared for B. as his own child

and acted in all respects as her father. Robert, Kelli, Robert's daughters, B., and sometimes Kelli's other two daughters lived together in Robert's home. B. believed that Robert was her father and that Robert's two children were her siblings.

After B.'s birth, S.R. arranged for paternity testing, and the results evidenced that S.R. was the biological father of B. However, S.R. never took any legal action to judicially establish his paternity. S.R. also did not financially support B.

Kelli was friends with S.R.'s sister and maintained her friendship with her after B. was born. S.R.'s sister sometimes provided childcare for Robert and Kelli, and Robert allowed some contact between B. and S.R.'s family. However, unbeknownst to Robert, Kelli periodically brought, allowed, and permitted B. to visit with S.R., often when S.R. was at his sister's home. Kelli also sometimes allowed S.R. to visit B. at her and Robert's home when Robert was at work. B.'s contact with S.R. was initially very minimal; S.R. saw B. maybe once or twice a month at best, and there were gaps of time where S.R. had no contact with B. at all. S.R.'s contact with B. was sporadic during the year 2006 because S.R. was in trouble with the law and using drugs. In early 2007, S.R. was sent to prison.

Robert and Kelli's marriage was rocky. In 2006, Kelli began working part-time as an apprentice electrician, and at the time of trial, she was a full-time employee and eligible for benefits. In 2007, Robert suspected Kelli of having a relationship with a coworker. The parties initially sought counseling, but on March 13, 2007, Robert filed his petition for dissolution. Robert's petition sought joint legal custody of B. and permanent physical care of the child, with Kelli

having visitation rights. On May 8, 2007, Kelli filed her answer and counterclaim seeking to disestablish Robert as B.'s father pursuant to Iowa Code chapter 600B (2007). Kelli took B. and moved out of the marital home. Kelli was granted temporary primary physical care of B.

A bitter custody battle ensued. Because Kelli sought to disestablish Robert's paternity, a guardian ad litem was appointed for B. Additionally, a guardian ad litem was appointed to represent S.R. because he was a necessary party to the disestablishment of paternity proceeding and he was at the time confined in a state penal institution on a drug conviction. On December 17, 2007, Robert filed a petition for the termination of S.R.'s parental rights under Iowa Code chapter 600A.

On February 11, 2008, Robert filed a request for an injunction. Robert alleged Kelli had been taking B. to visit S.R. at the prison where S.R. was incarcerated and requested Kelli be enjoined from allowing B. to visit S.R. On February 12, 2008, the court issued a temporary injunction without hearing on the matter. The court found that S.R., although alleged to be B.'s biological father, had not been established as such and had no parental relationship or rights with regard to B. Additionally, the court found that S.R. was incarcerated and a relationship with him at that time would be of no benefit to B., who was at that time three-and-a-half years old. The court then set the matter for hearing.

Kelli filed a motion to dissolve the temporary injunction. Kelli asserted that B. had known S.R. all of the child's life and that interruption of their relationship was not in B.'s best interests. She also argued that she had not had an opportunity to file a response showing that the allegations were untrue.

Following a hearing on the matter, the district court entered an order denying Kelli's motion to dissolve the temporary injunction and ordering the injunction to remain in full force and effect. The court's order stated:

Kelli testified under oath that [S.R.] has had a relationship with [B.] since [B.'s] birth. She states that she and [S.R.] have continued to maintain contact all during the pregnancy and following the birth and alleges that Robert was aware of this fact. However, both [S.R.] and his sister testified that [S.R.] did not have much of a relationship with [B.] until he went to prison in December of 2006 or January 2007. [S.R.] acknowledged he had agreed to stay away and let Robert be [B.'s] dad because Robert and Kelli were married. . . . Both [S.R.] and [S.R.'s sister] acknowledge that, although [S.R.] may have seen [B.] occasionally, they both knew that this was being done secretly and without Robert's knowledge. While Robert acknowledges that he approved of [S.R.]'s family having a relationship with [B.], he was apparently unaware of the extent of these contacts or that [S.R.] was occasionally present. Additionally, the record is uncontroverted that those individuals, at least until recently, had not discussed or emphasized their roles as [B.'s] potential relatives. Instead, [B.] merely knew [S.R.] as an acquaintance and knew his family.

The evidence indicates that Kelli began a course of activities designed to interfere with that relationship when Robert pursued his current parental rights regarding [B.]. . . .

Despite the pendency of these actions, Kelli has chosen to inform [B.], who was three years old, that [S.R.] is her daddy and that Robert is [Robert's other daughters'] daddy but not hers. She has attempted to explain this to [B.] by telling her that she has two daddies. This action was taken in spite of Kelli's knowledge that [S.R.] has no legal rights or relationship with regard to B. at this point. . . . In addition to attempting to transfer [B.'s] parental relationship from Robert to [S.R.] during the pendency of this action, Kelli has also allowed and encouraged B. to visit [S.R.] in prison, which has been occurring since August of 2007. Kelli sees nothing wrong with [B.'s] visitation of [S.R.] in a prison, even though [S.R.] himself admits that he has concerns about the prison being an appropriate environment. . . .

. . . .  
Kelli in her testimony acknowledges that she sees no problem with putting [B.] in the middle of this litigation, even though she is aware that paternity is at issue and any parental rights that [S.R.] may ultimately possess may be terminated. Kelli does not see any detriment to [B.] and establishing a parental relationship with [S.R.] where one has not previously existed. She does not

recognize the impact on [B.] of telling her that she has two daddies and advising her that her father of three and a half years is not her daddy.

The court found that Kelli could not be trusted to put [B.'s] interests above her own and as a result, injunctive relief was appropriate to prevent further harm to B.

On July 1, 2008, the juvenile court entered its ruling terminating S.R.'s parental rights to B. pursuant to Iowa Code section 600A.8. The court found that S.R. had abandoned the child and had waived his right to establish his right as B.'s father. The court also found that the termination of S.R.'s parental rights was in B.'s best interests. S.R. did not appeal the termination of his parental rights.

On October 29, 2009, trial began on Robert's petition for dissolution and Kelli's counterclaim to disestablish Robert's paternity of B. At the time of trial, Robert was thirty-four years old and Kelli was twenty-nine years old. At trial, Kelli dismissed her counterclaim, but B.'s guardian ad litem continued to participate in the proceedings. After a two-day trial, the parties filed their proposed findings of facts, conclusions of law, and decrees with the court. For the first time, Kelli, in her proposed decree, requested she be returned to her former name of "Kelli Ann Hildebrand." B.'s guardian ad litem also filed a report after trial, noting he had concerns about Kelli's credibility and finding that Robert testified more credibly.

The guardian ad litem further noted:

The record is clear that both parties have exercised poor judgment. Their past struggles with relationships and their present inability to effectively resolve even minor issues between themselves concerning the ability to schedule visitations to accommodate visits with [B.'s] siblings do not bode well for [B.'s] future. Nonetheless,

when I consider the judgments involved in this matter, I am most acutely concerned about the judgment to unilaterally reintroduce [S.R.] into [B.'s] life after he had been effectively out of her life for over one-half year and had never played a significant role in [B.'s] life. The injection of the issues of disestablishment, and the reintroduction of [S.R.] into the child's life all speak of a willingness to utilize any and all possible means, even if it involved damage to the child, for the sake of securing the custody of that child. . . .

The guardian ad litem expressed grave concerns about how best to deal with the family of S.R. The guardian ad litem ultimately concluded that it was a question that must be resolved by the parties. The guardian ad litem did not take a position as to custody of B. or any potential relationship of B. with S.R.

On February 20, 2009, the district court entered its statement of issues, findings of fact, conclusions of law, judgment and decree. The court found that the parties should have joint legal custody. Although the court was satisfied that either Robert or Kelli would be a fit and proper person to have primary physical care of B., the court concluded that B.'s long-term best interests required Robert be granted primary physical care. The court granted Kelli liberal and reasonable rights of visitation with B. Additionally, the court's order stated:

The court too shares the guardian ad litem's concerns regarding contact between [S.R.] and [B.]. The court is satisfied that any contact of any type between [S.R. and B.] now and in the foreseeable future would be detrimental to [B.'s] emotional and psychological well-being; not be in [B.'s] best interest; and, have the substantial likelihood of adversely affecting the parent/child relationship between Robert and [B.]. Accordingly, the court is satisfied that some restrictions are appropriate under the circumstances shown to reasonably safeguard [B.], and prevent any contact between [S.R. and B.].

The court therefore ordered:

Kelli shall be restrained and enjoined, until further order of the court or written agreement of the parties, from the following:



(a) communicating with [B.] in any manner regarding her paternity, or in any way implying to [B.], directly or indirectly, that Robert is not her father and [S.R.] is her father;

(b) making or encouraging any attempt, directly or indirectly, to establish a relationship between [B. and S.R.]. Such provision shall include, but not be limited to, any visitation, telephone contact or other form of communication between [S.R. and B.]; and,

(c) from interfering in any manner, directly or indirectly, with the parent/child relationship between Robert and [B.].

Any violation of the foregoing restrictions may adversely affect Kelli's future visitation privileges as well as her standing as a joint legal custodian of [B.].

The court also noted that Kelli for the first time in her proposed decree requested she be returned to her former name "Kelli Ann Hildebrand." The court stated it did not know Robert's position with respect to Kelli's request. The court found that Kelli was referred to as both "Kelli Ann" and "Kelli Joyce" in various court documents and that changing Kelli's surname at that time might be confusing to [B.]. However, the court did not specifically rule on Kelli's request.

On March 2, 2009, Kelli filed her motion to enlarge or amend the court's decree. Among other things, she requested her name be changed to "Kelli Joyce Hildebrand" and stated Robert did not resist her name change request. Kelli also requested the court reconsider what was in B.'s best interests and grant her primary care of B. Robert resisted the reconsideration of primary care, but did not resist Kelli's name change. On March 6, 2009, the district court filed its ruling, denying relief on those two issues raised by Kelli.

Kelli now appeals.

## ***II. Scope and Standards of Review.***

We review the provisions of a dissolution decree de novo. Iowa R. App. P. 6.907 (2009); *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007); *In*

*re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *Sullins*, 715 N.W.2d at 247 (quoting *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003)).

### **III. Discussion.**

On appeal, Kelli contends the district court erred in failing to return her to her former name and in awarding Robert primary physical care of B. Additionally, Kelli maintains the injunction within the decree preventing Kelli from communicating with B. in any manner regarding her biological father or allowing her biological father to have any relationship or contact or visitation is unreasonable and should therefore be cancelled. Robert requests an award of appellate attorney fees. We address their arguments in turn.

#### **A. Name Change.**

Kelli requested the restoration of her maiden name, Kelli Joyce Hildebrand. Robert does not resist Kelli's request. However, the district court did not grant Kelli's request, noting that Kelli failed to ask for the name change in her answer or counterclaim and that a change in Kelli's surname may be confusing to B.

Iowa Code section 598.37 authorizes a dissolution court to change a person's name to either the name appearing on the person's birth certificate or the name the person had immediately before the marriage. Iowa Code § 598.37;

*In re Marriage of Erickson*, 553 N.W.2d 905, 908 (Iowa Ct. App. 1996). Additionally, the presumption that the child and parent should have the same surname is outdated and has been rejected by our courts. See *In re Marriage of Gulsig*, 498 N.W.2d 725, 729 (1983). Given the rejection of that presumption in this day and age, and under the facts of this case, we find that a change in Kelli's surname is unlikely to be confusing to B. Although it is certainly a better practice for a party to request a change of name prior to trial, we find the district court should have granted Kelli's request for restoration of her maiden name.

***B. Physical Care.***

Kelli argues the district court also erred in awarding Robert primary physical care of B. Kelli argues the district court failed to consider that she was the child's primary caretaker during the marriage, and that the court provided excessive weight to her past drug use and a relationship with another man.

In determining whether to award joint physical care or physical care with one parent, the best interests of the child is the first and governing consideration. Iowa R. App. P. 6.904(3)(o); *Hansen*, 733 N.W.2d at 695. The district court is guided by the factors enumerated in Iowa Code section 598.41(3), as well as other nonexclusive factors enumerated in *Hansen*, 733 N.W.2d at 696-99, and *In re Marriage of Winter*, 233 N.W.2d 165, 166-67 (Iowa 1974). See *Hansen*, 733 N.W.2d at 698 (holding that although Iowa Code section 598.41(3) does not directly apply to physical care decisions, "the factors listed [in this code section] as well as other facts and circumstances are relevant in determining whether joint physical care is in the best interest of the child"). Although consideration is given in any custody dispute to allowing the child to remain with a parent who

has been the primary caretaker, *see id.* at 696, the fact that a parent was the primary caretaker of the child prior to separation does not assure an award of physical care. *See In re Marriage of Toedter*, 473 N.W.2d 233, 234 (Iowa Ct. App. 1991). The ultimate objective of a physical care determination is to place the child in the environment most likely to bring him or her to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999); *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). As each family is unique, the decision is primarily based on the particular circumstances of each case. *Hansen*, 733 N.W.2d at 699.

We defer to the credibility assessments of the district court and conclude the district court's factual findings are fully supported by the record. Further, the district court's detailed written ruling reflects that it considered all of the appropriate factors in making a physical care award. Therefore, we affirm the district court's physical care decision.

***C. Restrictions Concerning the Child's Biological Father.***

Finally, Kelli maintains the injunction within the decree preventing Kelli from communicating with B. in any manner regarding her biological father or allowing her biological father to have any relationship or contact or visitation is unreasonable and should therefore be cancelled. Robert argues error was not preserved and alternatively, the restrictions were reasonable. Since the record reveals the issue of B.'s contact with the biological father was raised at trial, we will pass on the question of error preservation and address the merits of Kelli's claim. *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999) (bypassing error preservation concerns and affirming on merits).

It is true that in general, courts avoid placing restrictions or conditions on a parent's visitation with a child following a dissolution. See *In re Marriage of Rykhoek*, 525 N.W.2d 1, 4 (Iowa Ct. App. 1994). Any conditions which are imposed must be in the best interests of the children. *Id.* at 5. A parent's visitation should not be restricted unless direct physical harm or significant emotional harm to the children or a parent is likely to result from such contact. *In re Marriage of Gilliland*, 487 N.W.2d 363, 366 (Iowa Ct. App. 1992).

The juvenile court determined it was in B.'s best interests that the biological father's parental rights be terminated. Termination of parental rights results in "a complete severance and extinguishment of a parent-child relationship." Iowa Code § 600A.2(17). The biological father did not appeal the termination of his parental rights. S.R. has no right to have any relationship with B. See generally *In re J.P.*, 499 N.W.2d 334, 339-40 (Iowa Ct. App. 1993) ("Once a court determines the requirements are met to support termination, our legislature has chosen not to allow a parent to have enforceable rights."); see also *In re Adoption of M.M.B.*, 376 N.W.2d 900, 903 (Iowa 1985) ("Because of the termination of [the biological father's] parent-child rights, he no longer was in the position of a non-custodial parent."). Kelli argues that since S.R. is the biological father the court should not prevent his contact with B. Kelli has no standing to assert on S.R.'s behalf a right S.R. does not have.

Kelli argues the injunction is unreasonable. She makes the argument despite the juvenile court's determination that severance and extinguishment of that relationship was in B.'s best interests, the district court's findings the temporary injunction was in B's best interest, and the guardian ad litem's belief

that it was not beneficial to B. to hear questions about whether S.R. should be in her life. Kelli argues “[i]t is unhealthy to prevent the child from addressing these issues until [B.] is [eighteen] or prevent the mother from talking with the child about these issues.” She makes this argument despite her own admission to the district court that B. is not age appropriate to understand what has transpired. Upon our de novo review of the record, we find the injunction to be in B.’s best interests and conclude the restrictions imposed by the district court to be justified to prevent further harm to B. Further, we find the restriction that the biological father should not be discussed with B. “until further order of the court or written agreement of the parties” appropriately balances the parties’ and B.’s interests regarding future discussion of the biological father.

***D. Appellate Attorney Fees.***

Robert seeks attorney fees for this appeal. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id.*; *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). Having considered the appropriate factors, we award Robert \$1000 in attorney fees for this appeal. Costs of this appeal are taxed one-half to each party.

***IV. Conclusion.***

We affirm the district court’s well-reasoned decisions to award physical care to Robert and to impose restrictions upon Kelli’s visitation with the child, and we award Robert appellate attorney fees. However, we find the district court

should have granted Kelli's request for restoration of her maiden name. We accordingly reverse on that issue and remand for entry of an order granting Kelli's request for a name change to Kelli Joyce Hildebrand.

***V. Postscript.***

Some 146 pages of trial transcript are included in the parties' appendix and we note the names of the witnesses were not inserted at the top of each page where witnesses' testimony appeared. This violation of Iowa Rule of Appellate Procedure 6.905(7)(c) may seem inconsequential, but having the witness's name at the top of each page makes our job navigating an appendix much easier. Additionally, the exhibits included in the appendix were not properly identified or described in the table of contents as required by rule 6.905(4)(c). Compliance with the rules facilitates our duty to achieve maximum productivity in deciding a high volume of cases. See Iowa Ct. R. 21.30(1).

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.**