

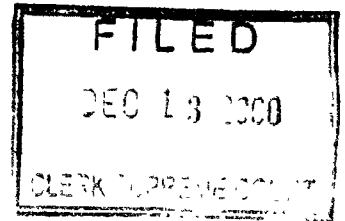
IN THE COURT OF APPEALS OF IOWA

No. 0-551 / 00-0423
Filed December 13, 2000

STEVEN G. REGENWETHER,
Petitioner-Appellee,

vs.

KERIE A. BODMAN,
Respondent-Appellant.



Appeal from the Iowa District Court for Clinton County, David E. Schoenthaler, Judge.

Kerie A. Bodman, the respondent, appeals a district court ruling awarding Steven G. Regenwether, the petitioner, physical care of their minor child, Brady.

AFFIRMED.

Dennis D. Jasper of Stafne, Lewis, Jasper, Preacher & Rowe, Bettendorf, for appellant.

Robert J. McGee, Clinton, for appellee.

Considered by Sackett, C.J., and Streit, J. and R. Peterson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

R. PETERSON, S.J.

Steven G. Regenwether and Kerie A. Bodman are the parents of Brady who was born on March 4, 1996. Kerie appeals the decision awarding the physical custody of Brady to Steven. She contends the physical custody of Brady should have been awarded to her and there is no authority for postsecondary education subsidy under Iowa Code section 598.1(a) (1999) for a child not born in a marriage. Kerie also requests an award of appellate attorney fees and costs incurred in connection with this appeal. We affirm.

I. Background and Proceedings.

Steven G. Regenwether and Kerie A. Bodman had an intimate unmarried relationship which began in the Fall of 1994, and concluded when Steven moved out of the apartment where he and Kerie were living in September of 1997. During this relationship, Brady Regenwether was born on March 4, 1996.

At the time of the trial, Steven was twenty-six years of age and living at 1415 Honey Lane in Clinton, Iowa, with Melody Driscoll and her two sons who were eight and nine years of age. Kerie was twenty-seven years of age and living at 908 Washington Avenue in Lowden, Iowa, with her husband, Christopher Bodman, her daughter, Courtney, and Brady. Courtney was born on November 27, 1991, while Kerie was in high school. Kerie was not married to Courtney's father, Matthew Langfitt.

During the time Steven and Kerie lived together, Steven provided the financial support for Kerie and Courtney, although Kerie does receive child support. In April of 1996, Steven secured employment at Guardian Industries

and worked there until he was hired as a firefighter and paramedic in September of 1998, for Clinton, Iowa. While at Guardian Industries, he also worked other jobs part time and began going to school.

During the time Steven and Kerie lived together, Kerie handled the financial matters of the parties. Unfortunately they disagreed about their finances and this led to confrontation between them. Some of these confrontations included physical contact.

One incident happened at Kokomos, which is a local tavern. Steven and Kerie had gone out that evening with other individuals and met at the tavern later in the evening. Kerie and Steven began arguing which resulted in a pushing match between them. Steven walked out of the tavern and Kerie followed and grabbed him and in the ensuing struggle, Steven's shirt was ripped.

The next incident also began at Kokomos. Steven wanted to talk about their finances, and Kerie did not. Steven persisted, however, finally left. When Kerie arrived home later that evening, they began arguing again. As a result of the argument, they engaged in a physical struggle. A third party called the police and when they came to the apartment, the police interviewed the parties and because Steven initiated bodily contact, the police arrested him for domestic abuse. The charges were subsequently dropped.

The next incident occurred when Steven and Kerie were in a boat with another couple. Kerie threw a beer can at Steven which spilled in the boat and upset Troy. An argument then ensued and continued after they returned to shore.

In September of 1997, Steven moved out of 21 Place Court where he had been living with Kerie, Courtney, and Brady. He lived in various places until November of 1998, when he moved in with Melody Driscoll. They plan to be married in April of 2000.

In March of 1998, Kerie obtained employment at Guardian Industries and worked there until April of 1999. During the period of time Kerie and Steven both worked at Guardian Industries, Steven and Kerie shared care for Brady. If this was not possible because they were both working at the same time, Brady was cared for generally by Jennifer Regenwether, Steven's sister.

In July of 1998, Kerie was convicted of operating a motor vehicle while intoxicated. That conviction resulted in the loss of her driver's license, although on a few occasions she did drive.

After Steven moved out, Kerie had a relationship with three other individuals. In January of 1999, she met Christopher Bodman. Approximately two months later Christopher's lease was up, and they moved in together. They were married on June 26, 1999.

Kerie's employment at Guardian Industries involved physical effort. In April of 1999, she left that employment indicating she wanted to spend time with Courtney and Brady. Four weeks after she left that employment, she suffered a miscarriage.

In July of 1999, Kerie, Christopher, Courtney, and Brady moved to Lowden, Iowa, from Clinton, Iowa. She explained this move by saying she

wanted to live in a small town, and she wanted her children to go to a small-town school.

Prior to the time Kerie moved to Lowden, Iowa, Steven enjoyed substantial visitation with Brady. Generally, not more than two days would elapse between his visits with Brady. After the move to Lowden, Iowa, Kerie restricted Steven's visitations with Brady to every other weekend and every other Wednesday. She contended this restriction was on the advice of her attorney, which is unfortunate if it is true. Due to the distance involved, Steven was somewhat erratic with times he would arrive to pick up Brady and return him. Because Kerie did not have a driver's license, she was unable to assist in the transportation for these visits.

Courtney spent a great deal of time while in Clinton with her maternal grandparents. Kerie did not make her parents aware of her intention to move to Lowden, Iowa. This has caused her parents some concern because they no longer are able to see Courtney as much as they had in the past.

Steven had been providing medical insurance for Brady. Both Steven and Kerie have taken him for doctors' appointments. On one occasion, Kerie called Steven and told him Brady had a bad night and was coughing and was very croupy throughout the night and she had made a doctor's appointment for him. She said, however, Christopher was upset she was babying Brady and he did not need to go to the doctor. Rather than taking Brady herself, she called Steven and asked him to come and pick him up and take him to the doctor. Steven did

this and it was determined Brady had a bronchial infection and secured a prescription to cure that.

On another occasion, Brady had an appointment at the dentist. Steven felt it would be better for him if both he and Kerie took him to the dentist. Kerie agreed to do so, and when Steven went to pick up Kerie to go to the dentist, she was not available.

Steven and Melody have described what they believe to be anxiety symptoms when it is Brady's time to return to Kerie. They contend at times Brady would run to the bedroom and lay on the bed and insist he did not want to leave.

Steven contacted Kerie and discussed enrolling Brady in preschool. Kerie indicated there was not one in Lowden. Steven then agreed to enroll him in a preschool in Clinton and provide the transportation back and forth when it met two days a week as well as pay for the cost of preschool in addition to the child support he is paying. Subsequently, Kerie found out a preschool began in Lowden, and she enrolled Brady in that preschool.

Steven filed a petition in equity on July 30, 1999, seeking to establish paternity, custody, and support. On August 31, 1999, the court entered an order providing for temporary support without addressing temporary custody or setting out visitation. Trial was held on November 23, and December 20, 1999, and on January 7, 2000, an order was entered that provided Steven was the father of Brady and Steven and Kerie would have joint legal custody of him with the physical care placed with Steven. It was further ordered Kerie pay child support

in the amount of \$50 per month and specific visitation was established. The court further deferred for future determination Brady's eligibility for postsecondary education subsidy under Iowa Code section 598.1(a).

II. Scope of Review.

Review in equity cases is de novo. Iowa R. App. P. 4. The appellate court gives weight to the findings of fact by the district court especially when considering the credibility of witnesses, but is not bound by them. Iowa R. App. P. 14(f)(7).

III. Custody.

Iowa Code section 600B.40 provides if custody of a child born out of wedlock is not awarded to the mother, the court shall consider factors specified in section 598.41(3) in making that determination, including but not limited to a parent's history of domestic abuse. We also consider the criteria delineated in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). When an issue of custody arises from the competing claims of unwed parents, the critical issue is not which parent possess a greater right to the child; rather, the controlling consideration must be the interest of the child; such decision involves selecting as custodial parent the person who can minister more effectively to the long-range best interests of the child. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981).

There was no expert testimony concerning the physiological and emotional needs of Brady. However, there was some indication of Brady's

anxiety when in Steven's physical custody and it was time for him to return to Kerie's physical custody.

Both parents are able to communicate with each other regarding Brady's needs and both have actively cared for him since their separation, although Kerie has cared for him more than Steven.

Kerie changed Brady's visitation with Steven after she moved to Lowden, Iowa. At that point, she substantially decreased Steven's visitation with Brady. We also note the move to Lowden also substantially curtailed Courtney's contact with her grandparents.

Steven first suggested Brady be enrolled in a preschool and made arrangements to enroll him in one and provide the necessary transportation.

There had been some incidents of physical contact during arguments between Steven and Kerie. The history of domestic abuse is not necessarily established by a single incident, nor does more than one minor incident automatically establish a history of domestic abuse. *In re Marriage of Ford*, 570 N.W.2d 757, 760 (Iowa 1997). It is for the court to weigh the evidence of domestic abuse, its nature, severity, repetition, and to whom it was directed. *Id.* The trial court did not find the incident of physical confrontation between the parties was such that it would be a factor in determining custody.

The trial court found Steven more stable and Melody and Steven to be more mature than Kerie and Christopher. We defer to the trial court's determination on these issues.

We believe Steven can minister better to the long-range best interest of Brady, and the trial court did not err in awarding physical custody of Brady to Steven. This will separate siblings, but the record does not show a substantial bond between Brady and Courtney.

IV. Postsecondary Education.

Kerie contends there is no authority for postsecondary education for a child not born in a marriage. Because Kerie does not cite any authority to support this issue, it may be deemed she has waived the issue. Iowa R. App. P. 14(a)(3). Denying a child a benefit to which other children are entitled simply because the child is illegitimate, violates equal protection. *Bryant v. Schuster*, 447 N.W.2d 566, 568 (Iowa App. 1989). There is no rational basis to allow a legitimate child to recover support through college and not allow an illegitimate child to recover the same. *Id.* The trial court did not err in its consideration of postsecondary education.

V. Attorney Fees.

Kerie request attorney fees in connection with this appeal. The trial court required Steven pay \$1000 toward Kerie's attorney fees. The record indicates Steven's income is \$36,000 a year, and Kerie is unemployed. Under appropriate circumstances, attorney fees can be awarded to an appellant even though that appellant is not entirely successful. *Lovett v. Lovett*, 164 N.W.2d 793, 804 (Iowa 1969). We accordingly conclude Steven should pay an additional \$500 to Kerie for appellant attorney fees.

In conclusion, we find the trial court did not err in awarding physical custody of Brady to Steven and the trial court did not err in deferring until a later date any postsecondary education subsidy. We also award Kerie the sum of \$500 for appellant attorney fees.

AFFIRMED.

Streit, J., concurs; Sackett, C.J. concurs specially without opinion.