IN THE COURT OF APPEALS OF IOWA

No. 1-378 / 00-1597
Filed October 12, 2001

JEFFREY ALLAN LAMISON,
Plaintiff-Appellee,

vs.

JODELL LENAE ARNOLD,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Jasper County, J. W. Jordan, Judge.

Jodell Arnold appeals from a custody order entered by the district court.

AFFIRMED.

Diane L. Dornburg, Des Moines, for appellant.

Lee M. Walker of Walker, Knopf & Billingsley, Newton, for appellee.

Heard by Huitink, P.J., and Mahan and Zimmer, JJ.

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ZIMMER, J.

Jodell Arnold appeals from a custody order entered by the district court. She contends the evidence does not support the trial court's order granting primary physical care of her daughter to the child's father. She also challenges the trial court's exercise of jurisdiction and contends she was denied due process. We affirm.

I. Background Facts and Proceedings.

Jodell Arnold and Jeffrey Lamison are the unmarried parents of Megan Lamison, born in April, 1995. The couple began living together in California in 1992. From California, they moved to Arizona, and then to Oregon, where their daughter Megan was born. Shortly after Megan's birth, Jodell and Jeffrey purchased a home in Broomfield, Colorado. The parties resided in the home until separating in June of 1999. It is unclear who acted as Megan's primary caretaker immediately following their separation.

In the late fall of 1999, Jeffrey came to Iowa to visit his family. During this visit, he met his future wife, Jody. He was also offered employment with a local construction company and began considering a move to Iowa.

Meanwhile, Jodell was facing some difficult circumstances back in Colorado. She found herself in the midst of a volatile relationship with a new paramour which culminated in a physical altercation and each party's arrest on domestic abuse charges. Because Jodell was on probation at the time, she was concerned about the consequences of her arrest. Therefore, when Jeffrey proposed that Megan return to Iowa with him, Jodell consented to the move. Jodell claims she and Jeffrey agreed that Megan would be allowed to visit for

Christmas and would return to Colorado after Jodell's legal difficulties were resolved.

Jeffrey and Megan moved to Iowa on December 5, 1999. Jeffrey married Jody Carson in February of 2000. Megan and Jeffrey moved in with Jody and continue to live with her in a home Jody owns in Newton, Iowa. Since returning to Iowa, Jeffrey has worked in the construction industry as a carpenter and framer.

On June 22, 2000, Jeffrey filed a petition to establish paternity and a request for custody in the Iowa District Court. Jodell was served with notice on July 11, 2000. On August 3, 2000, Jeffrey obtained an ex parte order granting him temporary custody of Megan. On August 11, 2000, Jodell filed her answer to Jeffrey's paternity petition, applied for return of the child, and moved to have the temporary custody order set aside. Hearing on the motions was scheduled for August 21, 2000.

The motions were not heard on the 21st. Instead, a trial on the merits was held August 23, 2000, by agreement of the parties. Following trial, the district court granted the parties joint legal custody of Megan, and designated Jeffrey as her primary physical caretaker. Jodell was granted liberal visitation and ordered to pay child support.

Jodell appeals. She contends the trial court did not have jurisdiction under Iowa Code chapter 598B (Uniform Child-Custody Jurisdiction and Enforcement Act). She bases her claim on the allegation that Jeffrey engaged in "unjustifiable conduct," and therefore the Iowa court was required to refuse jurisdiction. *See* Iowa Code § 598B.208(1). She also contends that because she was not given

proper notice of the proceedings, she was denied due process. Additionally, Jodell claims the trial court erred in failing to take adequate consideration of Jeffrey's past domestic assault charges and asserts Megan's placement with him is contrary to her best interests. Jeffrey requests an award of appellate attorney's fees.

II. Standard of Review.

Our review of this matter is de novo. *See* Iowa R. App. P. 4; *see also In re Marriage of Miller,* 532 N.W.2d 160, 162 (Iowa Ct. App. 1995). We are not bound by the district court's findings of fact, but do give them deference because the district court had the opportunity to view first hand the demeanor of the witnesses when testifying. *Id.; see also In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992). The controlling consideration in child custody cases is always the best interest of the child. *In re Marriage of Swenka,* 576 N.W.2d 615, 616 (Iowa Ct. App. 1998).

The legal analysis employed in determining custody of children born to unmarried parents is the same utilized if a child's parents were married and divorced. *Lambert v. Everist,* 418 N.W.2d 40, 42 (Iowa 1988). Jeffrey bears no higher burden of proving parental fitness under these circumstances. *Id.* The best interest of the child is our first and overriding concern. Iowa R. App. P. 14(f)(15). The factors considered in awarding custody are enumerated in section 598.41(3) of the Iowa Code and in *In re Marriage of Winter,* 223 N.W.2d 165, 166-67 (Iowa 1974), and they need not be repeated here. Our objective is to make a custody award that will assure the child has an opportunity for maximum

continuing physical and emotional contact with both parents. Iowa Code § 598.41(1); *In re Marriage of Athy*, 428 N.W.2d 310, 311 (Iowa Ct. App. 1988).

III. Jurisdictional Issues

Jodell first claims the district court improperly exercised jurisdiction. The Uniform Child-Custody Jurisdiction and Enforcement Act was adopted by the Iowa legislature and codified as Chapter 598B of the Iowa Code. This act enables an Iowa court to make an initial custody determination if Iowa is "the home state of the child on the date of the commencement of the proceeding." Iowa Code § 598B.201(1)(a). Because there were no previous judgments, orders, or decrees affecting the custody rights of either Jeffrey or Jodell, the district court's order amounted to an "initial determination" regarding Megan's legal custody. *See* Iowa Code § 598B.102(3), (8).

"Home state" is defined in the Code as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." Iowa Code § 598B.102(7). Jodell acknowledges that Jeffrey brought Megan to Iowa to live with him in early December 1999. Jeffrey's initial custody request was filed in an Iowa district court on June 22, 2000. According to these undisputed facts, Megan lived in Iowa for the requisite six-month period necessary to establish Iowa as her "home state." Therefore, the Iowa district court had jurisdiction of this matter under Chapter 598B of the Code.

Jodell contends, the Iowa court should have declined to exercise jurisdiction due to Jeffrey's alleged "unjustifiable conduct." Iowa Code section 598B.208 provides that: "if a court of this state has jurisdiction under this chapter

because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction..." Iowa Code § 598B.208(1). Jodell claims that Jeffrey failed to return Megan to Colorado for a Christmas visit, failed to provide her with an accurate home address, and failed to return Megan to her custody after the resolution of her legal troubles. She contends the aforementioned conduct was sufficiently egregious to be considered "unjustifiable" under the statue. Jeffrey responds by noting that Jodell did not raise the jurisdictional argument she now asserts on appeal with the district court. He also points out that trial in the matter was held with the consent of the parties. We conclude Jodell waived her "unjustifiable conduct" argument by failing to assert it in district court and then consenting to a trial on the merits. "Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song on appeal that was not first sung in the trial court." *State v. Rutledge*, 600 N.W. 2d 324, 325 (Iowa 1999). Because error was not preserved, we reject this assignment of error.

IV. Due Process Claim

Jodell next claims that a combination of inaccuracies in Jeffrey's petition, the failure to provide information alerting the court to child-custody jurisdictional issues, the entry of an ex-parte temporary order by default without prescribed notice, and inadequate time to prepare for trial served to deprive her of her constitutionally protected right to procedural due process. Once again, Jeffrey responds by pointing out that Jodell's trial counsel raised none of the due process claims she now asserts on appeal in the district court.

Our de novo review of the record confirms Jeffrey's contention. Jodell brought none of the due process claims she now wishes to raise on appeal to the attention of the trial court for a ruling. Instead, she consented to an expedited trial on the merits. Her failure to complain at the trial court level bars her due process challenge on appeal.

V. Custody Issues

In any custody determination, the primary consideration is the best interest of the child. Iowa R. App. P. 14(f)(15); *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). The court's objective is to place the child in the environment most likely to bring them to healthy physical, mental, and social maturity. *Murphy*, 592 N.W.2d at 683. We identify numerous factors to help determine which parent should serve as the primary caretaker of the child. *See* Iowa Code § 598.41(3); *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997) (citations omitted). These include the characteristics of the parents, as well as the capacity and desire of each parent to provide for the needs of the child. *Id.*

Domestic Abuse

Jodell contends the district court erred by failing to give proper consideration to Jeffrey's prior involvement in domestic abuse and his ongoing pattern of aggressive behavior. A history of domestic abuse by one parent is a factor to be weighed in determining child-custody. Iowa Code § 598.41(3)(j); *see also In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997). A "history" of abuse is not necessarily established by a single, documented incident. *Forbes*, at 760. In assessing what is sufficient to constitute a "history" of abuse, we

weigh the evidence of abuse, its nature, severity, repetition, and to whom it was directed, not just the number of incidents. *Id.*

After an altercation between Jeffrey and Jodell on May 23, 1997, Jeffrey was arrested and convicted of domestic violence. As a condition of his sentence, Jeffrey attended and successfully completed a thirty-six week domestic abuse course. The trial court found that in the three years since the incident, Jeffrey had learned to control his emotions and manage his anger. The trial court also noted the existence of domestic abuse allegations against Jodell. It appears the trial court considered the domestic abuse issue and found it was not significant enough to be the sole factor in determining the custody of Megan. We agree with this assessment.

Best Interest of the Child

The trial court awarded Jeffrey primary physical care of Megan, Jodell argues she is best suited to meet Megan's long-term best interests. She alleges that Megan's best interests will not be served by living hundreds of miles from her mother. Furthermore, Jodell questions Jeffrey's commitment to sobriety, his marriage to his new wife, and his ability to support his family based on his job history.

Neither party presents an image of the ideal parent. Both acknowledge troubled histories involving violence, drugs, and drinking. Fortunately, both parties seem committed to becoming better parents. While neither party is a model parent, the district court found either could serve as a competent caretaker for Megan. We agree.

Although we find no serious deficiencies with Jodell's ability to parent, we find the trial court's decision to award Jeffrey primary care is amply supported by the record. Megan, now six years old, has been living with Jeffrey in Iowa since December of 1999. She came to Iowa in large part because of legal difficulties Jodell was experiencing in Colorado. Megan has adjusted well to her new surroundings. She is enrolled in school and is involved in a number of youth activities. She is described by the trial court as a normal healthy child. Jeffrey has remarried, holds a steady job, and has the support of nearby family. The evidence regarding the characteristics of the parents, as well as each one's capacity and desire to provide for Megan's needs weighs in Jeffrey's favor. We conclude it is in Megan's best interest to have Jeffrey as her primary caretaker.

VI. Appellate Attorney Fees

Jeffrey seeks appellate attorney fees. An attorney fee award is not a matter of right, but rests within the sound discretion of the court. *In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App. 1998). We consider the needs of the party making the request, and whether the party making the request was obligated to defend the district court's action. *Id.* After consideration of the enumerated factors, we award no appellate attorney fees.

The district court's decree is affirmed.

AFFIRMED.