IN THE COURT OF APPEALS OF IOWA

No. 0-707 / 99-1704
Filed March 28, 2001

KEVIN L. PALMER,
Petitioner-Appellee,

vs.

ALMA M. LERMA,
Respondent-Appellant.

FILED
MAR 28 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Leo Oxberger, Judge.

Alma M. Lerma appeals a district court order that established support and visitation for Kevin Palmer, Teddy's father. **AFFIRMED.**

Susan L. Ekstrom, Des Moines, for appellant.

Kevin Palmer, Des Moines, pro se.

Considered by Streit, P.J., and Miller, J., and R. Peterson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code § 602.9206 (2001).

R. PETERSON, S.J.

Kevin Palmer and Alma Lerma are the unmarried parents of Teddy Palmer, who was born on June 24, 1997. Kevin filed a petition to establish paternity, custody, visitation, and support. Alma appeals the trial court's order contending the trial court incorrectly ordered unsupervised visitation, failed to require drug testing and provide for suspension of visitation for failure to comply, and failed to consider Kevin's physical abuse in the order for visitation. She also requests appellate attorney's fees.

Background and Proceedings.

Kevin, at the time of the trial, was living with his parents. He was employed and earns $9 an hour. He generally works a forty-hour week with the exception of November, December, and January, when his hours are reduced to between ten and twenty hours per week.

Alma, at the time of the trial, was a junior at Graceland College in Lamoni, Iowa and works part-time. During the summer months, she works approximately twenty hours a week and during the school year, approximately twelve hours a week.

Approximately two months after Teddy was born, Alma moved out of the apartment where she was living with Kevin and took Teddy with her.

A few months after that, Kevin became involved in drugs, including selling drugs. In May of 1998, he was arrested and charged with conspiracy to deliver a controlled substance and possession of a controlled substance with intent to deliver and failure to possess a tax stamp. These charges involved marijuana

and methamphetamine. He pled guilty to one charge and received a sentence of ten years. That sentence was reconsidered, and he was released after ninety days and placed on probation, and was on probation at the time of the trial.

On another occasion he was charged with false use of a credit card and had received a deferred judgment. This was revoked upon his arrest in May of 1998. He served a period of time in jail for that charge.

Alma also alleged he was charged with harassment as a result of a threat he made on the phone to a friend. She did not know the disposition of that charge and none was shown in the record.

During the time Kevin and Alma lived together, there were two incidents of physical contact between them. On one occasion, Kevin pushed her head while holding her arm and then released her. On the evening she decided to leave the apartment, he would not let her out of the apartment. He threw some things at her while she was holding Teddy and grabbed Teddy and would not let go for a period of time. Kevin's parents came over and would not let Alma leave. Alma called the police and they came and escorted her from the premises.

At the time of the trial, the parties agreed to paternity and agreed custody would remain with Alma. The only issues that remained were those of visitation, primarily whether or not it should be supervised, and the amount of child support Kevin would be required to pay.

Alma had prepared a proposed decree and it provided for visitation with Teddy one day a week. Kevin requested his visitation be every other weekend with overnight visitation and with parental supervision. Another provision he

objected to required he submit a urine sample to be analyzed for drugs on the first Monday of each month and forward the results to Alma. It further provided if Alma desired an alternative or an additional urine analysis, Kevin must do that within twelve hours. This drug requirement would continue for twenty-four months from the date of the order or the last violation of drug testing or by failing to make an ordered drop or by testing positive to any illegal drugs. The costs of the testing would be paid by Kevin. If he failed to comply with this, visitation would be suspended. He agreed with the drug testing, but he did not feel he should be responsible for paying for it. He also objected to the provision that required supervision by his parents or other individuals because of the work schedule of his parents and his brothers and sisters who would provide that supervision.

There were other provisions which he did not object to concerning holiday visitations, transportation, and transportation in bad weather. He wanted to add to the holiday visitation, Father's Day.

At the conclusion of the trial, the court stated its conclusions and requested Alma's counsel prepare a decree. The court indicated visitation should occur in the parents' home but they need not be present every minute of the day. In the event Kevin moved from his parents' home, the visitation would be in their home. Visitation would be every other weekend beginning Saturday morning and ending Sunday at 6:00 p.m., but it could be unsupervised. There would be summer visitation of two weeks in the parents' home and in the event the parents were not available and Kevin does not take time off from work to care

for Teddy, the child would be returned to Alma whenever Kevin is working. Father's Day and Mother's Day visitations would be added to the holiday visitations. The child support guidelines would be followed and Kevin's earnings would be based on forty hours per week except during the months of November, December, January, and February when they would be based on twenty hours per week. He would provide Alma copies of his pay stubs for those months. In the event he worked forty hours a week during these months, the child support would automatically increase to the amount the child support guidelines require for forty-hour weeks. Kevin would be responsible for a total of $1000 attorney fees, including the temporary amount.

The trial court also felt there was a desire to prevent Kevin from drug activity, but determined there would be adequate safeguards with urine analysis while on probation and under the supervision of a probation officer.

A decree was prepared by Alma's counsel and was signed by the trial court on July 24, 1999. Subsequent to the entry of the decree, Kevin, who had represented himself in these proceedings, contacted the trial court and told the judge he believed the decree contained provisions that were not in accordance with the trial court's conclusions at the end of the trial. Alma also filed a motion pursuant to Iowa Rule of Civil Procedure 179(b) raising additional factual matters subsequent to the entry of the decree.

Both matters were set for hearing, and on the fifteenth day of September, 1999, the trial court entered a corrected order establishing paternity, custody, visitation, and support. The major change in the order concerned the testing for

drugs on behalf of Kevin. The initial decree contained the provision requiring Kevin to drop a urine analysis on the first Monday of each month and forward the test results to Alma. If Alma desired an alternative or additional drop, she would notify Kevin and he must drop a urine analysis within twelve hours. The amended decree, in accordance with the trial court's findings at the conclusion of the trial, relied on Kevin's probation for requiring drug tests. In the event the tests show Kevin is back on drugs or if he is arrested for drug charges, his visitation would cease.

Standard of Review.

Our review is de novo. Iowa R. App. P. 4. We are required to examine the record made at the trial and determine anew rights on issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). The findings of the trial court, however, are recognized and given great weight especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). The trial court has had the advantage of hearing the evidence and observing the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). This important prospective can greatly enhance a decision making process and is not forgotten on appeal. *See In re Marriage of Callihan*, 214 N.W.2d 133, 136 (Iowa 1974).

Discussion.

Alma argues the trial court incorrectly ordered unsupervised visitation because Teddy was only two years old at the time of trial and had not had an overnight visit with Kevin. She also argues the court should have considered the

characteristics of the child. However, in reviewing the record, there does not appear to be any testimony about the individual characteristics of Teddy. The trial court had the opportunity of observing the parties during the presentation of the evidence. We defer to the judgment of the trial court on this issue, and agree with the visitations the trial court ordered. There is no convincing argument the visitation the trial court ordered in this situation was in error.

Alma in argument further contends the trial court should have considered the domestic abuse by Kevin in determining the visitation. Iowa Code § 598.41(1)(b) (1999). In this case there were some incidents of physical contact between Alma and Kevin. 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 the abuse, its nature, severity, repetition, and to whom it was directed. *Id.* There were only two incidents of physical contact. The court did not comment on these incidents, and we conclude the trial court determined it was not a factor to be considered.

Alma next contends the trial court should have taken the agreement of the parties where they both agreed to substance abuse testing as a condition of visitation. The initial decree prepared by Alma's counsel contained a provision regarding drug testing that Kevin did not agree with. The provision was contrary to the conclusions of the trial court. The trial court had indicated drug testing as a condition of probation would be satisfactory. The amended decree provided if

Kevin was re-arrested for any offense relating to drug use, manufacture or delivery, Kevin's visitation shall cease.

Alma also requests appellate attorney's fees. Under appropriate circumstances, attorney's fees can be awarded to an appellant even though the appellant is not entirely successful. *Lovett v. Lovett*, 164 N.W.2d 793, 804 (Iowa 1969). Kevin is employed on a full-time basis and makes $9 an hour, although during the winter months does not always work a forty-hour week. Alma, on the other hand, is employed part-time and attends college. We believe Kevin should pay an additional $300 for appellate attorney's fees.

In conclusion, we find the trial court did not err in ordering the visitation it did. The court provided drug testing through probation and provided visitation would cease upon further drug activity. Further, the court did not err in not considering specifically the incidents of physical contact between Kevin and Alma. We also award appellate attorney's fees in the sum of $300.

AFFIRMED.