

IN THE COURT OF APPEALS OF IOWA

No. 1-211 / 00-1545

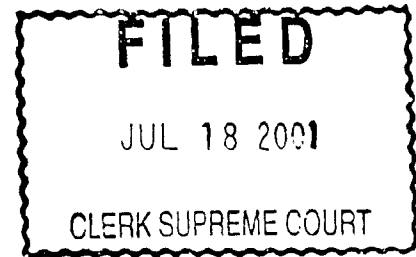
Filed July 18, 2001

IN RE THE MARRIAGE OF M.T.K.
AND D.D.K.

Upon the Petition of
M.T.K.,
Petitioner-Appellant,

And Concerning
D.D.K.,
Respondent,

R.B. and A.B., Maternal Grandparents,
Appellees.



Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers,
Judge.

The father appeals following a district court order granting sole legal and
physical custody of his son to the son's maternal grandparents. **AFFIRMED.**

Kelly G. Cunningham of Goebel & Koury, P.L.C., Davenport, for appellant.

Justin A. Teitle of Teitle Law Offices, Davenport, for appellees.

Paul Macek, Davenport, guardian ad litem for minor child.

Heard by Huitink, P.J., and Streit and Hecht, JJ.

STREIT, J.

A man who is a stranger to his young son wants custody of him now that the boy's mother has died. We affirm the district court's order granting the boy's maternal grandparents sole custody of him.

I. Background Facts & Proceedings.

Michael Kelly (hereinafter "Kelly") and Dawn Kelly were married in April 1990. Their only child, Conner, was born in January 1995. When their marriage was dissolved in April 1997, Dawn received sole custody of Conner. Kelly was limited to supervised visitation with him.

Dawn and her new husband died in a car accident in December 1999. In March 2000 Conner's maternal grandfather, Richard Benthin, filed a petition for the termination of Kelly's parental rights in which he alleged Kelly had abandoned Conner. Shortly thereafter, Kelly filed an application for the modification of the dissolution decree in which he sought sole custody of Conner. A hearing was held on both matters in August 2000. The district court dismissed Benthin's petition, but granted him and his wife, Alice, sole custody of Conner. Kelly appeals.

II. The Merits.

We review equity proceedings de novo. Iowa R. App. P. 4. We give weight to, but are not bound by, the district court's findings of fact. Iowa R. App. P. 14(f)(7).

A. Purported Procedural Defects.

Kelly claims the district court erred in granting the Benthins custody of Conner because he did not have notice before the hearing they were pursuing anything beyond the termination of his parental rights. None of the pleadings filed before the hearing expressly state the Benthins intended to seek custody of Conner.¹ However, Kelly's attorney made the following statements at the hearing:

I would like to conduct testimony on Friday afternoon when we resume with the clear understanding that . . . your clients are seeking—you pick a word—primary custodial arrangement, sole custodial arrangement. Shared custodial arrangement. Whatever it is, it's them and we can proceed Friday with that knowledge. I never had that until now and that's okay. That's all I was getting at when you are talking to my client about termination and I'm sitting here thinking, where is this child going to go? A good question. I'm sorry.

Given these statements and the context in which they were made, Kelly cannot now complain about lack of notice. *Cf. Dutcher v. Randall Foods*, 456 N.W.2d 889, 893 (Iowa 1996) ("When a party introduces evidence without objection on an issue not raised by the pleadings, the court considers the matter tried by consent and properly in the case."). Custody was fairly tried by these parties, and the district court did not err in granting the Benthins custody of Conner despite the purported procedural defects in this case.

¹ After the hearing, Richard filed an answer to Kelly's application for modification in which he asked the district court to grant him and his wife custody of Conner.

B. Conner's Best Interest.

Kelly also claims the district court erred in granting the Benthins custody of Conner because he is a more suitable custodian for his son. According to the Iowa Code,

When a parent awarded legal custody or physical care of a child cannot act as custodian or caretaker because the parent has died or has been judicially adjudged incompetent, the court shall award legal custody including physical care of the child to the surviving parent unless the court finds that such an award is not in the child's best interest.

Iowa Code § 598.41(6) (1997). It is in Conner's best interest he remain in his grandparents' sole custody.

As stated by the district court, at the time of the hearing Kelly and Conner were "virtual strangers to each other." Kelly left Conner and Dawn in the fall of 1996 and moved to Oregon. From then until Dawn's death in December of 1999, Kelly did little to maintain his relationship with Conner—he never visited him, and he seldom communicated with him. Even in the months between Dawn's death and the hearing in August 2000, Kelly did not visit Conner, he talked with him on the telephone only a few times, and he apparently did not acknowledge his fifth birthday with a card or a present. Kelly and Conner thus have had a nearly nonexistent parent-child relationship for roughly three-fourths of Conner's life.

Kelly seems to argue his failure to maintain a meaningful relationship with Conner should be excused because of various extenuating circumstances. In particular, he urges us not to overlook the significant marital problems he had with Dawn that precipitated his move to Oregon. He also points to the efforts of Dawn, her new husband, and perhaps others to curtail his contact with Conner.

These circumstances may help explain, to some extent, why Kelly chose to leave Iowa and allowed his relationship with Conner to disintegrate. They do not, however, alter what constitutes our paramount concern in this case: Conner's best interest. Iowa R. App. P. 14(f)(15).

As we stated previously, it is in Conner's best interest he remain in the Benthins' sole custody. Conner has lived near his grandparents for most of his life, has spent a substantial amount of time with them, and has a close relationship with them and other members of their extended family. The Benthins have provided proper care for Conner after his move to their home following Dawn's death.² We will not uproot Conner from his proven source of stability, security, and love and place him in the custody of a man who, for much of Conner's life, has been his father in name only. See *In re Guardianship of Knell*, 537 N.W.2d 778, 783 (Iowa 1995); *Thompson v. Collins*, 391 N.W.2d 267, 269 (Iowa Ct. App. 1986). We affirm the district court.

AFFIRMED.

² At the hearing Kelly, who apparently has had some run-ins with Richard Benthin in the past, would not agree Richard provided Conner proper care. The district court found both Richard and Alice Benthin "have consistently demonstrated their ability to put Conner's needs first in a way that Kelly has consistently failed to do."