IN THE COURT OF APPEALS OF IOWA

No. 3-486 / 93-551

FILED
JAN 25 1994
CLERK SUPREME COURT

THOMAS HULL and SARA HULL,

Appellants,

vs.

LONNIE SMALL and TERESA SMALL, and LARRY SMALL and VAL SMALL,

Appellees.

Appeal from the Iowa District Court for Buena Vista County, James L. McDonald, Judge.

Tom and Sarah Hull appeal the district court decree awarding custody of Tom's daughter, Jazzmine Small, to Larry and Val Small. **AFFIRMED.**

Steve Hamilton of Hamilton Law Firm, P.C., Storm Lake, for appellants.

Redge O. Berg of Redge O. Berg, P.C., Spencer, for appellees.

Heard by Schlegel, P.J., Hayden, J., and McCartney, S.J.* Sackett, J., takes no part.

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

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McCARTNEY, S.J.

The appellants, Tom Hull and Sara Hull, appeal the order of the district court determining the legal custody of a minor child, Jazzmine Small, natural daughter of appellant Tom Hull. Appellants further appeal the visitation rights granted them by the district court.

We affirm.

Jazzmine Small was born April 28, 1985, the issue of appellant Tom Hull and appellee Teresa Small. The parents were not married.

Tom and Teresa lived together some three months in 1984, when Jazzmine was conceived. They separated and Teresa then married Lonnie Small in December 1984. When Jazzmine was born, Lonnie accepted Jazzmine as his child, and the birth certificate was so recorded. The parties, however, have stipulated that Tom is the natural father of Jazzmine.

The parties at that time lived in the Muscatine, Iowa, area, and Tom saw Jazzmine on a fairly regular basis and also provided some monies and gifts for the child. Jazzmine, however, was in the primary custody of Teresa and her husband, Lonnie, although Tom did have custody for a short period prior to 1988.

In January of 1988, allegations were made through appropriate channels that Tom had sexually abused Jazzmine, and these allegations were founded in October 1988 after

investigation and examination by medical doctors and other professionals.

Subsequent to that time, the appellants have had little, if any, contact with Jazzmine, and after Teresa and her husband moved from Muscatine to the Buena Vista County area in late 1989 or early 1990, the appellants have had no contact with Jazzmine.

Teresa and her husband now have four children from their marriage. They found it difficult to support and raise five children including Jazzmine, and as a consequence, Teresa and her husband, Lonnie, agreed to the appointment of Larry Small and Val Small, appellees herein, as legal guardians of Jazzmine. Larry Small is a brother of Teresa's husband, Lonnie Small. They have acted as guardians since October 1990, and Jazzmine has resided with them since that time.

Tom Hull married Sara Hull. She has two children from two separate liaisons prior to her marriage to Tom. She and these two children receive AFDC assistance.

Tom has an inconsistent employment record, and until a few months prior to trial of this cause, he resided with his mother in his mother's home together with his wife, Sara, and her two children. A few months prior to trial, he obtained separate housing for his family.

Tom is an alcoholic, but no longer attends AA meetings. His work history has been sporadic. He was unable to remember Jazzmine's birth date, what grade she

was in at school at the time of hearing, has never contacted Jazzmine's guardians or her teachers regarding school progress, and had no idea how she was doing in school, what her activities were, or what school she attends.

Prior to appellees Larry Small and Val Small becoming her guardians and her consequent residence with them, Jazzmine had serious behavior problems and lacked social skills. Since living with her guardians, she has made considerable progress. She has learned basic hygiene, her school work is going well; she is involved with Brownie Scouts and counseling. She has prospered greatly under the care and guidance of the guardians.

Our review of this matter is de novo, but we do give weight to the findings of the trial court, especially with respect to the credibility of witnesses. In re A.R.S., 480 N.W.2d 888 (Iowa 1992).

Our polestar is the best interests of the child. In re Marriage of Wedemeyer, 475 N.W.2d 657 (Iowa App. 1991).

We acknowledge the importance of a child being with its parents, but if the best interests of the child are served by awarding its custody to a third party, then we are justified in making that placement. In re Marriage of Corbin, 320 N.W.2d 539 (Iowa 1982). It is apparent that Jazzmine was regressing in her development until she was taken in by the appellees Larry Small and Val Small, and since that time she has blossomed.

She has resided with the Smalls for more than two years. Her development would be stunted, if not destroyed, were she to be placed in the custody of the appellants. Subsequent to 1988, Tom Hull has not expressed by word or by action any concern about Jazzmine until the past year. He has never provided substantial care for her, and his interest in her is exemplified by his lack of knowledge concerning her grade in school, her birth date, her progress in school, or her human condition. Being a biological parent is not enough to warrant a change under these circumstances. We are undergirded in this by the founded allegation of abuse. It is clearly to the best interests of the little girl that she remain in the home where she is supported and where she has lived for over three years. It would be a disservice to her best interests to place her in a new and unfamiliar home with other adults and children who are essentially strangers to her. We concur with the district court when it stated that if custody of Jazzmine were given the appellants the "court would be guilty of a grave injustice . . . ."

We consequently find that the district court recognized the statutory presumption for a preference that the natural parent have custody of a minor child but that the district court correctly ruled in granting custody of the child to the appellees Larry Small and Val Small. In so doing, the court clearly recognized the best interests of Jazzmine.

The appellants further appeal the ruling of the district court granting visitation rights to the appellants once a month and for the limited hours from 2:00 p.m. to 4:00 p.m. The district court further directed that such visits be supervised by the custodians or either of them.

Jazzmine has had no contact with the appellants for several years. Prior to that, her contact with them was sporadic, particularly during the time when her mother moved from the city of Muscatine to Buena Vista County. Jazzmine is undergoing counseling provided by her guardians for sexual abuse. Under these circumstances and giving appropriate weight to the findings of the district court, we find such visitation appropriate and consequently affirm the district court in this regard.

Based upon the foregoing, we affirm the decision of the district court as amended by it to provide for specific visitation of the child by the appellants. We assess the costs of this appeal to the appellants.

AFFIRMED.