

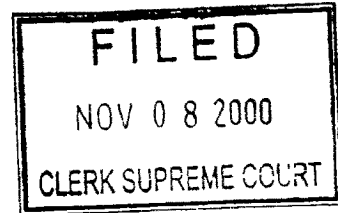
IN THE COURT OF APPEALS OF IOWA

No. 0-579 / 99-0566
Filed November 8, 2000

TRACEY ALLEN McGHGHY,
Petitioner-Appellant,

vs.

ERICKA LYNN THUMANN,
Respondent-Appellee.



Appeal from the Iowa District Court for Cedar County, C.H. Pelton, Judge.

Petitioner father appeals contending the district court (1) should have granted him joint custody; (2) should not have allowed respondent to change their daughter's name; (3) ordered him to pay excessive child support; and (4) should have appointed a guardian ad litem. **AFFIRMED.**

Tracey McGhghy, Pekin, Illinois, pro se.

Brian T. Fairfield of Norton & Norton, P.C., Lowden, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Petitioner-appellant Tracey Allen McGhghy and respondent-appellee Ericka Lynn Thumann are the parents of a daughter, Haley, born in December of 1995. The district court refused Tracey's request to provide for joint custody of Haley and allow him visitation, and Tracey on appeal challenges these findings. Tracey further contends the district court ordered him to pay excessive child support and incorrectly allowed Ericka's request to change Haley's last name. Tracey also contends the district court should have appointed a guardian ad litem to represent Haley's interests. We affirm.

Tracey and Ericka never married. The fact Tracey is Haley's father is not challenged and the district court found that Tracey was Haley's father. Tracey was present at Haley's birth and she was given his last name. Ericka assumed primary care of Haley. Tracey had some involvement with Haley in the early months of her life and made some contributions to her support. Before Haley's first birthday Tracey was arrested on federal drug charges. At the time of trial he was serving a nine-year sentence in a federal prison in Illinois.

The district court awarded custodial care to Ericka and denied Tracey's request for joint physical care finding among other things that Ericka has assumed care for Haley since her birth and Tracey serving a nine year sentence was not able to provide for Haley's emotional, social material or educational needs. The court further found Tracey has no personal relationship with his daughter. The court determined it would not be in Haley's interest to order visitation at this time leaving open Ericka's option to provide visitation should she

determine it is in Haley's interest or should circumstances change to support a modification.

Tracey contends that he should have been named joint custodian and should have been provided visitation. The controlling consideration on these issues is the interest of the child. Iowa R. App. P. 14(f)(15). We review the record de novo. Iowa R. App. P. 4. We give weight to the findings of the trial court, but are not bound by them. See *In re Marriage of Novak*, 220 N.W.2d 592, 597 (Iowa 1974). The criteria governing our decision on the issue of joint custody and visitation is the same regardless of whether the parties are dissolving their marriage or are unwed. See *Petition of Purscell*, 544 N.W.2d 466, 468 (Iowa App. 1995); *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988).

To deny joint custody requires a finding by clear and convincing evidence that joint custody is not reasonable and not in the best interest of the child to the extent the legal custodial relationship between the child and a parent should be severed. Iowa Code § 598.41(2), (3) (1997); *In re Marriage of Holcomb*, 471 N.W.2d 76, 79-80 (Iowa App. 1991); *In re Marriage of Athy*, 428 N.W.2d 310, 311 (Iowa App. 1988); *In re Marriage of Bartlett*, 427 N.W.2d 876, 877 (Iowa App. 1988).

We agree with the district court that joint custody is not reasonable. Haley does not know her father. Tracey has provided for Haley with minimal care and financial assistance. Tracey is not available to Haley due to his incarceration. Tracey was also abusive to Haley's mother, Ericka. Furthermore, communication is difficult between Tracey and Ericka.

For many of the same reasons, we agree with the district court decision not to order Ericka to take Haley to prison for purpose of visitation with her father. We affirm the district court's denial of joint custody and visitation.

Tracey next contends the district court should not have honored Ericka's request to change Haley's last name from McGhghy to Thumann. Ericka filed a request for the name change under Iowa Code section 774.6. The district court in providing for the change found that Tracey was not identified on Haley's original birth certificate as Haley's father, Haley has gone by Thumann for some time and that the name McGhghy bears a bad reputation in the community because of Tracey's activities.

The presumption that a child bear the surname of his or her father has been found to be outdated and rejected. *In re Marriage of Gulsvig*, 498 N.W.2d 725, 728 (Iowa 1993). A mother does not have the absolute right to name her child because of custody due to birth. *Id.* Neither parent has superior right to determine the surname of his or her child. *See id.* We look instead to the interest of the child. *See id.*

Haley is in her mother's custodial care, her father cannot be physically present in her life for an extended period of time. He has provided little support for Haley and has little ability to provide support in the future. We agree with the district court that Haley's interests are served by the name change and we affirm on this issue.

Tracey next contends he should not have been ordered to pay child support of \$50.00 a month. In addressing in a modification action the support a prisoner should pay the court found that although the prisoner's current financial

status was the result of voluntary criminal activity, some consideration needed to be given to the prisoner's earning capacity and ability to pay. *In re Marriage of Walters*, 575 N.W.2d 739, 743 (Iowa 1998). The court in *Walters* found the prisoner father's reduction in income and earning capacity the result of his criminal activity which, while voluntary, was not done with an improper intent to deprive his children of support. *Id.* We apply the test in *Walters* in assessing Stacey's challenge to the child support order.

Ericka show she had net income as defined for purposes of applying the child support guidelines of \$608.24 a month. Tracey has no income and no available assets. The minimum support required under the Iowa Child Support Guidelines, even for persons with no income, is \$50 per month. *In re Marriage of Barker*, 600 N.W.2d 321, 324 (Iowa 1999). That amount is ordinarily required of a prisoner without any income. See *id.* Accordingly we affirm on this issue.

Tracey further contends that the district court should have appointed a guardian ad litem for Haley. He filed the request following the filing of his notice of appeal and the district court found it had no jurisdiction to rule on his application. There is nothing in this record to convince us that a guardian ad litem for Haley is needed at this time and we reject Tracey's request that one be appointed.

AFFRIMED.