

IN THE COURT OF APPEALS OF IOWA

No. 9-354 / 98-1735
Filed October 15, 1999

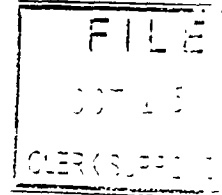
**IN RE THE MARRIAGE OF DARIN McINTOSH
AND MELISSA McINTOSH**

Upon the Petition of
DARIN McINTOSH,

Appellant,

And Concerning
MELISSA McINTOSH,

Appellee.



Appeal from the Iowa District Court for Harrison County, J.C. Irvin, Judge.

Darin McIntosh appeals from the decree dissolving his marriage to Melissa McIntosh. **AFFIRMED AS MODIFIED.**

Susan Larson Christensen of Larson, Childs, Hall & Christensen, P.C., Harlan,
for appellant.

Craig M. Dreismeier of Reilly, Petersen & Hannan, P.L.C., Council Bluffs, for
appellee.

Heard by Streit, P.J., and Vogel, and Zimmer, JJ.

ZIMMER, J.

Darin McIntosh appeals from the decree dissolving his marriage to Melissa McIntosh. He contends the district court erred in awarding primary physical care of the parties' son to Melissa. Both parties seek appellate attorney fees. Finding it in the best interests of the child, we modify the trial court's decree and award primary physical care to Darin.

I. Background. Darin and Melissa ("Missy") McIntosh married in September of 1992. They have one child, Colby, born in August of 1991. Darin is not Colby's biological father.

Missy and Darin began dating in high school. Their relationship ended when they went off to college. Shortly thereafter, Missy became pregnant with Colby. During the first trimester of Missy's pregnancy, the parties renewed their relationship. Darin has been actively involved in Colby's life since his birth. The parties began living together when Colby was eleven months old and married shortly after his first birthday. Colby has had no contact with his biological father. Since birth, Colby has suffered a near-total hearing loss.

Darin adopted Colby on April 6, 1998, when Colby was about six and one half years old. Just minutes before the adoption hearing, Missy required Darin to sign a handwritten note agreeing not to fight for custody of Colby in the event of a divorce. Five days later, Missy informed Darin that she wanted a divorce. Neither Darin nor the attorney who handled the adoption were aware Missy intended to end the parties' marriage. Missy and Darin had purchased a new home in January of 1998. They

vacationed together in Las Vegas a month before the adoption. In the week prior to the adoption, they went to a fertility clinic for testing in an effort to conceive a child.

Darin petitioned for dissolution of the marriage in June of 1998. At the time of trial, he lived in Missouri Valley and Missy lived in Council Bluffs. Both Missy and Darin were twenty-six years old when trial was held. The parties stipulated to virtually all of the terms of the divorce, except physical custody of Colby. Following trial, the district court granted Missy primary physical care of Colby, giving Darin joint legal custody with liberal visitation.

Darin appeals the trial court's decree solely on the issue of physical custody. He claims he has been more supportive of Colby's education and speech development. He also maintains he was Colby's primary caretaker and has been integrally involved in Colby's sports activities.

II. Scope of Review. Our review of a custody order is de novo and our primary consideration is the best interests of the child. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995).

III. Primary Physical Care of Colby. Iowa Code section 598.41(1997) lists ten factors for courts to weigh in considering what is in the best interests of the children. **The critical issue is which parent will do the better job in raising the child.** *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997) (citations omitted). The objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa App. 1996).

The trial court characterized this custody dispute as a close question. We agree. Both parents appear to be basically good people and either is capable of providing Colby with a good, loving home. The trial court cited two factors in support of its decision to award primary care to Missy. First, the district court concluded Missy was Colby's primary caretaker prior to the period the parties began experiencing marital difficulties. Second, the district court believed it would be easier to get Colby to and from the Iowa School for the Deaf in Council Bluffs because Missy lived in that city. Our de novo review of the record leads us to a different result. We conclude it is in Colby's best interests to be in the primary care of his father.

We find little basis in the record for concluding Missy has been Colby's primary caretaker. Darin has been actively involved in Colby's life since birth. It is apparent from Missy's own testimony that prior to the parties' separation, Darin was as involved as Missy in Colby's day-to-day routine.

We also believe Missy's residence in Council Bluffs should be awarded little weight in determining the issue of primary physical care. Colby was born and raised in Missouri Valley. He regularly took the bus to the Iowa School for the Deaf before the parties separated. Darin's residence is not far from the school and Colby clearly enjoys living on the farm.

In concluding Darin should be awarded primary physical care of Colby, we give considerable weight to the importance of his development as a deaf child. Colby is a child with special needs. Since birth, Colby has suffered near-total hearing loss.

He attends the Iowa School for the Deaf. Teachers testified that Colby is a happy boy, curious and eager to learn, however, he needs more help than a normal child building language and vocabulary skills. His education meshes inevitably with his socialization skills--a deaf child who does not develop proper language and communication skills may act out behaviorally. For these reasons, the teachers emphasized that it is important for the parents of a hearing-impaired child to be involved in the classroom as well as at home. Parents must work with the deaf child constantly so the child grows in communication abilities and can function socially.

We believe the record indicates Darin is best able to minister to Colby's special needs. Darin has demonstrated in-depth involvement in many of Colby's activities and his development. Darin has often helped with homework, including spelling and flash cards. He and Colby worked out their own signing system, even before Colby went to school. Darin participated in Colby's classroom an average of at least once a month. Colby enjoys all sports, both playing and watching. However, if he is playing, he needs someone to translate for him. Darin serves in that capacity and assists with coaching duties.

Only three non-party witnesses testified at trial. Two were Colby's teachers. They testified Darin has spent much more time visiting and working with Colby at school. Missy did attend parent-teacher conferences, pick him up for doctor appointments, and provide birthday and holiday treats. While these functions are important, Colby needs more.

Missy claimed that her work did not enable her to take time off to attend Colby's classes. She argues that a custody award to Darin based on his school involvement with Colby would be unfair because his farming work permits him to have more time with Colby at school. In custody decisions, we do not reward or punish. *Kleist*, 538 N.W.2d at 277. Rather, we consider what is best for the child. When parents present equal capabilities, we ask which situation would be *better* for the child. *In re Marriage of Volding*, 544 N.W.2d 457, 459 (Iowa App. 1995)(finding that father's involvement in children's activities one factor tipping scales in his favor); *In re Marriage of Kehrli*, 241 N.W.2d 923, 924 (Iowa 1976)(awarding custody to mother because she could give more time to the children); *In re Marriage of Kleist*, 538 N.W.2d 273, 278 (Iowa 1995)(same). The fact that Darin can and does spend more time with Colby factors into our decision because of Colby's particular developmental needs.

Missy failed to provide evidence of her involvement with Colby both during and after school to the same extent that Darin did. Her involvement with Colby seems more superficial. Missy took Colby to games and attended some, but did not help communicate with coaches. Missy worked two nights a week during the last year of the marriage, in addition to her day job. However, at trial she did not specify any activities that she did with Colby on her evenings off to further his development. Darin testified that he was still the one working with Colby on homework and signing most of the time. During testimony, Missy's first references to her role in Colby's education were to her attending conferences and bringing treats on holidays. Only

when specifically asked by her attorney whether there were other times when she worked with Colby did she reply with a simple 'yes', but also indicated that Darin "did a lot of it." Missy spent much of her testimony focusing on Darin's negative qualities.

At trial, Missy contended she had been the victim of physical and verbal abuse at the hands of Darin. Pursuant to Iowa Code section 598.41 and prior case law, domestic abuse is a factor in determining the custodial parent. *See In re Marriage of Barry*, 588 N.W.2d 711, 713 (Iowa App. 1998)(noting domestic abuse is a consideration in custody disputes). Darin testified the parties had a skirmish in the first year of their marriage during which he pushed Missy out of the house and locked the door. Evidence presented at trial establishes that Darin has never been convicted of domestic abuse or any other crime. In addition, he has never been the subject of a protective order. We also note that Missy did not attempt to apply the domestic abuse presumption created by statute and agreed to a joint custody arrangement. The trial court made no finding that Darin had committed spousal abuse. We do not minimize the seriousness of domestic abuse allegations. *Barry*, 588 N.W.2d at 713. In this case, however, the record simply does not support a finding of a 'history of abuse' within the meaning of the child custody statute.

There was also a time when Missy denied Darin's visitation. We take this into account, along with her actions at the time of the adoption. The denial by one parent of a child's opportunity to have meaningful contact with the other parent is a

significant factor in determining the custody or physical care arrangement. *Barry*, 588 N.W.2d at 713.

We modify the trial court's decree by awarding primary physical care of Colby to Darin. We award Missy visitation according to the terms of the trial court decree. We also require Missy to pay Darin child support of \$310.42 per month. Missy is granted the dependency exemption under the same terms as the trial court decree.

IV. Appellate Attorney Fees. Both parties request appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Vieth*, 591 N.W.2d 639, 641 (Iowa App 1999) (citations omitted). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *Id.* We award no appellate attorney fees. Costs of this appeal are taxed to the appellee.

AFFIRMED AS MODIFIED.