



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ERNEST E. BERGER AND CHRISTA L. BERGER

Upon the Petition of	)	
ERNEST E. BERGER,	)	
Petitioner-Appellant,	)	Filed February 26, 1985
And Concerning	)	
CHRISTA L. BERGER,	)	
Respondent-Appellee/	)	<u>4-501</u>
Cross-Appellant.	)	83-670

Appeal from the Iowa District Court for Scott County - J. Hobart Darbyshire, Judge.

Petitioner husband appeals and respondent wife cross-appeals from a decree dissolving the parties' marriage. AFFIRMED AS MODIFIED.

Ronald E. Silver and Realff H. Ottesen of Ottesen, Ottesen & Hoffman, Davenport, for petitioner-appellant.

Paul L. Macek of Ridenour and Macek, Davenport, for respondent-appellee.

Considered by Oxberger, C.J., and Donielson and Snell, JJ.

DONIELSON, J.

Petitioner husband appeals and respondent wife cross-appeals from the decree dissolving the parties' marriage. Petitioner asserts that the district court should have awarded him custody of the parties' child. Respondent cross-appeals, asserting (1) that the district court allowed petitioner excessive visitation rights; (2) that the district court awarded her inadequate child support; and (3) that the district court should have ordered petitioner to pay a specified sum of money through the district court clerk as temporary support, rather than ordering him to pay all of the parties' debts payable in monthly installments while the action was pending. We affirm as modified.

Petitioner Ernest E. Berger and respondent Christa L. Berger were married in 1979. It was Ernest's second marriage and Christa's first. Ernest is employed as a shop foreman and earns \$20,800 per year. Christa is a respiratory therapist and earns \$20,280 per year. The parties lived in Las Vegas until their daughter, Heather, was born in 1980. They subsequently moved to the Quad-Cities area to be near their relatives. In 1982 the parties separated, at which time Ernest brought this dissolution action. The district court gave Christa temporary custody of Heather and ordered Ernest to pay as temporary support all of the parties' debts, which were payable in monthly installments, while the action was pending.

After trial, the district court entered a dissolution decree, awarding Christa sole custody of Heather. The district court stated that the parties were not capable of cooperating in a joint custody arrangement, but noted that both parties exhibited good parenting skills. In granting Christa sole custody, the district court stated that no single factor "tipped" the balance in favor of Christa, but that it would give serious consideration to a modification of the custody decree should Christa decide to leave the Quad-Cities area. The district court set visitation at every weekend plus alternate holidays. Ernest was directed to pay \$35 per week in child support. Ernest has appealed and Christa has cross-appealed.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. While the findings of the trial court are not binding upon us, we view them with considerable weight. In re Marriage of Burham, 283 N.W.2d 269, 274 (Iowa 1979).

The paramount consideration in determining custody is the best interests of the child. Iowa R. App. P. 14(f)(15). While there is no hard and fast rule governing which parent should have custody, factors to be considered in a custody decision include those set out in section 598.41 of the Code and in In re Marriage of Winter, 223 N.W.2d 165-67 (Iowa 1974). As in all cases of this type, precedent is of little value, and our decision will ultimately depend on the particular facts of the case. In re Marriage of Castle, 312 N.W.2d 147, 148 (Iowa Ct. App. 1981).

Ernest asserts that based upon the record as a whole, he would be the better parent to minister most effectively to the long-range interests of Heather. We disagree.

The record reflects that both parties are deeply interested in the long-range interests of Heather. Upon learning that she was expectant with Heather, Christa stopped smoking and read numerous books on the subject of child care. Christa has also exhibited an interest in the proper nutrition of Heather, and has enrolled Heather in a Montessori school to further advance Heather's social and educational development. Ernest has equally demonstrated an awareness of Heather's needs, evidenced by Ernest's remodeling of Heather's bedroom to provide her more space, and his purchasing of ski equipment and lessons for Heather's recreation. While the record reveals that both parties have quite divergent lifestyles, neither lifestyle has caused any emotional or physical harm to Heather, nor has it interfered with either party's parenting ability. Indeed, the record firmly establishes that Heather has developed into a well-adjusted, intelligent child under Christa's custody.

Ernest contends that the district court did not take into full consideration the testimony of various experts employed by the parties and the district court to

aid in the determination of custody. Ernest points out that two of the three experts, Dr. W. David McEchron and Family and Children Service recommended that Ernest be afforded custody, while Dr. Robert A. Busch could only state Christa was a fit parent, not having interviewed Ernest. It is a settled rule that "a trier of fact is not bound to accept testimony, even if uncontradicted, although testimony should not be arbitrarily and capriciously rejected." Eickelberg v. Deere & Co., 276 N.W.2d 442, 447 (Iowa 1979). Such testimony may be adopted in whole, in part, or not at all. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). The district court acknowledged that a total of fifteen witnesses offered testimony on the issue of custody. We therefore cannot say that the district court did not properly weigh the offered testimony.

Ernest additionally contends that he would be the better parent by noting that the district court stated in its decree that should Christa desire to move from the Quad-Cities area, it would give serious consideration to a modification to change custody. Due to the increasing mobility of our society, and the greatly expanded opportunities for economic advancement, our courts have generally held that removal of children from geographic proximity of the non-custodial parent provides no justification in itself for a custodial change. In re Marriage of Weidner, 338 N.W.2d 351, 360-61 (Iowa 1983). Trial courts should generally make a final disposition of a dissolution case on the circumstances then existing. In re Marriage of Schlenker, 300 N.W.2d 164, 165 (Iowa 1981). This case does not reveal circumstances so exceptional as to depart from these general rules. If Ernest should hereafter seek a modification of the custodial provisions of the decree, it will be encumbant upon him to show a substantial change in circumstances making it essential and in Heather's best interest that custody be changed.

While we are not unaware of the fact that both parties have expended considerable energy attempting to undermine the other as a parent, we believe that Heather has developed into a healthy and normal child under Christa's custody.

Because Christa has been the primary parent of Heather since the temporary custody decree, and because stability is so important to a young child's development, we therefore affirm the trial court's decree with respect to custody.

Having determined that custody of Heather should remain with Christa, we next turn to Christa's cross-appeal of the decree of dissolution.

Christa first contends that the district court allowed Ernest excessive visitation rights. The trial court in its final decree set visitation at every weekend from 9:00 a.m. Saturday morning until 7:00 p.m. Sunday evening, and alternate holidays. Christa contends that this limits her recreational activities with Heather to weekday evenings after work. We agree.

It is a well-settled principle that it is in the best interests of a child of divorce to maintain meaningful relations with both parties. In re Marriage of Leyda, 355 N.W.2d 862, 866 (Iowa 1984); In re Marriage of Bolin, 336 N.W.2d 441, 445 (Iowa 1983); In re Marriage of Burham, 283 N.W.2d 269, 276 (Iowa 1979). Indeed, our decisions emphasizing the importance of relationships with both parents have recently been codified by the 1984 Regular Session of the 70th General Assembly through Senate File 2163, amending section 598.1 of the Code. The new subsection provides:

6. "Best interests of the child" includes, but is not limited to, the opportunity for maximum continuous physical and emotional contact possible with both parents, unless direct physical or significant emotional harm to the child may result from this contact. Refusal by one parent to provide this opportunity without just cause shall be considered harmful to the best interests of the child.

1984 Iowa Acts ch. 1088, § 1. While this provision is not applicable to the case at bar because of its subsequent passage after the district court's decree, it nonetheless clarifies the importance we give to cooperation between divorced parents.

We have, however, recognized that visitation provisions of a dissolution decree may unfairly interfere with the parental responsibility of the parent

granted custody. In McCrery v. McCrery, 258 Iowa 354, 138 N.W.2d 876, 878 (Iowa 1965), the Iowa Supreme Court held that a decree granting every weekend visitation "would give the father little free time to spend with his child and restrict her opportunity for other social contacts." An order granting the father every other weekend visitation amounting to 49 hours was held "unjustifiably upsetting and disruptive to the routine of the children." Remsburg v. Remsburg, 180 N.W.2d 461, 463 (Iowa 1970).

Based upon these considerations, we believe it to be in the best interests of Heather that Ernest's visitation period be modified to every other weekend from 6:00 p.m. Friday until 7:00 p.m. Sunday, plus alternate holidays. Additionally, Ernest shall have the right to have Heather for two two-week periods during each summer, one of which shall coincide with his vacation period. Should the parties be unable to agree on the second period, it shall be either the last two weeks of June or the first two weeks of August. Ernest shall also have the right to have Heather on alternate birthdays, from 9:00 a.m. until 8:00 a.m. the day following, commencing with her birthday in April, 1986.

Christa next asserts that child support should be \$215 per month. She argues that the needs of Heather require the increase and that Ernest has the ability to pay.

In considering Christa's claim, we examine the facts of this case in light of the factors listed in Iowa Code section 598.21(4). We recognize that both parents have a mutual duty to support their child. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). It should be apportioned, however, according to the fair ability of each parent to contribute. In re Marriage of Heineman, 309 N.W.2d 151, 153 (Iowa Ct. App. 1981). The courts may weigh factors such as increased school and medical expenses, increases in inflation, and other needs of growing children in considering a modification of child support. In re Marriage of Stutsman, 311 N.W.2d 73, 76 (Iowa 1981).

Ernest earns a net income of approximately \$297 per week. Christa earns approximately \$264 per week. Considering Ernest's financial resources together with the needs of his child, we believe an increase is appropriate. We therefore modify the child support award from \$35 per week to \$50 per week.

Christa lastly asserts that the district court should have ordered Ernest to pay a specified sum of money through the district court clerk as temporary support, rather than ordering him to pay all of the parties' debts payable in monthly installments while the action was pending.

Christa has raised this issue for the first time on appeal. An argument not raised in trial court cannot be raised for the first time on appeal. Regal Ins. Co. v. Summit Guar. Corp., 324 N.W.2d 697, 706 (Iowa 1982); Beitz v. Horak, 271 N.W.2d 755, 759 (Iowa 1978); Davidson v. Van Lengen, 266 N.W.2d 436, 439 (Iowa 1978). Because this issue was never presented to the district court, we need not consider it.

AFFIRMED AS MODIFIED.