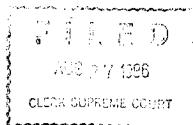


IN THE COURT OF APPEALS OF IOWA



IN RE THE MARRIAGE OF ROBERT PAUL HENRY, JR.
AND DEBRA ANN HENRY

Upon the Petition of	)	125
ROBERT PAUL HENRY, JR.,	)	
Petitioner-Appellee,	)	Filed August 27, 1986
And Concerning	)	
DEBRA ANN HENRY,	)	<u>6-213</u>
Respondent-Appellant.	)	<u>86-07</u>

Appeal from the Iowa District Court for Taylor County (No. 6462)

- Theodore H. Miller, Judge.

Respondent wife appeals from the decree dissolving the parties' marriage.

AFFIRMED.

Ione G. Shadduck of Shadduck Law Firm, West Des Moines, for appellant.

Jeffrey B. Millhollin of Mullin & Millhollin, Corning, and Richard O. McConville of Scalise, Scism, Sandre & Uhl, Des Moines, for appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J.

Respondent Debra Ann Henry appeals from the decree dissolving the parties' marriage. She asserts (1) that the trial court should have awarded her, not petitioner husband, physical care of the parties' child in its joint custody arrangement, and (2) that the trial court should have considered the distance between the parties' place of residence when it specified times for visitation. We affirm.

Petitioner Robert Paul Henry, Jr. and respondent Debra Ann Henry were married in 1976. They have one child of this marriage, Clinton, who was born in 1979. Debra's child from a previous marriage, Bradley, born in 1975, also lived with the parties and has not been adopted by Robert. When the parties separated in 1984, Debra left both children in Robert's care and moved to Oskaloosa, Iowa. Shortly before trial Debra took Bradley back to live with her. Robert is a 32-year-old machinist at NSK Corporation in Clarinda, Iowa. Debra is a 28-year-old legal secretary in Oskaloosa. At the time of trial Robert was residing rent-free in a home near Bedford, Iowa, owned by Debra's grandfather. Debra was living with another man, whom she presently plans to marry, in his home in Oskaloosa. The distance between the two parties' residences was approximately three to four hours apart. In its dissolution decree, the trial court ordered a joint custody arrangement with Robert having physical custody of Clint and Debra having visitation of alternate weekends, alternate holidays, and four weeks in the summer. Debra has appealed the custody and visitation provisions of that decree.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. While we accord weight to the trial court's findings of fact because the trial court has had the unique opportunity to hear and observe the witnesses firsthand, we are not bound by them. In re Marriage of Vrbanc, 359 N.W.2d 420, 423 (Iowa 1984).

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J. R. B.

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).

Debra asserts that based upon the record as a whole, she would be the better parent to minister most effectively to the long-range interests of Clint. Debra contends that because she was the primary caretaker of both children during the marriage and because Clint and Bradley were raised together as brothers, she should therefore have custody of Clint. We disagree.

The record reflects that both parties are deeply interested in the long-range interests of Clint. The testimony offered at trial revealed that Debra was a good house keeper and was attentive to the cleanliness of her children. Debra prepared wholesome, well-balanced meals. Debra also displayed an interest in her children's mental and social well-being, seeing to it that both Clint and Brad attended school on a regular basis and that they were involved in school activities. Debra additionally played catch, football, and other sports with her children.

Robert has equally demonstrated an awareness of his children's needs. Though it appears that Debra was the primary caretaker of the home while the couple was married, Robert took self-improvement classes to better his potential for providing for the family welfare. During the fourteen months that Robert had physical custody of both Brad and Clint, both children were well-fed, well-dressed, and attended school on a regular basis. Due to Robert's hours of employment, Robert ensured that the children were well-supervised

by the baby-sitter that he and Debra had hired prior to their separation. Since the separation, Robert has evidenced an increased willingness to spend his spare time with Clint, taking Clint to movies, taking him out to eat, helping him with his work studies, and playing in the yard. Thus, while the record reveals that Debra appears to be more socially active and Robert apparently enjoys activities at home, neither life-style has caused any emotional or physical harm to Clint, nor has it interfered with either party's parenting ability. Indeed, the record firmly establishes that Clint, after a period of adjustment following his mother's and Brad's leaving the family home, has developed into a well-adjusted, intelligent child.

Debra contends, however, that Robert spent time with the children only when he was free to do so. Debra argues that to allow split custody of Brad and Clint would be detrimental to Clint's long-range interests because they were raised as brothers. Debra also contends that Clint's long-range interests would best be served by awarding her custody because of the excellent school system available in Oskaloosa, the new modern house in which she and Brad live, and the activities in which Clint could participate at the YMCA. We disagree.

We have traditionally recognized that in attempting to foster a child's best interests, the court should attempt to keep children of broken homes together. In re Marriage of Ellerbrook, 377 N.W.2d 257, 260 (Iowa Ct. App. 1985). "The underlying rationale is that split custody deprives the children of the benefit of constant association with each other which, as innocent victims of marital bankruptcy, they should not be subjected to." Id.; In re Marriage of Wahl, 246 N.W.2d 268, 270 (Iowa 1976). This rule, however, is not immutable, but may be departed from if there exist good and compelling reasons. In re Marriage of Grandinetti, 342 N.W.2d 876, 878-79 (Iowa Ct. App. 1983). We

also recognize that child custody should be quickly fixed and thereafter little disturbed. In Interest of C.W., 342 N.W.2d 885, 889 (Iowa Ct. App. 1983).

The Iowa Supreme Court recently discussed the issue of split custody in In re Marriage of Orte, 389 N.W.2d 373 (Iowa 1986). In Orte, the district court had granted the wife custody of the parties' child on the grounds that it would be in the best interests of that child that he reside with his mother and half-brother due to a close bond with the half-brother and the fact that the mother had been the primary caretaker of the children. 389 N.W.2d at 374. The court of appeals reversed. Id. at 373. The Iowa Supreme Court, in vacating the court of appeals decision, held that while other factors militated against the award of physical care of the son to the mother, the fact that the mother had been the primary caretaker and had demonstrated that she had been a loving and able parent warranted the granting of custody to the mother. Id. at 373-74. The Orte court therefore held that keeping the two children together promoted both children's best interests. Id. at 375.

We find the Orte case distinguishable from the present. The following excerpts from the trial court's decree accurately reflect the distinguishing factors not present in Orte:

The Court concludes Clinton is a healthy youngster. He is at home in Bedford, Iowa. He is doing well in school. He has been living with his father since Debra left and he has performed very well in making Clinton his primary interest as a concerned father. He provides very well for the emotional, moral, and material needs of his son. He has provided all of the financial support for Clinton. He took care of Bradley as well as Clinton for a substantial period of time before Bradley was taken to Oskaloosa by Debra. Clinton has a stability there with his father that would in the opinion of the Court be an important factor to maintain. The atmosphere between Debra, Bradley and Clinton has not been an easy one. Debra has done better relating to Bradley than with Clinton. Clinton relates much better to his father, Robert, than to his mother, Debra. To remove Clinton from his home with his father would be a major disturbance uncalled

for under all the circumstances. Clinton is a rather determined and set-minded youngster. This has been a problem to Debra, but apparently not as much so with Robert, apparently for a number of reasons culminating in one factor over all which is that Robert and Clinton are close more so than Clinton and Debra.

The keeping of Bradley with his half brother Clinton is an important consideration not overlooked by this Court. This factor and the need to keep siblings together has considerable weight. However, the move of Clinton to Oskaloosa would considerably undermine the stability and continuity of Clinton's life. It would undermine Clinton's close relationship with his father which has produced much of his present stability and secure sure feeling so necessary to a youth of 6 years of age. He is doing well socially, in school and in health. His father, Robert, has a good job, a secure home, and has demonstrated an ongoing parentability and Clinton has begun to flower under it. Without considering the moral problem obvious from Debra's cohabiting with her male friend, the Court considers Clinton's physical custody with his father as good and should continue with reasonable visitation rights to Debra.

Applying the foregoing rationale to the present situation and after reviewing all the evidence which was before the trial court, we find that the trial court was correct in its finding that the best interests of Clint would best be served by awarding custody of Clint to Robert. While Clint was in Robert's care, he always appeared to be well-fed, very well-groomed, and neat. The record reveals that Clint has developed a close relationship with his father and enjoys talking about the activities he participated in with Robert. The school officials testified that after a brief adjustment period following his parents' separation, Clint is progressing both academically and socially at an excellent pace. Robert has expressed an understanding that young children such as Clint need parental contact and therefore returns home from work as soon as possible to spend his evenings with Clint.

There is also evidence tending to show that while Clint naturally has a bond of affection for his mother, Clint is more easily disciplined by his father.

Though Debra makes much of the fact that a baby-sitter handles much of the daily household duties and supervision of Clint, we note that a similar situation existed when the parties were married, this not appearing to have any detrimental affect upon Clint. Debra admits that Robert has been a good father.

When a parent seeks to take custody from another, that parent must show a superior claim based upon an ability to minister to a child's needs more effectively than the custodial parent. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). In the present case, Debra has failed to prove that her parenting skills are so superior to that of Robert's that we should disturb custody. We do not think that it would be in the best interests of Clint to remove him from his father's custody solely to assure him the benefit of a constant association with his step-brother, Brad. In re Marriage of Wahl, 246 N.W.2d 268, 271 (Iowa 1976). The effect of doing this would be to disrupt the stable relationship he now enjoys with his father and classmates.

Nor are we concerned about the possibility of Robert moving to Arizona. 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 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. Robert testified that as long as Clint was doing well in school and wished to remain in Bedford, that Robert would not consider moving, at least until Clint reaches 18 years of age. If Debra should hereafter seek a modification of the custodial provisions of the decree, it will be incumbent upon her to show a substantial change in

circumstances making it essential and in Clint's best interests that custody be changed.

We believe that Clint has developed into a healthy and normal child under Robert's custody. Because Robert has been the primary caretaker of Clint 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 Clint should remain with Robert, we next turn to Debra's contention that the trial court erred in not considering the distance between the parties' residences in establishing visitation.

In its decree the trial court entitled Debra to have visitation with Clint in her home on alternating weekends from 6:00 P.M. Friday night to 4:00 P.M. Sunday afternoon. Debra is to provide transportation from Osceola to Oskaloosa in both directions, and Robert is to provide transportation from Bedford to Osceola in both directions each weekend visit. Debra is entitled to visit with Clint on alternating holidays, including Christmas, Christmas Eve, Thanksgiving, Labor Day, Memorial Day, Independence Day, and Easter. Debra is entitled to visitation for one week the first week in June, one week the first week in July, and two weeks the first two weeks in August.

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 Burham, 283 N.W.2d 269, 276 (Iowa 1979). Visitation, like custody, is determined by the best interests of the child. In re Marriage of Hubbard, 315 N.W.2d 75, 82 (Iowa 1982).

Based upon a consideration of all the evidence, we do not believe the trial court abused its discretion. The trial court, sitting in its unique position, determined that upon the consideration of all the evidence it would be in Clint's

best interest that visitation be ordered for every other weekend, with alternating holidays and four weeks during the summer. Each party was to share equally in the costs and distance for transportation. Both Debra and Robert appear to be flexible on the amount of visitation, and Robert testified that if Clint desired increased visitation, he would not block such requests. We are also mindful of the fact that as Clint grows older, he will become involved in a larger number of school activities after hours, and we therefore believe that the parties would be better suited to determine fair and equitable visitation than we as a court sitting in equity. We therefore affirm the trial court's decree concerning visitation.

AFFIRMED.