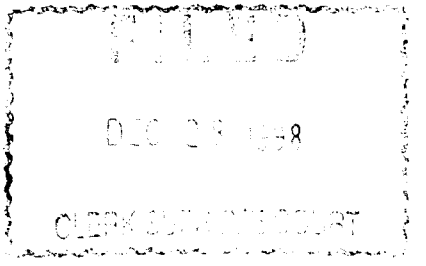
IN THE COURT OF APPEALS OF IOWA

No. 8-589 / 98-0370
Filed December 28, 1998



IN RE THE MARRIAGE OF TERRY FELDMAN AND TROY FELDMAN

Upon the Petition of
TERRY FELDMAN,
Appellant,

And Concerning
TROY FELDMAN,
Appellee.

Appeal from the Iowa District Court for Boone County, David R. Danilson, Judge.

Terry Feldman appeals various child custody and support provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Eric Borseth of Borseth & Genest, Pleasant Hill, for appellant.

Brian J. Humke of Parmenter & Humke, Huxley, for appellee.

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

STREIT, P.J.

Terry Feldman appeals the custody provisions of her divorce decree granting primary physical care of her daughter, Britanie, to her ex-husband, Troy. Because Terry's role as primary caregiver outweighs the disruptive effect that moving away from the family home will have on the child, we reverse the trial court and award primary physical care of Britanie to Terry.

I. Background & Facts.

Terry and Troy Feldman were married in 1987. They have one child, Britanie, born in 1988. Troy was thirty-four at the time of trial and Terry was thirty.

Troy is a high school graduate and employed full-time in the family farm corporation. Troy earns a gross monthly wage of $1182 per month. As part of Troy's employment, he has the use of a home, a truck, the payment of all utilities except telephone, and health insurance coverage for himself and his family. He also receives a $200 per month food allowance. All truck maintenance, insurance, and gasoline is paid for by the corporation.

Terry has a marketing degree from Iowa State University. In the early years of their marriage, Terry worked as a cosmetologist and part-time at Wal-Mart. She currently is employed full-time as a manager for Petite Sophisticates in Des Moines. She earns a net monthly income of $1426.59. She works a rotating shift of evenings and weekends.

Terry was Britanie's sole primary caregiver until Britanie was three. Troy became more active in Britanie's care as Britanie grew older. After the separation, the parties agreed to a joint physical care arrangement but, during the course of the divorce proceedings, it became clear this arrangement would not be possible.

Terry filed a petition for dissolution on July 21, 1997. The major dispute at trial was primary physical care of Britanie. The court concluded it would be least disruptive to Britanie for Troy to have primary physical care. The court awarded Terry liberal visitation, without setting out an explicit visitation schedule, and ordered Terry to pay $300 per month child support. Terry appeals the custody ruling and a portion of the economic provisions of the decree.

II. Standard of Review.

Our review is de novo. Iowa R. App. P. 4. *In re Marriage of Miller,* 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact, but do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.; In re Marriage of Brown,* 487 N.W.2d 331, 332 (Iowa 1992).

III. Primary Physical Care.

The controlling consideration in child custody cases is the best interests of the child. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). Both these parents are suitable primary physical caregivers. In this situation, where the parents cannot work jointly to raise their children because of their own differences, it is in the best interests

of the children to have one primary physical caregiver. *See Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This decision requires us to select the custodial parent who can minister most effectively to the long-term best interests of the children and place them in an environment that will foster healthy physical and emotional lives. *In re Marriage of Daniels*, 568 N.W.2d 51, 53 (Iowa App. 1997).

The trial court awarded primary physical care of Britanie to Troy. The court reasoned Britanie's life would be less disrupted because she would remain on the farm, in the same school, and with her friends if primary physical care were with Troy. Other factors looked at by the court were: Troy's increased participation in Britanie's care, Britanie's preference to live with her Dad if her Mom did not live in Boone, Britanie's anger at her mother over the divorce, and the couple's work schedules.

It is undisputed Terry was Britanie's primary caregiver prior to the separation. The parent who has been the primary caretaker of the children during the marriage will not necessarily be designated by the court to be primary caretaker at the time of the divorce. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). However, the role the primary caretaker has played in the lives of the children is given consideration in custody disputes. *In re Marriage of Burkle*, 525 N.W.2d 439, 441 (Iowa App. 1994). Allowing a parent to continue as the primary caretaker after the divorce gives continuity to the lives of children. *Id.* To continue the primary

caretaker with the children recognizes the need for stability and continuity of relationships as an important consideration for the child's best interests.

Until Britanie was three, Troy admits Terry was responsible for all of Britanie's care. Even after Britanie grew older, it was Terry who was responsible for Britanie's daily care. Terry woke Britanie up in the morning, got her cleaned and dressed, packed her bag, and took her to day care. Terry picked her up from day care, bathed her, fed her, played with her, and made sure she had social interaction and physical activities. It was Terry who attended all of Britanie's school conferences and who works with Britanie on her reading and spelling skills, which are a challenge for Britanie.

The bond that has developed between Terry and Britanie is not outweighed by the disruption it will be upon Britanie's life to move away from Boone, but this is not our only consideration in coming to the conclusion primary physical care should be with Terry. There are several issues the trial court overlooked when evaluating Troy as Britanie's primary physical caregiver.

First, the issue of domestic abuse, although not discussed by the trial court, must be considered. Terry testified she kept diary entries of times when Troy had hit, pushed, or shoved her as a method of resolving conflict. We have previously recognized domestic abuse as a factor in determining the custodial parent. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997). The trial court did not make a credibility ruling on Terry's testimony or a ruling that the alleged domestic

abuse was insignificant. Although Troy denied pushing and shoving Terry in one instance, he did not deny he had hit and pushed Terry during their marriage as a method of conflict resolution. This is a factor in our decision to reverse the trial court.

Second, some aspects of Troy's relationship with Britanie are not in her best interests. Troy testified he was Britanie's friend and he did not see a difference between being a father and being a friend. The counselor who worked with this family during the separation testified Troy was using Britanie for emotional support during the separation and divorce. Britanie expressed a need to take care of her father. Troy told Britanie the visceral details of the couple's separation and divorce. Britanie, a nine-year-old girl, should not have been burdened with such knowledge. Troy has fostered Britanie's feelings of anger toward Terry. Britanie's desire to live with her father must be viewed in light of these observations. This is not a healthy situation for a child. Neither is it supportive by Troy of Terry's parenting role. In contrast, Terry sought counseling for Britanie to help Britanie deal with the impact of the divorce upon her.

Another observation of the counselor was that Troy exploited Britanie to get Terry back. At one point, Troy came to pick up Britanie from Terry and told Terry she would not see Britanie again unless she moved back home. A parent's denial of visitation without just cause is a significant factor in determining the proper custody arrangement. *See* Iowa Code § 598.41(1).

There are other matters that do not bode well for Troy's ability to adequately care for Britanie on a day-to-day basis. At one point, while staying with Troy, Britanie did not bathe for about four days. Another factor the trial court used in making its determination was Troy's work schedule on the farm was more flexible than Terry's at the clothing store. However, it has been in Troy's care Britanie has called friends and family expressing she was alone and scared and, at times, hungry. This has not happened in Terry's care. Terry ensures Britanie has a caretaker when she is at work.

The disruption it will cause Britanie to move from her home, school, and friends does not outweigh the good it will do Britanie to remain with her primary caregiver, Terry. This is especially true in light of the other factors we have discussed in this opinion. For all these reasons, it is in Britanie's best interests for Terry to be awarded primary physical care of Britanie.

IV. Child Support & Visitation.

Our decision requires us to calculate child support and address visitation. Troy and Terry earn gross annual incomes of $15,636 and $22,000, respectively. We hold Troy should pay child support under the guidelines adjusted for other benefits paid for by his employers. The guideline amount based on these incomes would be $323 per month as child support. However, because Troy receives much from his employer corporation that should be considered in determining child support, the support ordered should deviate from the guideline amount. *In re Marriage of Russell*, 511

N.W.2d 890, 893 (Iowa App. 1993)(holding all income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligation). *See also In re Marriage of Lee*, 486 N.W.2d 302, 305 (Iowa 1992)("The guidelines do not limit the definition of gross income to that income reportable for federal income tax purposes"). This non-monetary income is not speculative. Each year Troy has the use of a house and $200 per month food allowance, a truck, the payment of all utilities except telephone, and health insurance coverage for himself and his family. All truck maintenance, insurance, and gasoline is paid by the corporation. Troy is ordered to pay Terry $600 per month as child support. If Troy is fully current on the payment of child support at the end of the calendar year, he is entitled to the tax exemption for Britanie. Troy shall maintain medical insurance for the child. The parents shall share evenly any medical expense not covered by insurance.

Terry has proposed a visitation schedule be ordered by this court. Troy argues a schedule is not needed because the parents can work together. Troy also argues this issue has not been preserved for appeal. An appellate court can modify visitation when modifying a custody award. Primary physical care of Britanie is placed with Terry with Troy having liberal visitation rights, as the parties may agree. If the parties do not agree, visitation shall be every other weekend, every other holiday (New Years, Easter, Memorial Day, Independence Day, Labor Day, Thanksgiving,

Christmas Eve, Christmas Day, child's birthday), every Father's Day, and six weeks each summer.

We have reviewed Terry's claim that Troy should be required to assume a portion of her student loan debt, and find it without merit. We affirm the trial court on this issue.

AFFIRMED AS MODIFIED.