

IN THE COURT OF APPEALS OF IOWA

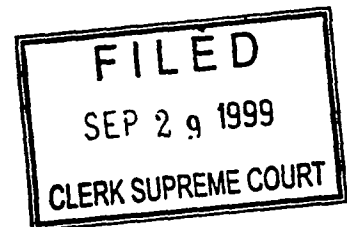
No. 1999-152 (9-368) / 98-1940

Filed September 29, 1999

KHAMSING VANG,
Petitioner-Appellee,

vs.

EVA DAWN HANAWALT,
Respondent-Appellant.



Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Respondent appeals from the district court's order granting primary physical care of the parties' child to Petitioner. **MODIFIED AND REMANDED.**

Steve Vanden Berg of Torgerson & Vanden Berg, Mason City, for appellant.

Ta-Yu Yang, Des Moines, and Jeanne K. Johnson, Des Moines, for appellee.

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

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HUITINK, J.

I. Background Facts and Proceedings.

Khamsing Vang (Sing) and Eva Dawn Hanawalt lived together from 1987 through 1992. Their child, Joey Hanawalt, was born July 11, 1989. With the exception of part of the 1996-97 school year, Joey lived with Dawn and her two other children, Bradley and Chelsea, since 1992. After separation, Dawn and Sing agreed to a visitation schedule allowing Joey to stay with Sing during the summer and holidays.

These proceedings commenced with Sing's May 7, 1997, petition to establish paternity and formalize Joey's custodial status. At trial Sing testified he was thirty-nine years old and had received a bachelor's degree in mass communications and art. He was currently working for Home Plastics as an artist, and his annual income was between \$18,000 and \$20,000. He has no other children besides Joey and is able to provide a permanent home for Joey. He owns his home in Des Moines. His parents, two sisters, and a brother live there and are willing to help with Joey's care. Sing testified that he and his family are from Laos and that Joey has learned Laotian while staying with Sing. Sing also testified he regularly paid Dawn \$100 monthly child support.

Sing's custodial demands were premised on Dawn's environmental instability. He offered evidence detailing Dawn's frequent residential and employment changes. Sing testified Dawn sent Joey to live with him for the 1996-97 school year because

revocation of her A.D.C. benefits left her unable to care for her children and that Dawn unilaterally ended Joey's stay without consulting him. Sing additionally offered a December 10, 1996, founded child abuse report by the Cerro Gordo County Department of Human Services based on Dawn's failure to properly supervise Joey.

Dawn testified she had been living in Garner for the last five months. She was unemployed at the time of trial and relied on A.D.C. benefits of \$495 per month, food stamps, and Title XIX benefits for her family's subsistence.

Dawn acknowledged most of Sing's allegations of instability, but attributed her situation to factors beyond her control. She testified Sing abandoned Joey in 1992 and has provided only token financial and custodial support for Joey since that time. Dawn disputed Sing's negative assessment of her lifestyle and its implications for Joey. She testified Sing frequently abused her when they lived together and made sexual advances towards Joey's fifteen-year-old baby-sitter. Dawn also testified Joey has a close relationship with Bradley and Chelsea, and their separation would be traumatic for Joey. Dawn explained the child abuse report resulted from a simple misunderstanding over Joey's transportation after school.

The district court awarded Sing and Dawn joint custody of Joey. Sing was awarded physical care subject to Dawn's specified visitation privileges. Dawn was ordered to pay Sing \$150 monthly child support.

On appeal Dawn contends the district court's decision is contrary to the evidence and Joey should remain in her physical care. Dawn also demands an award

of past child support, medical expenses, and attorney's fees. Dawn alternatively seeks a reduction of the child support award made by the district court.

II. Standard of Review.

We review this equitable proceeding de novo. Iowa R. App. P. 4.

III. Physical Care.

The criteria governing child custody determinations are the same regardless of whether the parents are dissolving their marriage or have never been married to each other. *Neubauer v. Newcomb*, 423 N.W.2d 26, 26 (Iowa App. 1988) (citing *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981)). The best interest of the child is the first and governing consideration. The factors to consider in awarding custody are enumerated in section 598.41(3) and *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983), and *In re Marriage of Winters*, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue in determining the best interest of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). The objective is to place the child in the environment most likely to bring him to healthy physical, mental, and social maturity. *Phillips v. David-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995).

Dawn is Joey's life-long sole custodian and primary care provider. She has been and remains entirely dependent on governmental assistance for the support of her three children. Sing has made a formidable record concerning Dawn's parental

failures. Dawn's inability to establish and maintain a stable home and school environment for Joey weighs heavily against her.

Sing has never denied paternity. He has shown an enduring interest in Joey's welfare through regular visits. Sing provided Joey a secure home when Dawn could not. Sing's employment and residential stability offer Joey long-term security.

Although Dawn's primary care experience is tainted by environmental instability, we find its root causes in financial disadvantage rather than lack of parental motivation or competence. Dawn candidly acknowledges the negative consequences for Joey resulting from frequent location and school changes. Dawn earnestly contends, however, that she has done what she could with what she had to provide for her children's needs.

Sing has always had the means to pay meaningful support for Joey. However, even with credit for the support he claims, Sing has made no more than token contributions to Joey's financial and custodial support. Sing has instead secured for himself and others those advantages Dawn and Joey have been denied. While Dawn's past environmental instability weighs heavily against her, we are equally unimpressed with Sing's efforts to exploit circumstances for which he bears substantial responsibility. We are confident Dawn, given adequate financial means, is capable of providing Joey with a stable and secure environment. Placement with Dawn also preserves continuity of physical care and Joey's close relationship with Bradley and

Chelsea. We accordingly modify the district court's decree by placing Joey in Dawn's physical care.

IV. Child Support.

Iowa Code section 600B.25 provides:

1. Upon a finding of paternity pursuant to section 600B.24, the court shall establish the father's monthly support payment and the amount of the support debt accrued or accruing pursuant to section 598.21, subsection 4, until the child reaches majority or until the child finishes high school, if after majority. The court may order the father to pay amounts the court deems appropriate for the past support and maintenance of the child and for the reasonable and necessary expenses incurred by or for the mother in connection with prenatal care, the birth of the child, and postnatal care of the child and the mother, and other medical support as defined in section 252E.1. The court may award the prevailing party the reasonable costs of suit, including but not limited to reasonable attorney fees.

2. A copy of a bill for the costs of prenatal care or the birth of the child shall be admitted as evidence, without requiring third-party foundation testimony, and shall constitute prima facie evidence of amounts incurred.

The district court's failure to award past and future medical expenses, child support, and attorney's fees necessitates a remand for this purpose.

V. Visitation.

Ordinarily, the best interest of children requires continuing association with the noncustodial parent unless contrary is clearly shown. *Metallo v. Musengo*, 353 N.W.2d 872, 875 (Iowa App. 1984). In establishing visitation rights, the court's governing consideration is the best interests of children, and generally, liberal visitation rights are in the children's best interest. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa App. 1992). Although liberal visitation is the benchmark, the

governing consideration in defining visitation rights is the best interests of the children, not those of the parent seeking visitation. *In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa App. 1994).

We believe the district court is in the best position to determine when, and the conditions under which, visitation should be permitted. *Lamansky v. Lamansky*, 207 N.W.2d 768, 772 (Iowa 1973). We therefore remand this matter to the district court for proceedings consistent with this opinion.

VI. Attorney Fees.

Dawn requests an award of appellate attorney fees for the instant case.

Attorney fees are not awarded as a matter of right. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 867 (Iowa App. 1996). An award of attorney fees is based on the parties' respective needs and abilities to pay. *In re Marriage of Lattig*, 318 N.W.2d 811, 817 (Iowa App. 1982).

We award Dawn \$1000 for appellate attorney fees. Costs are taxed to Sing.

MODIFIED AND REMANDED.