

IN THE COURT OF APPEALS OF IOWA

No. 7-111 / 96-1375

EDMUND D. GHERARDI,
Petitioner-Appellee,

vs.

ANGELA PARSONS,
Respondent-Appellant.

Appeal from the Iowa District Court for Benton County, Van D. Zimmer,
Judge.

Angela Parsons appeals from a district court decree in a custody action.

AFFIRMED IN PART AND REVERSED IN PART.

Morris L. Eckhart of Milroy and Eckhart, Vinton, for appellant.

Karen A. Volz of Ackley, Kopecky and Kingery, Cedar Rapids, for appellee.

Heard by Habhab, C.J., and Huitink and Streit, JJ.

STREIT, J.

Angela Parsons appeals from a district court decree in a custody action. She contends the district court erred in (1) awarding primary physical care of her daughter to the daughter's father, Edmund Gherardi, and (2) failing to require Edmund to contribute toward her attorney fees.

Angela Parsons and Edmund Gherardi are the unwed parents of Brianna M. Gherardi, born August 14, 1988. They lived together, along with Angela's older daughter, Natasha Zarkowski, in Pennsylvania for two years after Brianna's birth, then separated. Edmund then paid child support and exercised some visitation with Brianna.

In July 1993, Angela moved to Montana with her fiancée, Jeffrey Parsons. Angela failed to notify Edmund of the move, and he had to hire a private detective to locate her and Brianna. Edmund visited Brianna only once after the move to Montana and did not pay any money to Angela for Brianna's expenses during this period. His visitations were compromised when Angela moved to another location in Montana without notice and later obtained a restraining order against him based on an alleged threatening phone call. Jeffrey and Angela had a daughter, Amanda, in 1993.

The Parsons moved to a trailer in Vinton, Iowa, in 1994. Edmund again was not notified. In January 1995, it was discovered Jeffrey repeatedly sexually abused Natasha in Montana while Angela was working. He pled guilty to lascivious acts and

was sentenced to prison for a term not to exceed five years. Another daughter, Sierra Parsons, was born on March 7, 1995.

In November 1995, Edmund filed an action in Iowa to establish paternity and seek custody of Brianna. At the time of trial, Edmund was thirty-seven years old and lived in Pennsylvania with his wife and young son. Angela was thirty-five and lived in Vinton.

Following a hearing, the court entered its ruling ordering primary care of Brianna to Edmund. The court found Edmund and his wife, Susan, could provide more than adequate care for Brianna.

The court ordered Angela to pay \$50 per month in child support, set a visitation schedule, required each party to pay their own attorney fees, and divided the costs equally.

Angela appeals.

Our review in this case is de novo. Iowa R. App. P. 4. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). We give weight to the trial courts findings of fact, but we are not bound by them. Iowa R. App. P. 17(f)(7).

The critical issue is not which parent possesses the greater right to the child, rather the controlling consideration must be the best interests of the child. *Heyer v.*

Peterson, 307 N.W.2d (1), 7 (Iowa 1981). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the child. The objective should always be to place the child in the environment most likely to bring that child to healthy physical, mental, and social maturity. *In re Marriage of Weidner*, 223 N.W.2d 165, 167 (Iowa 1974). The court should also consider the characteristics and needs of the child, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the child, the relationship of the child with each parent, the nature of each proposed environment, and the affect of continuing or changing an existing custodial status.

There is no presumption in favor of the mother or the father. *In re Marriage of Bowen*, 219 N.W.2d 684, 688 (Iowa 1974). Greater primary care experience is one of many factors the court considers but does not ensure an award of physical care. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa 1995). In so far as is reasonable and in the best interests of the child, the court should make an award of custody which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents and which will encourage the parents to share the rights and responsibilities of raising the child. Iowa Code §598.41(1). To effectuate that policy the court must consider the willingness of each party to allow the child access to the other party. *In re Marriage of Burham*, 283 N.W.2d 269 (Iowa 1979).

Although we do not welcome disturbing Angela's primary care of Brianna, we find Edmund can provide a more stable environment than Angela and is more likely to provide Angela with meaningful contact with Brianna. Angela claims Edmund failed to exercise adequate visitation and did not voluntarily provide child support after they left Pennsylvania, however, Angela has moved frequently in the past without telling Edmund where they have moved.

There is some concern due to Angela's denial of contact between Edmund and Brianna in the past. Angela blames Jeffrey, her husband, for her clandestine moves to Montana and Iowa. It is evident though, Angela does not intend to stay in Iowa. Angela has already expressed intentions of moving away from Iowa to an undecided location because of Jeffrey's short prison term. Angela claims Jeffrey has threatened retaliation on Angela and the girls as a result of the criminal charges and incarceration. Angela is afraid for the safety of herself and the girls.

Angela has failed to protect her children from abuse. Even though Angela claims she was unaware of Jeffrey sexually abusing her eldest daughter, there is evidence Jeffrey had beaten Brianna on the soles of her feet with a belt in Montana. Angela argues she immediately arranged for counseling for the children when she became aware of the sexual abuse, yet she continued to visit Jeffrey in jail from January 1995 until May 1995. She did not file for divorce until November 1995. All of these circumstances lead the court to question Angela's stability and parenting

abilities. Despite the fact Angela has been the primary care giver, Brianna's best interests are served in Edmund's primary physical care.

Although it appears Angela and her other daughters are closely bonded to Brianna, this reason standing alone will not prevent a court from denying physical care to an otherwise competent father. Our primary concern is the welfare of Brianna. We find Brianna's long-range best interests outweigh the strong interest in keeping half siblings together. *See Yarolem v. Ledford*, 529 N.W.2d 297, 299 (Iowa App. 1994); *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986).

Angela also suggests she has had de facto physical custody of Brianna for many years because there was no prior judicial determination of paternity. *See Iowa Code* § 600B.40 (1995).

In a custody case regarding a child whose parents had never been married, no higher burden of providing fitness as a parent rests upon the father. The legal analysis employed in resolving a question concerning the custody of a child born of such a union is the same as that which would have been utilized if the child's parents had been married and a dissolution of their marriage had resulted.

Lambert v. Everist, 418 N.W.2d 40, 42 (Iowa 1988).

Under the factors considered in awarding custody enumerated in Iowa Code section 598.41(3), we find Edmond is the superior parent to administer the educational, medical, material, and social needs of Brianna.

Finally, Angela claims the district court erred in refusing to award her attorney fees, and requests appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 trial court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981).

We determine the district court has not abused its discretion for failure to award Angela attorney fees at trial. Each party should pay his or her own attorney fees on appeal.

Appellant filed a application for child support during this appeal. Said application is denied.

AFFIRMED IN PART AND REVERSED IN PART.

Huitink, J., concurs; Habhab, C.J., dissents.

HABHAB, C.J. (dissenting)

I respectfully dissent. I would reverse the trial court and award custody of Brianna to her mother, Angela.

Before setting forth my reasoning, it is clear from my de novo review of the record that Angela's actions are indeed faulty and to a great extent deserving of censure. But, from the same record, I believe Angela, despite her significant shortcomings, can minister more effectively to the long-range best interests of Brianna.

Angela has three other daughters. Brianna is closely bonded to her half-siblings and her mother. Angela has been the sole caregiver of Brianna since her birth. Brianna is now eight years of age and has expressed a desire to remain with her mother and her half-siblings.

Although I believe Brianna's best interests will be served by awarding custody to Angela, it is not my intent to minimize Angela's behavior and the insensitivity she has displayed towards the general welfare of her other children. Yet, I cannot conclude Brianna's best interests will be served by awarding her custody to a father she barely knows.

I would reverse.