IN THE COURT OF APPEALS OF IOWA

No. 1-472 / 00-1713
Filed August 29, 2001

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CLERK SUPREME COURT

MICHAEL J. MICULINICH,
Petitioner-Appellee,

vs.

KARI L. HANSEN,
Respondent-Appellant.

Appeal from the Iowa District Court for Fayette County, James L. Beeghly, Judge.

The respondent appeals a district court order on petitioner's action for joint custody and visitation granting petitioner physical care of their minor child. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Elizabeth Lounsberry and Sarah Dooley-Rothman of Lounsberry Law Office, Independence, for appellant.

David L. Strand of Strand & Riker Law Office, Decorah, for appellee.

Considered by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

MAHAN, J.

The respondent, Kari Hansen, appeals a district court order on petitioner, Michael Miculinich's, action for joint custody and visitation granting petitioner physical care of their minor child. Respondent contends the district court erred in: (1) placing physical care of their child with petitioner; (2) awarding petitioner child support; (3) failing to grant her request for back child support; and (4) failing to award her sufficient trial attorney fees. Respondent also requests an award of appellate attorney fees. We affirm in part, reverse in part, and remand for a determination of the amount of back child support owed to respondent.

Background Facts and Proceedings. Michael and Kari began dating during high school, when Michael was a sophomore and Kari was a freshman. The parties eventually discussed the possibility of marriage. When Kari was a junior, and Michael a senior, Kari became pregnant. Christopher Michael Hansen was born May 15, 1998. Michael and Kari broke off their relationship shortly thereafter.

At the time of Christopher's birth, Michael and Kari resided in Oelwein with their respective parents. Michael graduated from high school in May 1998, shortly after Christopher's birth. He moved out of his parents' home to a trailer near Decorah, and began working at the Decorah Fareway grocery store, where he eventually earned $9.25 per hour ($14,652 per year). He also attended Northeast Iowa Community College in Calmar. Michael graduated with an agri-business management degree in February 2000. In his current employment as a route sales representative for Interstate Brands Company, Michael earns a base

salary plus commission of approximately $31,200 per year. His work schedule is flexible.

Michael began paying child support of $11.53 per week after the entry of a child support order requiring him to do so. He did not inform the Child Support Recovery Unit or Kari of his increase in income at the time it occurred.

Michael met Elyse Running when the two worked at the Decorah Fareway. Eventually, Michael moved in with Elyse and lived with her in the basement of her mother's house. Michael and Elyse are engaged and plan to marry in the fall of 2001. They purchased a house together in Decorah, where they both reside.

After Christopher's birth, Kari returned to high school. She spent her senior year attending school, working at McDonald's, and caring for Christopher. Kari's mother cared for Christopher when Kari was at school or work. After graduation from high school in May 1999, Kari moved to Eagle Grove, where her then-fiancé, Scott, lived. She and Christopher lived in an apartment Scott rented for them. Kari worked full-time at McDonald's restaurants in Webster City, and Fort Dodge. Scott broke off the couple's engagement in September 1999. Kari and Christopher returned to Oelwein, where they lived in an apartment until October 2000. Kari worked at the McDonald's in Oelwein. In the fall of 2000, Kari received a promotion to management, which required a transfer to the Waverly McDonald's. She and Christopher moved to an apartment in Plainfield, in October 2000. She expected her pay to increase from $7.20 per hour to $7.75 per hour for a forty-hour workweek.

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By all accounts, Christopher is an energetic, bright, well-adjusted, secure, and affectionate child. He is an active two-and-one-half year old, and loves the outdoors. He has a strong bond with both parents, and his needs are adequately met while with either parent. Michael has exercised regular and liberal visitation during most of the time since Christopher's birth without major problems between the parties.

On October 26, 1999, Michael filed a "petition for joint custody and permanent and temporary visitation". He requested the court establish primary physical placement of the child and a permanent visitation schedule. In February 2000, Michael filed a "motion for leave to amend petition and amendment to petition for joint custody". The amendment specifically requested temporary and permanent physical care of Christopher be placed with Michael, and Kari be ordered to pay temporary and permanent child support. The court denied Michael's request for temporary physical placement of Christopher with him. The court never ruled on Michael's motion to amend the petition.

After a two-day trial in October 2000, the court issued a decree, establishing joint legal custody with both parents, and placing primary physical care of Christopher with Michael. The court established a visitation schedule for Kari, and ordered her to pay child support of $221 per month. The court denied Kari's request for modification of child support retroactive to February 2000, when Michael began working full-time. Michael was ordered to pay $750 toward Kari's attorney fees, and pay $172 in court costs. Kari appeals.

Standard of Review. We review de novo. Iowa R. App. P. 4. We review the entire record and adjudicate rights anew on issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). While we give weight to the factual findings of the district court, especially with respect to credibility determination, they do not bind us. *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 51 (Iowa 1999). 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).

Physical Care. The governing consideration in a custody action is the best interests of the child. *In re Marriage of Barry*, 588 N.W.2d 711, 712 (Iowa Ct. App. 1998). Our analysis is the same regardless of whether the parties were married. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988); *In re Purscell*, 544 N.W.2d 466, 468 (Iowa Ct. App. 1995). The objective of the court is to place the children "in the environment most likely to bring [them] to a healthy physical, mental, and social maturity." *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999) (quoting *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995)). The court must determine which parent will better raise the child. *Barry*, 588 N.W.2d at 712. Several factors assist a court in deciding the long-term best interests of the child. *See* Iowa Code § 598.41(3) (2000); *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). The parent's gender is irrelevant and should not be considered. *Murphy*, 592 N.W.2d at 683.

In spite of the parties' criticisms of the other's ability to care for Christopher, our review of the record reveals both parents provide an appropriate

environment in which to raise and nurture him. The difficulty in this case lies in determining the credibility of witnesses. The district court explained its difficulty in making such determinations as follows:

> This trial was characterized by major inconsistencies between the testimony of Kari and Michael. To some degree credibility issues have carried over to some witnesses. The inconsistency in testimony has made it somewhat difficult for the court to sort out the truth. Often, incidents that were reported, were experienced with only two participants and no witnesses. Where there were witnesses who have testified, the court has concerns about credibility, in some instances. While it is not uncommon for the court to hear varied versions of events in cases of this nature, the divergence of testimony in this case exceeded what one would normally expect to result from truthful witnesses testifying from their biased prospective.
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> Michael appears for the most part to have outgrown the practice of lying. Kari, on the other hand, has not only continued the practice, but has enlisted others who appear to have similar problems with the truth.

The district court found Michael generally more credible than Kari. Because the trial court had the opportunity to observe the demeanor of the witnesses, we give weight to its findings, particularly with respect to credibility. *Murphy*, 592 N.W.2d at 683. Although the primary physical care issue is close, we agree with the district court that Michael will more adequately meet Christopher's needs. We affirm on this issue.[1]

Child Support. Kari argues the court erred in awarding child support because it never granted Michael's motion for leave to amend the petition to include a request for child support. Kari requests reimbursement of all monies

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[1] Kari asks the court to treat this case as a modification action and require a higher burden of proof before changing primary physical care, because Christopher lived with Kari for two and one-half years prior to the change in physical placement. We refuse Kari's invitation to change the current state of the law.

paid by her since the entry of the court's order. In addition, she contends the court erred in its decision not to grant her request for back child support from Michael because it had not been properly pled.

Kari failed to preserve error on the issue of Michael's child support award. The pretrial order indicated child support was an issue for the court's determination. Kari failed to object to its inclusion as an issue at trial. We affirm the court's award of child support to Michael.

However, we agree with Kari the district court erred in its decision not to grant her request for back child support from Michael. A valid child support order, of which the district court was aware, existed at the time of trial. Michael failed to promptly notify the Child Support Recovery Unit or Kari of his increase in income. Between February 2000 and the trial in October 2000, Michael continued paying only $11.53 per week in child support, even though his income had increased substantially.

Kari requested $3688 in back child support. We cannot determine from the record before us whether the amount she requested is accurate. Therefore, we remand to the district court for a determination of the amount of child support owed by Michael to Kari during the period from February 2000 to the entry of the decree on October 10, 2000, and entry of judgment against Michael equal to that amount.

Attorney Fees. Ordinarily, an award of attorney's fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa

1995). An award of attorney fees depends upon the financial circumstances of the parties and their respective ability to pay. *Id.* The district court ordered Michael to pay $750 of Keri's attorney fees. We conclude the district court properly considered this issue and we find no abuse of discretion.

Kari requests appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). A successful party does not have a vested right to appellate attorney fees. *In re Marriage of Vieth*, 591 N.W.2d 639, 641 (Iowa Ct. App. 1999). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Wood*, 567 N.W.2d at 684; *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We deny Kari's request for appellate attorney fees.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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