IN THE COURT OF APPEALS OF IOWA

No. 3-565 / 93-627

IN RE THE MARRIAGE OF MINDY LANE HUFF AND BRUCE EDWIN HUFF

Upon the Petition of
MINDY LANE HUFF,

Appellant,

And Concerning
BRUCE EDWIN HUFF,

Appellee.

FILED
SEP 16 1994
CLERK SUPREME COURT

Appeal from the Iowa District Court for Montgomery County, Glen M. McGee, Judge.

Mindy appeals from the dissolution decree. She argues the district court erred in: (1) awarding custody of the parties' child to Bruce; (2) awarding her inadequate visitation; and (3) not awarding her trial attorney fees. **AFFIRMED AS MODIFIED.**

Verd R. Bailey of Bailey Law Office, P.C., Clarinda, for appellant.

Richard B. Maher, Council Bluffs, for appellee.

Considered by Hayden, P.J., and Sackett and Cady, JJ.

CADY, J.

Petitioner, Mindy, appeals from the trial court's dissolution decree dissolving her marriage with respondent, Bruce. She contests the child custody, visitation, and attorney fee provisions. The trial court awarded joint custody of their son, Gage Edwin Huff, and appointed Brad the primary caretaker. We affirm with modification.

Mindy and Bruce began living together in the fall of 1989. They are the natural parents of Gage, born July 3, 1990. In December, 1990 Mindy took the baby from the farmhouse where they had been living and moved to the nearest town, Red Oak, Iowa. In July 1991, she moved back in with Bruce and they were married July 12, 1991. Mindy and the baby moved out again in March 1992. The marriage was dissolved on March 1, 1993.

Mindy is twenty-one years old. She works at Nishna Productions as a job coach for handicapped adults and has another job at a day care center. She is also attending a paralegal course two nights a week in Omaha, Nebraska. The district court found that her net disposable income was $722 per month.

Bruce is twenty-three years old. In January 1993 he began working for Richards & Sons, local farmers. Prior to this he had done farm work for his father. The district court found that his net disposable income was $961 per month.

The district court awarded primary physical care of Gage to Bruce. Mindy was given visitation including alternate weekends. No provision was made for additional visitation in the summer. The parties were instructed to "alternate holiday visitation." Mindy was ordered to pay $158 per month child support and her request for trial attorney fees was denied.

Mindy appeals. She argues the court should have placed Gage in her primary physical care. Mindy also asserts the visitation provisions are inadequate and Bruce should have been ordered to pay a portion of her attorney fees.

I. Scope of Review

Our review is de novo. Iowa R. App. P. 4. We are required to examine the record made at trial and determine the issues presented on appeal unimpeded by the findings of the trial court. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). The findings of the trial court, however, are recognized and given weight, especially when considering credibility of witnesses. Iowa R. App. P. 14(f)(7). The trial court hears the evidence and observes the witnesses. In re Marriage of Will, 489 N.W.2d 394, 397 (Iowa 1992). This important perspective can greatly enhance the decision-making process, and is not forgotten on appeal. See In re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974).

II. PHYSICAL PLACEMENT OF THE CHILD

The best interest of the child is the preeminent consideration in child custody cases. Numerous factors set forth in Iowa Code section 598.41(3) (1991) supplement the best interest standard. See also In re Marriage of Weidner, 338 N.W.2d 351, 355-56 (Iowa 1983); In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue in determining the best interests of the child is which parent will do better in raising the child. In re Marriage of Golay, 495 N.W.2d 123, 125 (Iowa App. 1992). Gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. Id.

Mindy argues the trial court erred in awarding primary physical custody of Gage to Bruce. Specifically, she asserts the court failed to adequately consider evidence of Bruce's abusive behavior toward her and unfairly judged her moral character.

We acknowledge that violent tendencies of a parent adversely impact on the fitness of that parent to be the primary caretaker of a child. In re Marriage of Snyder, 241 N.W.2d 733, 734 (Iowa 1976). However, after reviewing the record anew, we affirm the trial court's determination.

The trial produced conflicting testimony regarding many of Bruce's alleged controlling and abusive actions toward Mindy. The trial court had a firsthand opportunity to hear the evidence and view the witnesses, therefore, we believe

it was in the best position to determine the credibility of the witnesses. See In re Marriage of Will, 489 N.W.2d 394, 399 (Iowa 1992). The trial court's decision to award Bruce primary physical custody reflects its assessment of the credibility of the witnesses on the issue of spousal abuse. Furthermore, the record indicates Bruce never acted violently toward Gage and recognizes the need to be patient and gentle when caring for him.

Mindy also asserts the trial court did not grant her custody because she has a live in boyfriend and took Gage into bars on several occasions when she needed to speak with her father. Moral misconduct is a circumstance to be considered in determining a parent's fitness to have custody of minor children. In re Marriage of Dawson, 214 N.W.2d 131, 132 (Iowa 1974). It is not however, the only factor. Id. Each case must be decided on its own particular facts. In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

After reviewing the record, we find the trial court did not base its decision solely on its evaluation of Mindy's moral character. Rather, the record as a whole contains credible evidence supporting the courts custody determination. Bruce has an eight to five job allowing him to provide a constant structured environment for Gage. In contrast, Mindy's schedule is variable and includes night school two days a week. Furthermore, Bruce has a strong family support network whose members have previously helped

care for Gage. The home study commissioned by the court indicated Bruce was more attuned to Gage's emotional and psychological needs. Bruce is also supportive of Mindy's relationship with Gage. While both parents clearly love Gage, we believe the trial court's placement order is in Gage's long-term best interest. We affirm that order.

III. VISITATION

Mindy also argues the visitation provisions of the dissolution decree are inadequate and should be liberalized. The decree provides: The parties shall have "alternating weekend visitation from Friday at 6:00 p.m. to Sunday at 6:00 p.m. The petitioner shall also have visitation one night during the week which may be overnight visitation. The parties shall alternate holiday visitation with the goal of equal time to each party." Bruce does not contest amending the decree to give Mindy visitation during the summer.

In establishing visitation rights our governing consideration is the best interest of the child. In re Marriage of Stepp, 485 N.W.2d 846, 849 (Iowa App. 1992) (citing Petition of Deierling, 421 N.W.2d 168, 171 (Iowa App. 1988). Generally, liberal visitation rights promoting maximum continuing physical and emotional contact with both parents are in the child's best interest Stepp, 485 N.W.2d at 849. See Iowa Code § 598.41(1) (1991).

In the present case, we conclude the visitation provisions are unnecessarily restrictive and should be

liberalized. We grant Mindy visitation on alternating weekends from Friday at 6:00 p.m. to Sunday at 6:00 p.m. Mindy may have visitation one day during the week not including Saturday or Sunday, until Gage starts school and then one evening per week when he starts school. Furthermore, we grant Mindy visitation from 9:00 a.m. to 9:00 p.m. on the following holidays in each even numbered year: New Year's Day, Memorial Day, Labor Day, and Christmas Day. Mindy shall have visitation from 9:00 a.m. to 9:00 p.m. on the following holidays in each odd numbered year: Easter Sunday, Independence Day, Thanksgiving Day, Christmas Eve Day, and New Year's Eve Day. Mindy shall have visitation with Gage on his birthday every other year. Mindy shall have visitation from 9:00 a.m. to 9:00 p.m. on Mother's Day and Mindy's birthday every year. Finally, Mindy shall have four weeks of summer visitation from the last two full weeks in June to the first two full weeks in July. Additional visitation for special events, other holidays, or overnight stays shall be permitted providing the parties or their attorneys agree to the times, places, and length of the visits. Moreover, these provisions are subject to modification by the parties or their attorney's without approval of the court.

IV. ATTORNEY FEES

Mindy also argues the trial court erred in failing to require Bruce to pay a portion of her attorney fees. We disagree.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn the award the complaining party must show the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

We find no abuse of discretion in this case. The trial court properly declined to award attorney fees.

We also decline to award attorney fees on appeal. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.