IN THE COURT OF APPEALS OF IOWA

No. 1-303 / 00-1594
Filed June 13, 2001

FILED
JUN 13 2001
CLERK SUPREME COURT

Upon the Petition of
STEVE TRUSHEIM,
Petitioner-Appellant,

And Concerning
DONNA DOES-GORSUCH,
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Dale E. Ruigh, Judge.

The petitioner appeals a district court order denying his request for physical care of the parties' minor child. Petitioner contends the district court erred in: (1) awarding respondent their child's physical care; and (2) failing to place greater emphasis on respondent's sudden move to Oregon without notice to anyone in making its primary care determination. **AFFIRMED.**

Kevin M. O'Hare and Reyne L. See of Johnson, Sudenga, Latham, Peglow & O'Hare, P.L.C., Marshalltown, for appellant.

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan, Condon & Frese, Marshalltown, for appellee.

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

000341

MILLER, J.

The petitioner, Steve Trusheim, appeals the district court order denying his request for physical care of the parties' minor child. Steve contends the court erred in awarding the respondent, Donna Does-Gorsuch, physical care of their minor child and in failing to place greater emphasis in its physical care determination on her sudden move out of state without giving him notice. We affirm.

I. BACKGROUND FACTS

Steve and Donna are the parents of Brice Michael Trusheim, born August 12, 1995. Donna and Steve were never married, however they cohabitated from approximately September 1994 through their separation in May of 1997. Donna was twenty-seven years old at the time of trial and Steve was thirty. Donna had a high school education and was not working outside the home at the time of trial. Steve has an eleventh grade education and worked in the hog confinement and truck driving industries during the year preceding trial.

Donna was hospitalized in 1997 for approximately two weeks for exhaustion and depression. She was on anti-depressant medication for a short time after her hospitalization but was no longer taking it at the time of trial. It does not appear from the record that Donna has suffered any mental health difficulties since 1997 and she was found to be free from any "symptoms or any other kind of psychiatric disorder" by a licensed psychologist shortly before trial. Steve was convicted of operating while intoxicated in 1993. However, nothing in the record indicates he had any alcohol or drug abuse problems at the time of trial and he appeared to be in good mental and physical health.

The parties moved three times during the time they were living together. During this time Steve worked in different hog confinement operations while Donna spent the majority of the time as a full-time homemaker and mother, working outside the home very little. As a result, after Brice's birth Donna provided the bulk of his day-to-day care, although Steve was also involved in Brice's care and he helped out as time allowed while working full time.

The parties eventually ended up in Marshalltown where they continued to reside together until their separation in 1997. By that time Steve had taken a job as a truck driver and as a result was often on the road. During his absence Donna of necessity continued to provide the majority of the day-to-day care for Brice. The parties' separation in the spring of 1997 was a result of a breakdown in their relationship. The trial court found neither party was more responsible for the breakup than the other, a finding with which we agree.

When Donna and Steve separated Brice remained in Donna's care in Marshalltown, apparently with Steve's consent. Steve continued driving trucks until April of 1999 when he returned to Marshalltown to work in the hog industry again. During the approximately two year period between the parties separation and Steve's return to the hog industry, as a result of his truck driving job Steve was able to have only occasional, irregular contact with his son. While Steve tried to see Brice as often as possible the logistics of the situation were clearly difficult. It appears from the record Donna was relatively cooperative and accommodating concerning Steve's irregular and unpredictable schedule while he was driving trucks.

Sometime after the parties separated in 1997 Donna began living with Don Gorsuch. On September 26, 1998 Donna and Don had a son, Tres. The three and Brice lived together until on or about April 29, 1999 they moved to Oregon. Donna and Don wed on or about June 5, 2000 and were expecting their second child at the time of trial. Mr. Gorsuch was a shift manager at a McDonald's in Oregon at the time of trial.

Soon after the parties' separation in 1997 Steve lived with Wanda Brown for a few months and then lived with his parents for a period of time. Since the fall of 1999 Steve has been living with Melissa Waldo in a house provided by his employer. Ms. Waldo was employed as a kitchen helper at a local nursing home at the time of trial. She had four children, however at the time of trial only one was living with her. One was living elsewhere by virtue of a court order and the placement of the other two was pending the outcome of a custody trial.

Donna left Marshalltown in April of 1999 with Don, Brice and Tres without informing Steve of the move. When the parties arrived in Oregon they lived in a motel for a period of time but had moved into a rented apartment at the time of trial. For several months following the move Steve was not able to contact Donna in Oregon because she did not tell him they were moving or provide him with an address or telephone number after their move. However, it does appear Donna's family knew of the move and they were able to contact her during the time Steve did not know where she was.

Approximately seven weeks after Donna left Iowa Steve filed an action in district court seeking joint custody of Brice and physical care of Brice. During the pendency of the action the parties reached an agreement whereby Steve

traveled to Oregon, picked up Brice, and returned with him to Iowa for an extended visitation. Donna returned to Iowa as well shortly before the custody trial and had visitations with Brice. At trial Steve argued he could provide a more stable, disciplined and financially secure home for Brice than Donna. He also questioned Donna's mental health and emphasized her move to Oregon with Brice without providing him notice or giving him any means of contacting his son.

The trial court found that Donna's move to Oregon without giving prior notice to Steve was one militating factor against allowing Donna to be Brice's physical caretaker. However, the court found several other factors favoring Donna over Steve. They included the facts that Donna has served as Brice's primary caretaker since his birth, Steve voluntarily chose to leave Brice in Donna's care after the parties separation in 1997 despite his current complaints regarding the adequacy of her housekeeping skills, the relatively stable relationship Donna has with Don, and the questionable stability of Steve's current relationship and living situation, especially considering the instability caused by the uncertain custody of Ms. Waldo's children.

The court determined that although both parents had a good relationship with Brice and each could provide a suitable residence, Brice's best interests would be served by placing physical care with Donna while allowing Steve as much meaningful contact as possible considering the distance between the parties' homes. Steve appeals.

II. SCOPE AND STANDARDS OF REVIEW

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In*

re Marriage of Smith, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value, except to provide a framework for analysis, and our decision must be based on the particular facts and circumstances before us. *Id.*

III. MERITS

Brice's best interests are paramount in our decision and the objective is to place him "in the environment most likely to bring [him] to healthy physical, mental, and social maturity." *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995). The critical issue in determining the best interests 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 re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996).

There are numerous factors to be taken into account when determining which parent should serve as the long-term primary caretaker of the child. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997); *see* Iowa Code § 598.41 (1999). The criteria governing physical care determinations are the same whether the parents are dissolving their marriage or have never been married to each other. *Jacobson v. Gradin,* 490 N.W.2d 79, 80 (Iowa Ct. App. 1992); *Hodson v. Moore,* 464 N.W.2d 699, 700 (Iowa Ct. App. 1990). We give some factors greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *Daniels*, 568 N.W.2d at 54;

Will, 489 N.W.2d at 397. We base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

The parent who has been the primary caretaker of the child during the marriage will not necessarily be designated the physical caretaker. *See In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). "The role of the primary caretaker is, however, critical in the development of children, and careful consideration is given in custody disputes to allowing children to remain with the parent who has been the primary caregiver." *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995).

It is undisputed that Donna was Brice's primary caretaker both before and after the parties' separation. Steve, on the other hand, had lived with Brice only the first twenty-one months of Brice's life and did not seek to be Brice's primary caretaker until two years after the parties' separation, when Donna moved to Oregon. It is clear from the record that both parties genuinely care for Brice and would both be able to adequately provide for his needs. However, based on the history of their respective relationships and time spent with him, we believe Brice to be more closely bonded to Donna than Steve, and that Brice considers Donna to be his "psychological parent." We give these facts substantial weight in physical care decisions. *See generally In re Marriage of Riddle*, 500 N.W.2d 718, 720 (Iowa Ct. App. 1993); *In re Marriage of Oakes*, 462 N.W.2d 730, 732 (Iowa Ct. App. 1990).

In determining the best interest of Brice we consider the emotional and environmental stability offered by each parent. *In re Marriage of Williams*, 589 N.W.2 759, 762.

> [O]ur case law places greater importance on the stability of the relationship between the child and the primary caregiver over the physical setting of the child. To that end, that which is least disruptive emotionally to the child should be given greatest consideration in achieving the ultimate goal of the child's long-term best interests.

Id. (citations omitted).

We find Brice's emotional stability should take precedence over his physical setting. In order to achieve that stability he should be placed with Donna as she is the parent who has been his primary caregiver throughout the entirety of his life, the parent under whose care he has developed, and therefore the parent to whom he necessarily has the stronger emotional bond. *See In re Marriage of Mayfield*, 577 N.W.2d 872, 874 (Iowa Ct. App. 1998) (finding physical care should not be modified based on custodial parent's decision to move child from community where he grew up to a location five hundred miles from other parent because child was flourishing in custodial parent's care, even though the move constituted a substantial change in circumstances). Steve's relatively recent interest in becoming more involved in the day-to-day care of Brice cannot diminish Donna's role as his primary caretaker since birth.

In support of his argument that the trial court erred in awarding physical care to Donna, Steve points to Donna's poor housekeeping abilities and her past hospitalization for depression. Steve asserts these circumstances adversely affect her ability to be Brice's primary caretaker.

The evidence does show that Donna's housekeeping skills may be somewhat deficient and need some improvement. However, Steve obviously did not feel her skills were so deficient as to disqualify her as their son's caretaker in 1997 when the parties separated or for the following two years while he drove trucks. He voluntarily elected to leave Brice with Donna during this time and only questioned her housekeeping abilities once she moved to Oregon with Don.

Further, a licensed psychologist did an evaluation of Donna in June of 2000 and found she was not experiencing any symptoms of any psychiatric disorder at that time. The trial court found this evidence to be credible and found Donna to be in good physical and mental condition at the time of trial. We see no evidence in the record to show otherwise and thus agree with the trial court that there is no present reason Donna's prior, one time hospitalization for exhaustion and depression should affect the determination of Brice's physical care.

Steve also argues the trial court did not give sufficient weight to the fact Donna suddenly moved to Oregon with Brice without giving him any prior notice and then failed to provide him with any way to contact Brice for several months, thereby denying him the opportunity to have meaningful contact with his son. One of the many factors we take into account in determining the proper care arrangement is the denial by one parent of the children's opportunity to have meaningful contact with the other parent. Iowa Code §598.41(1)(c); *see also Will*, 489 N.W.2d at 399; *Langer v. Mull*, 453 N.W.2d 644, 649 (Iowa Ct. App. 1990).

We agree with the trial court that Donna's abrupt move to Oregon was inappropriate. At the least she should have advised Steve of her new address

and telephone number. The fact her actions denied Steve contact with his son for a year was wrong. However, it does not appear Donna's sole reason for moving was to deprive Steve of contact with Brice, as Don had prior contacts with the state of Oregon. In addition, Donna has been fully cooperative in implementing a visitation agreement reached while this case was pending before the trial court. She was cooperative when Steve traveled to Oregon and took Brice to Iowa for extended visitation. She returned to Iowa about two weeks before trial, and cooperated in exchanging Brice for visitations pending trial. Finally, it appears Steve made no attempt to see Brice while Donna and Brice were visiting Marshalltown in the fall of 1999, even though Steve was made aware they were in town.

IV. CONCLUSION

Upon our de novo review of the entire record, we agree with the trial court's determination that Brice's best interest will be served by placing his physical care with Donna. She had been Brice's primary caretaker for the entirety of his life and he thus is much more closely bonded to her than to Steve who has had only sporadic contact with him. Furthermore, Steve neither expressed nor demonstrated a desire to assume responsibility for providing Brice's physical care until Donna moved to Oregon with Don. Therefore, the concerns which he now urges dictate Brice be placed with him, involving events that occurred and situations that existed substantially before that move, hold little weight in our determination. We find the trial court properly placed physical care of Brice with Donna and affirm the trial court.

AFFIRMED.

000350