

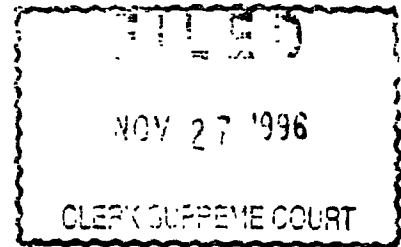
IN THE COURT OF APPEALS OF IOWA

No. 6-553 / 96-474

**Upon the Petition of
VINCENE LEE SMITH,**

Appellant,

**And Concerning
AMY REBECCA RATLIFF
Appellee.**



Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

Vincene Smith appeals from a district court ruling awarding primary physical care of his son to Amy Ratliff, the child's mother. **AFFIRMED.**

Michael J. McCarthy of McCarthy & Lammers, Davenport, for appellant.

Jack E. Dusthimer, Davenport, for appellee.

Considered by Cady, P.J., Huitink, and Streit, JJ.

CADY, P.J.

Vincene Smith appeals from a district court ruling awarding primary physical care of his son, Aaron Matthew Smith, to Amy Ratliff, the child's mother. Smith contends the district court erred in failing to designate him to be Aaron's primary caretaker. On our de novo review, we affirm.

Vincene Smith (Vince) and Amy Ratliff are the unmarried parents of Aaron, born June 15, 1994. They began living together in the home of Vince's parents shortly after Amy became pregnant. Amy was in high school at the time. Vince had just graduated from high school. Amy and Vince moved into their own apartment two weeks before Aaron's birth.

The relationship between Vince and Amy deteriorated over time. After living together in the apartment for just over one year, Amy moved out with Aaron. Vince exercised liberal visitation with Aaron after the separation. After taking Aaron for a visit on one occasion, however, Vince failed to return him to Amy's care. Instead, Vince took Aaron to live with him at his parent's house. He limited Amy to supervised visitation with Aaron at his parent's house. Amy was forced to seek court assistance for additional visitation.

Vince petitioned the district court for joint legal custody and primary physical care of Aaron. Amy responded by also requesting joint legal custody and primary

physical care. The district court awarded temporary custody of Aaron to Vince, with liberal visitation for Amy.

At the final hearing, witnesses testified Vince displayed a violent temper on occasions. Several times while in the relationship with Amy, Vince placed his head or fist through a wall. He also displayed violence in the presence of his own family members. There was no evidence he had been physically violent with Amy.

The guardian ad litem testified Amy and Vince had the potential to be good parents, although both were still gaining maturity. He testified Amy and Vince have the support of family and friends to help them out until they become mature adults. The guardian ad litem did not fear Vince would be physically violent with Aaron. He also thought Vince would be more likely to encourage visitation as the custodial parent. The guardian ad litem believed Amy harbored some animosity towards Vince. He did not recommend a change of the physical placement of Aaron.

The trial court found both parties to be immature, and indicated they would need help caring for Aaron. It also found their abilities and resources to be equal. Nevertheless, the court gave Amy primary care of Aaron. The factors which tipped the decision in favor of Amy were Vince's violent behavior and the deception he used to acquire temporary physical custody of Aaron. Vince was given reasonable visitation, including alternating weekends, alternating holidays, and an extended summer visitation.

Vince appeals alleging the trial court erred in designating Amy to be Aaron's primary caretaker. He asserts the court incorrectly failed to give weight to the guardian ad litem's recommendation. Further, he contends the court failed to recognize the support he receives from his family. Vince also believes visitation should include two week night visits for whomever is awarded primary physical care.

I. Scope of Review

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). 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).

II. Primary Physical Care

Vince contends the district court erred in placing primary physical care of Aaron with Amy. In child custody cases, the best interest of the child is the first and governing consideration. *In re Marriage of Wiarda*, 505 N.W.2d 506, 507 (Iowa App. 1993). The factors the court considers in awarding custody are found in our statutes, as well as in prior cases. See Iowa Code § 598.41(3) (1995); *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983). These factors ultimately bear on what will be in the long-term best interests of the child. *In re Marriage of Vrbanc*, 359 N.W.2d 420, 424 (Iowa 1984). 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 attempting to gain custody in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985).

Vince contends the trial court did not adequately consider the testimony of the guardian ad litem concerning physical care of Aaron. The findings of a guardian ad litem in a custody proceeding are not controlling. *See In re Marriage of Harris*, 499 N.W.2d 329, 331 (Iowa App. 1993). Nevertheless, it is appropriate to give considerable weight to the recommendations of the guardian ad litem, particularly when the guardian ad litem has had opportunities to meet with the parents and observe the interaction between each parent and the children. *Id.*

We give weight to the recommendation of the guardian ad litem. Yet, we recognize it was not based on a belief of superior parenting abilities, but a desire to avoid the disruption that would result from a change in physical placement. The guardian ad litem acknowledged Amy and Vince had equivalent parenting abilities and resources.

Continuity and stability are important considerations. In resolving the issue of primary care, however, our task is to consider and weigh all relevant factors and place primary care in the hands of the parent who is most capable and likely to provide the child with the tools for a healthy, productive future. Each factor must be considered as it impacts this ultimate goal. Moreover, when the evidence separating

one parent from the other approaches equipoise, those factors which do distinguish parents become all the more important. Small distinctions can become critical.

Vince's history of violent behavior is an important distinguishing consideration in this case. Although this violence has not been directed at Aaron or Amy, it has the potential of creating harmful examples for Aaron. Furthermore, the method Vince used to obtain custody of Aaron and his restrictive attitude toward Amy's visitation indicate he may be less likely to be supportive of Amy's relationship with Aaron. *See* Iowa Code § 598.41(3)(c) (1995). In this case, these considerations are important.

We acknowledge Aaron will benefit by the involvement of Vince's family in his upbringing. *See In re Marriage of Welbes*, 227 N.W.2d 756, 758 (Iowa 1982). Yet he will also benefit from the support of Amy's family. Family support is not a factor which tips the decision to either party in this case. Considering all the evidence, we agree with the trial court that primary care should be awarded to Amy. Aaron's best interests will be served by placing primary care with Amy.

III. Visitation

Vince requests an increase in visitation with Aaron to include week night visitations. The district court granted Vince reasonable visitation, with specific time periods. The specific times establish the minimal visitation periods. Amy allowed Vince extremely liberal visitation when she was the custodial parent immediately after the separation. Thus, we are confident she will continue to recognize the

importance of an active relationship between Vince and Aaron. We decline to specify additional visitation terms.

We affirm the trial court.

AFFIRMED.