

IN THE COURT OF APPEALS OF IOWA

No. 0-632 / 90-178

**FILED**

JAN 29 1991

CLERK SUPREME COURT

IN RE MARRIAGE OF RONALD JAMES MACLAGAN and SUSAN JOY  
MACLAGAN

203

Upon the Petition of

RONALD JAMES MACLAGAN,

Appellant,

And Concerning

SUSAN JOY MACLAGAN,

Appellee.

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Appeal from the Iowa District Court for Greene County,  
Gary L. McMinimee, Judge.

Appellant challenges the district court's modification  
of his visitation privileges. **AFFIRMED AS MODIFIED.**

Randy L. Waagmeester of DeWaay & Waagmeester, Rock  
Rapids, for appellant.

Thomas Polking of Wilcox, Polking, Gerken, Schwarzkopf  
& Hoyt, P.C., Jefferson, for appellee.

Considered by Donielson, P.J., and Hayden and Habhab,  
JJ.

**HAYDEN, J.**

Ronald and Susan married in 1971 and dissolved their marriage in June 1978. In their decree they had agreed to assume joint custody of their two boys, Ryan and Brent, who were then ages three and two respectively. Susan was given primary custody of the boys; Ronald received liberal visitation.

After the dissolution Ron remained in Westside, Iowa, where he worked as a school principal. The next year he accepted a position to become a school principal near Rapid City, South Dakota. During this year the boys lived with Ron while Sue attended college. The next year Ron moved to Idaho, and Ryan enrolled in school there.

In 1981 Ron moved to Alaska. By this time Sue and the boys had moved to Jefferson, Iowa. Ron made several telephone calls to the boys, and they visited him while he was in Alaska. In 1986 Ron's employer took bankruptcy, and later that same year Ron was involved in a serious auto accident.

In 1987 Ron returned to Vermillion, South Dakota, to complete his doctorate degree in education. He had difficulty paying his child support. Sue married Doug Reider of Jefferson. In 1989 Ron married Judy who had two children from a prior marriage. Judy currently works as a law clerk for the third judicial district. They live in Spencer, but Ron works for an auto dealership in Spirit Lake.

Ron and Sue have had their disputes concerning visitation and payment of child support over the years. The current dispute centers around the visitation schedule and clarifying Ron's visitation as it interrelates with the boys' activities. The district court appointed attorney William Ostlund of Jefferson to represent the two boys, who were ages fourteen and thirteen at trial time.

After a contested hearing in which the boys expressed their preferences, the court detailed the visitation Ron was to have with the boys. The court acknowledged the boys are involved in many scheduled activities and ruled if these activities should conflict with Ron's scheduled visitation, then Ron's visitation would be delayed until the time the activity has been completed. In case of disagreements over the importance of the activity, the court-appointed children's attorney was to decide. The court ordered each party pay one-half of the costs and children's attorney's fees and their own attorney fees.

Ron has appealed. He insists the trial court erred in: 1) allowing the activities of the children to take precedence over his visitation; 2) finding he did not have any substantial contact with his children after 1981; 3) giving substantial weight to the preference of the minor children; 4) accepting the stipulation drawn up by the attorney representing the minor children; 5) giving the court-appointed children's attorney the power of final decision making in decisions affecting the children's

activities; 6) not awarding him attorney fees; and 7) taxing him one-half of the children's attorney's fees. Ron also seeks attorney fees on appeal.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. 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).

The main problem in this case concerns the father's ongoing ability to visit his own children. It is apparent the parents do not cooperate concerning visitation. Indeed, it appears Susan's attitude is predicated on keeping Ron out of the boys' lives as much as possible.

We remind Susan liberal visitation rights are in the best interests of the children. Iowa Code § 598.1(c); In re Marriage of Muell, 408 N.W.2d 774, 777 (Iowa App. 1987). Both parents, as joint custodians, are charged with maintaining those interests. Unless visitation with the noncustodial parent will in some way injure the child, they are not to be prohibited. Fitch v. Fitch, 207 Iowa 1193, 1197, 224 N.W. 503 (1929).

We are mandated by the legislature to provide "liberal visitation rights" to the non-custodial parent. Iowa Code § 598.41(1). Additionally:

The court shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement.

Id. (emphasis added).

We further point out to Susan interference or denial of the liberal visitation mandated by the Iowa legislature can provide grounds for a change of custody to the father. See In re Marriage of Grabill, 414 N.W.2d 852, 853-54 (Iowa App. 1987). We fully expect the adults in this case to behave maturely in seeing both parent receive the necessary time with their natural children. In re Marriage of Fortelka, 425 N.W.2d 671, 673 (Iowa App. 1988) ("[j]oint custodians should be mature adults who can put aside their differences and operate in their children's best interests").

Ron was away from Iowa for an extended period of time. The reason for his absence was employment-related. This is insufficient to deny Ron his full visitation rights at this juncture.

#### **I. Extra-Curricular Activities and Visitation**

The trial court provided visitation to Ron subject to the boys' involvement in extra-curricular activities such as sports or band practice. We are mindful of the difficulties attendant a visitation schedule for teenage boys heavily involved in extra-curricular activities. The

trial court's method places too much discretion in Susan's capriciousness and the boys' own desires. This method places the clear mandate of the legislature for maximum continuing contact and liberal visitation in a secondary position to the boys' practice schedule.

Ron is an adult. He is these boys' father. As their father, he is presumed to have their best interests at heart. Cf. Fortelka, 425 N.W.2d at 673. If the boys have a scheduled practice, and that practice is necessary to their participation in that activity, Ron should take this into account in setting his visitation schedule. We decline, however, to demand Ron's scheduled visitation wait until after the boys have completed their extra-curricular activities.

We determine Ron's visitation shall begin and end promptly as scheduled. It is Ron's parental responsibility to ensure the boys are at whatever activities he deems important during his scheduled visitation.

We modify the trial court on this issue.

## **II. Children's Attorney Making Visitation Decisions**

The trial court provided the children's court-appointed attorney was to decide any dispute's between the parent concerning activities or summer visitation. Due to our determination Ron shall have his visitations as scheduled and assume responsibility for seeing the children are at their necessary practices, the attorney is not necessary to

help settle disputes in this respect. However, due to the legal posture of the trial court's ruling, we feel compelled to address this issue.

The determination of visitation schedule is a matter to be settled between the parents. If the parents fail to set a satisfactory visitation schedule, they may petition the court for a determination of their visitation rights. See Iowa Code §§ 598.21, .41.

Iowa Code § 598.12(1) outlines the authority vested in the children's attorney.

1. The court may appoint an attorney to represent the interests of the minor child or children of the parties. The attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify before the court on matters pertinent to the interests of the children.

Iowa Code § 598.12(1).

This section only empowers the children's attorney to investigate and report to the trial court. It does not empower the attorney to make decisions concerning the children's visitations. These decisions are reserved to the parents. If they cannot agree as mature adults, they may petition the court to determine their respective rights. It is then the court's sole responsibility to determine the proper visitation schedule.

We determine the trial court erred in delegating its decision making role to the attorney for the children. We reverse the trial court on this issue.

### III. Summer Visitation

The trial court granted only three weeks summer visitation to Ron. The trial court again made visitation subject to the boys' extra-curricular activities. We again are mindful of the importance of these activities to the boys. However, we once again reiterate these should not take precedence over the statutorily mandated maximum continuing contact with the non-custodial parent.

We agree with the trial court we should not require the boys to play baseball in one town or the other. However, we modify the trial court's ruling to remove the subordination of Ron's summer visitation to the boys' extra-curricular activities. It is not too much to ask of Ron as the father to voluntarily see the boys are at those activities he considers important to the boys and their development.

We determine the boys' summer visitation with their father should be extended to six continuous weeks in the summer. This will allow Ron and his sons time to develop the parent-child relationship envisioned by our supreme court and legislature. Cf. In re Marriage of Zabecki, 389 N.W.2d 396, 398-400 (Iowa 1986); In re Marriage of Weidner, 338 N.W.2d 351, 358-59 (Iowa 1983). See also In re Marriage of Kerber, 433 N.W.2d 53, 54 (Iowa App. 1988); In re Marriage of Muell, 408 N.W.2d 774, 777 (Iowa App. 1987).

Accordingly, we modify the trial court's ruling to allow Ron six weeks continuous summer visitation. This

visitation shall commence at 8 p.m. Sunday of the last full week of June. It shall terminate at 8 p.m. Sunday six weeks later. Ron shall be responsible for all transportation to and from the children's custodial home. We further modify to remove the subordination of Ron's visitation to the boys other activities.

We modify the trial court on this issue.

#### **IV. Attorney fees on Appeal**

Ron has requested attorney fees on appeal. 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 Ron is entitled to attorney fees on this appeal. We accordingly award him \$750 attorney fees.

We have reviewed the remainder of the trial court's ruling. The provisions regarding visitation on alternating weekends and holidays are satisfactory. We affirm the trial court on all other issues.

Costs of this appeal are taxed to Susan.

**AFFIRMED AS MODIFIED.**