IN THE COURT OF APPEALS OF IOWA

No. 3-153 / 92-1421

1993

IN RE THE MARRIAGE OF GUY RICHARD SAAK AND MARGARET MARY SULENTIC

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Upon the Petition of
GUY RICHARD SAAK,

Appellee,

And Concerning
MARGARET MARY SULENTIC,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, William J. Klotzbach, Judge.

The respondent wife appeals the district court's judgment granting physical custody of the parties' children to the petitioner husband. **REVERSED.**

Edward J. Gallagher, Jr. and Cynthia A. Scherrman of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellant.

Patricia A. McGivern of Clark, Butler, Walsh & McGivern, Waterloo, for appellee.

Bruce B. Zager of Zager Law Office, Waterloo, for minor children.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

SCHLEGEL, J. 000512

The wife appeals the district court's judgment granting physical custody of the parties' children to the husband. The wife contends the district court erred in awarding custody of the children to the husband in light of his continued heavy drug use, his emotional instability, and his inability to maintain steady employment.

Guy Saak and Margaret Sulentic were married on December 28, 1979, soon after Margaret received her B.A. in education from the University of Northern Iowa. The parties have two children: Lilly, born February 23, 1982, and Adam, born February 12, 1984. Upon graduation, Margaret obtained a teaching job in the Reinbeck Community School District. In 1980, Margaret and a friend opened a vintage clothing store, which was successful. In the summer of 1981, however, she moved to Minnesota with Guy, who had obtained employment as a chef in his brother's resort in an effort to overcome his severe drug dependency. Lilly was born at this time. While in Minnesota, Margaret worked as a waitress seven days per week and substituted in local schools.

The family returned to Waterloo in 1983 when Guy's brother sold the resort. Guy obtained employment at his old job at the Broom Factory restaurant. Adam was born during this time. In June of 1984, Margaret was hired as a full-time teacher with the Waterloo school district. Margaret is currently teaching at West Intermediate

School. From 1984 to the present, Margaret has won numerous teaching awards for her work in motivating students to learn. In 1986, Margaret obtained her Master's Degree. During this time, the parties began a shift-splitting arrangement for taking care of the children because their work schedules conflicted.

At this same time, Guy lost his employment with the Broom Factory and, with the help of Margaret's mother, opened his own catering business. During its three years of operation, the business lost money. Guy had also been employed at the Waterloo Club, but he left this job due to the high turnover of managers at the club. Guy returned to the Broom Factory in 1990, but was again let go in 1991.

In February of 1990, Margaret's mother loaned Margaret and Guy $42,000 to pay off credit card debts. About this time, Margaret suspected that Guy was again involved heavily into drugs. She found marijuana plants growing in their basement. Guy admitted to her that he was growing these plants for another person to sell for profit. Margaret also suspected that Guy was again intravenously using cocaine. Margaret decided to leave the home on the grounds that her leaving might shock Guy into obtaining therapy. The parties decided that the children should live with Guy, however, so as not to disrupt their education. During this period, Guy and Margaret split the care of the children, with Guy caring for the children during the day and Margaret caring for the children after work.

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Following a year of this arrangement, Guy sought temporary custody of the children. He received a work-related injury in July 1991 and received workers' compensation until December 1991. Guy presently works forty hours per week at the Beaver Hills Country Club, and his net monthly income is $766. Margaret's net monthly income is $1,524.

Pursuant to an order signed in February 1992, Guy was granted temporary physical custody of the children. Margaret was granted visitation of two evenings per week and every other weekend. On August 7, 1992, the district court entered its final decree. The court determined that although Guy had exhibited limited knowledge in promoting the moral needs of the children, it would be less disruptive if the children remained in his care. Margaret appeals.

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).

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In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) (1991), in In re Marriage of Weidner at 355-56, and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration"--the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 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).

Having carefully considered the facts of the present case in light of the above guiding principles, we reverse the district court on the issue of physical custody and award primary physical care of the children to Margaret. The record reveals that Margaret is better suited to provide for the long-range best interests of Lilly and Adam. While we are concerned about Margaret's decision to leave Guy and the children to move to Waterloo in August of 1990, the record shows that Margaret continued to actively participate in the care and upbringing of the children during this time. Margaret regularly picked up the

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children after school, cooked dinner for them, and stayed with the children at their residence until Guy returned from work. She also cared for the children on weekends.

In addition, Margaret has received several prestigious teaching awards, including one presented by the McCoy Trust and one awarded by U.S. West to outstanding Iowa teachers. As a teacher, Margaret relates well to low achievers as well as high achievers. The record strongly supports the district court's finding that Margaret possesses the unique ability to motivate any student to want to learn. We find such qualities to be admirable and to be indicative of Margaret's ability to effectively provide for the best interests of the children.

On the other hand, the record reveals Guy's history of drug abuse and severe financial mismanagement. As late as 1991, Guy was still using marijuana around the children, as evidenced by a photograph showing Guy smoking a marijuana pipe while holding the children. Guy was also growing plants in the family home to sell for profit as late as 1990. In addition, between 1990 and the time of trial in 1992, Guy spent over $100,000 and has nothing to show for these expenditures. Guy was forced to file for bankruptcy even after Margaret's mother gave Guy and Margaret $42,000 to clear their debts.

Despite our reservations about Guy's ability to provide for the long-range best interests of the children, the record indicates he has taken an active interest in

providing for the children's well-being. Accordingly, Guy should receive liberal visitation rights to Lilly and Adam. This is particularly true in light of the fact that Guy and Margaret have successfully cooperated in caring for the children and the fact that the parties live in close proximity to one another, with Guy living in Cedar Falls and Margaret living in Waterloo.

We conclude Guy's visitation rights shall consist of a period from 5:00 p.m. on Friday until 8:00 p.m. Saturday every other weekend beginning the first Friday after this opinion is filed. In the event that Guy ceases to work Sundays, this weekend visitation is extended until Sunday at 8:00 p.m. In addition, Guy shall enjoy mid-week overnight visitation privileges each Wednesday beginning at 4 p.m.

The holidays of Easter, Memorial Day, Fourth of July, Labor Day, Thanksgiving, Christmas Eve, Christmas Day, and New Year's Day shall be shared on an alternate basis with Guy having visitation on Easter, Fourth of July, Thanksgiving, Christmas Day, and New Year's Day in even-numbered years, and Guy having visitation Memorial Day, Labor Day, and Christmas Eve in odd-numbered years. Christmas vacation period shall begin the day that school is out and extend until Christmas Eve at 10:00 p.m. The Christmas Day vacation shall begin at 10:00 p.m. on Christmas Eve and terminate at 8:00 p.m. on New Year's Day. The Thanksgiving vacation shall include the Friday

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and the weekend following Thanksgiving. This provision for special holidays shall have priority over the every other weekend visitation awarded above.

Guy shall have an additional right of visitation during the months of June, July, and August for up to four weeks which need not be consecutive. By May 1 of each year, Guy shall notify Margaret of when Guy wishes to exercise this extra period of visitation. Any time the children are with Guy for more than fourteen days, Margaret shall be entitled to weekend visitation on the following weekend from Friday at 5:00 p.m. until Sunday at 8:00 p.m. In addition, Guy shall be entitled to visitation on Lilly's birthday in odd-numbered years and Adam's birthday in even-numbered years. This right of visitation includes the right to have the other child present when the birthday of the sibling is celebrated. Guy shall enjoy the right of visitation of the children on Father's Day, and Margaret shall have the right of visitation of the children on Mother's Day.

Next, we address the issue of child support which results from our decision to reverse the district court and to award Margaret primary physical custody of the children. Applying the Child Support Guidelines, adopted effective December 31, 1990, to the district court's findings that Guy's net monthly income is $766 and Margaret's net monthly income is $1,524 reveals Guy shall pay child support in the amount of $215.25 per month (28.1% of $766).

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Finally, we consider Guy's request for trial and appellate attorney fees and costs. 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 affirm the district court's order concerning trial attorney fees and costs. The parties shall pay their own attorney fees, and each shall pay one-half the costs of this appeal.

In accordance with the terms provided above, the district court's decision awarding primary physical custody of the children to Guy is reversed.

REVERSED.