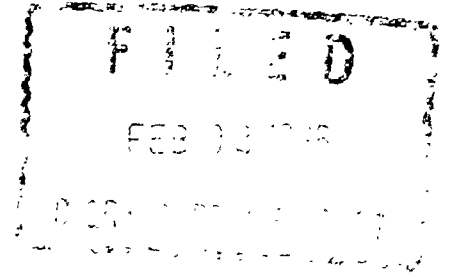


IN THE COURT OF APPEALS OF IOWA

No 5-637 / 95-0770



JASON BERRINGER,

Appellant.

vs.

CONICE CARMICHAEL,

Appellee.

Appeal from the Iowa District Court for Page County, James Richardson, Judge.

Jason Berringer appeals a district court order placing his and Conice Carmichael's child in Conice's primary care. **AFFIRMED AS MODIFIED AND REMANDED.**

Mark R. Crimmins and Mark D. Holmstrom of Bennett, Crimmins & Yung, Fort Dodge, for appellant.

Rana A. Scarlett, Shenandoah, and Sandford A. Turner of Turner, Bitting & Jones, Clarinda, for appellee.

Heard by Sackett, P.J., and Cady and Huitink, JJ. .

HUITINK, J.

Jason Berringer appeals the district court's decree awarding physical care of his daughter, Ambarlee, to her mother, Conice Carmichael. We affirm as modified. Ambarlee is five years old. At the time she was born on July 25, 1990, Conice was fifteen and Jason was twenty. Ambarlee was originally placed for adoption. However, Jason and Conice later revoked their consents to adoption, and it was agreed that Ambarlee would live with Jason and his parents until Conice finished high school.

Following graduation from high school, Conice moved in with the Berringers. In October 1992 Conice ended her relationship with Jason and left the Berringers' home. The Berringers refused to allow Conice to take Ambarlee when she left and Ambarlee has remained with Jason and his parents since that time.

Jason initiated these proceedings to establish Ambarlee's paternity, custody, and support following Conice's unexpected failure to return Ambarlee following a weekend visitation. The district court's temporary order provided for joint custody and established a visitation schedule. The district court also ordered a home study by the Iowa Department of Human Services.

The home study recommended joint custody and that Conice should be awarded physical care. The district court adopted this recommendation and ordered Jason to pay \$375 per month child support.

Jason appeals. He argues Ambarlee's long-term best interest requires that she be placed with him and that it was error for the district court to conclude otherwise.

Our review is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact particularly when the credibility of witnesses is implicated. Iowa R. App. P. 14(f)(7). We are, however, not bound by these determinations. *Id.* Prior cases have little, if any, precedential value, and we must 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).

In cases regarding a child whose parents had never been married, the legal analysis used to resolve the question of custody of the child is the same as that which would be utilized if the child's parents had been married and a dissolution of their marriage had resulted. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988). The critical issue is not which parent possesses the greater right to the child, rather the controlling consideration must be the best interest of the child. *Heyer v. Peterson*, 307 N.W.2d 2d 1, 7 (Iowa 1981). The decision requires selection of a custodial parent who can minister more effectively to the long-range best interest of the child. The objective should always be to place the child in the environment most likely to bring that child to healthy physical, mental, and social maturity. *See In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). The court must also consider the characteristics and needs of the child, the characteristics of the parents, the capacity and desire of each

parent to provide for the needs of the child, the relationship of the child with each parent and with each parent's other children, the nature of each proposed environment, and the effect of continuing or changing an existing custodial status. *Id.* at 166-67

There is no presumption in favor of either the mother or the father. *In re Marriage of Bowen*, 219 N.W.2d 684, 688 (Iowa 1974). Insofar as is reasonable and in the best interest of the child, the court should make an award of custody, physical care, and visitation rights which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents and which will encourage the parents to share the rights and responsibilities of raising the child. Iowa Code § 598.41(1). To effectuate that policy, the court must consider the willingness of each party to allow the child access to the other party. *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979).

The district court's physical care award was based primarily on the recommendations included in the home study. Improvement in Conice's personal and employment circumstances, and concerns about the hostility Jason's parents expressed towards Conice were cited as reasons for awarding Conice physical care. The district court also found Jason's failure to pay child support for his other children was a negative reflection on his ability to care for Ambarlee. Although there is evidence supporting these findings, we find other, more compelling, evidence distinguishes Jason as the preferred physical caretaker.

Jason's role as an active and interested parent has been understated by the district court and in the home study. There is evidence he has provided consistent financial and emotional support for Ambarlee and has attended to a variety of her subsistence needs. These include daycare, preschool, and medical attention. He has also demonstrated more stability than Conice in his employment and residential circumstances.

Ambarlee has resided with Jason and his parents for virtually all of her life. This is the only home she has ever known. Jason, with his parents' help, has provided a wholesome and nurturing environment for Ambarlee. She, by all accounts, is a happy and well adjusted child.

Conice's interest in active parenting was more recently acquired. From October 1992 through February 1994 Conice was content to defer all parental obligations to Jason and his parents. During this time period, she moved frequently, lost her job, experimented with illegal drugs and lived with a suspected drug dealer. As of the trial, she was living in Gravity, Iowa, with Monte Smith, who she intends to marry. She has found full-time employment. As a result of these distractions and Conice's demonstrated instability, her motivation to parent remains suspect. If Conice's sentiments are sincere, an award of joint custody should sufficiently accommodate her parental aspirations. Conice's faithful exercise of visitation and her attention to her

duties as a joint custodian will maximize her parental role without the disruption resulting from an award of physical care

We have awarded physical care to the parent who demonstrated a greater capacity and interest in providing and caring for the child over a longer period of time *In re Marriage of Ertmann*, 376 N.W.2d 918, 921 (Iowa App. 1985). We have also noted the importance of a supportive extended family willing to assist a parent with child care. *Langer v. Mull*, 453 N.W.2d 644, 649 (Iowa App. 1990); *see also Neubower v. Newcomb*, 423 N.W.2d 26, 27 (Iowa App. 1988) (relationship with grandparent important if it helps provide a healthy, loving, stable environment for the child); *In re Marriage of Leyda*, 355 N.W.2d 862, 866 (Iowa 1984) (the father and grandparents formed a parenting team with the grandparents looking after the child while father was at work).

We share the district court's concerns about the lingering ill feelings between Conice and Jason's parents. These sentiments have resulted in visitation conflicts and interference with Conice's access to Ambarlee. Our review of the record indicates any ill feelings are mutual and both the Berringers and Conice have been guilty of disruptive behavior. Moreover, the Berringers' concerns were not totally unjustified in view of Conice's admittedly irresponsible lifestyle. Jason has acknowledged his obligation to preserve Ambarlee's relationship with Conice, and he is willing to work with Conice toward the resolution of this problem. In any event, we do not find the

conflict between Conice and Jason's parents provides sufficient cause to disrupt Ambarlee's existing and familiar custodial circumstances.

We also acknowledge that our decision conflicts with the recommendations made in the home study. The home study, however, provides little more than a snapshot view of the parties and their circumstances. Moreover, the significance of the recommendation diminishes when its underlying factual assumptions are measured against the evidence in the record. For example, it unfairly faults Jason's parents for the conflicts with Conice when there is overwhelming evidence that any ill feelings were mutual. The home study also minimizes the significance of Conice's lack of interest in this child for nearly five years and overstates her ability to parent without assistance.

We conclude it is in Ambarlee's best interest to remain in the home environment in which she has spent virtually all of her life. In reaching this conclusion we do not wish to minimize the significance of Conice's efforts to turn her life around. Our primary concern, however, remains the best interest of the child, and we will not award physical care as a reward for admirable parental achievement.

We therefore affirm the district court's award of joint custody and modify the decree by awarding Jason physical care of Ambarlee. Conice shall have visitation as originally awarded to Jason. Jason's child support obligation is vacated, and this matter

is remanded to determine the amount of Conice's child support obligation. We do not retain jurisdiction.

AFFIRMED AS MODIFIED AND REMANDED.