IN THE COURT OF APPEALS OF IOWA

FILED
APR 12 2000
CLERK SUPREME COURT

No. 1999-353 (9-606) /98-1843
Filed April 12, 2000

NEIL ELMQUIST,
Petitioner-Appellant,

vs.

DANYELLE L. NAIRN, f/k/a
DANYELLE L. KEENEY,
Respondent-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Gilbert K. Bovard, Judge.

The petitioner appeals the district court's custody decision. **AFFIRMED.**

Mark A. Young of Young Law Office, Mason City, for appellant.

John G. Sorensen of Stanton & Sorensen, Clear Lake, for appellee.

Considered by Mahan, J., and Hecht, J., and Honsell, S.J.*

*Senior judge assigned by order pursuant to Iowa Code Section 602.9206 (1999).

HONSELL, S.J.

Neil Elmquist and Danyelle Nairn are the parents of Zachary, born May 22, 1995. The parties were cohabiting at the time of Zachary's birth. An administrative order from the Child Support Recovery Unit established Neil's paternity and set forth his child support obligation. In November 1995 Ms. Nairn moved from Mr. Elmquist's home in Audubon, Iowa, to her mother's home in Clear Lake, Iowa. Except for a short period of time, Ms. Nairn has had physical care of Zachary. Mr. Elmquist has exercised regular visitation.

Mr. Elmquist and Ms. Nairn married other individuals. In February 1998, Mr. Elmquist filed a petition for custody of Zachary, alleging that Ms. Nairn was planning to move to North Carolina with her new husband, who was in the military, and that such a move was against Zachary's best interest because it would disturb his visitation schedule. At trial, Mr. Elmquist testified that his employment history was better than Ms. Nairn's and he had a more stable lifestyle. The court concluded Zachary should remain with Ms. Nairn subject to Mr. Elmquist's visitation rights. The court awarded joint legal custody, but ordered that physical care remain with Ms. Nairn and reserved jurisdiction on the issue of visitation in order to allow the parties to reach a mutually workable schedule. In its conclusions, the court stated:

> While this matter is not a "modification" proceeding in the literal sense, yet the purpose of Neil's action is to change custody from the primary care giver to himself. As such, it is appropriate to apply the same safeguards that insure a child's custody shall not be easily disturbed. *Marriage of Mueller*, 400 N.W.2d 86). That burden is to prove an ability to minister more effectively. *Marriage of Ivins*, 308 N.W.2d 75,78). This Court believes it incumbent upon

> Neil to establish by a preponderance he is more able to meet Zachary's needs. The Court concludes he has not. It is therefore the conclusion of this Court that Zachary's best interests will be served by allowing him to remain with his mother, subject to rights of visitation with his father.

Mr. Elmquist appeals the district court's denial of his petition for custody. He claims the district court erred in concluding it was in Zachary's best interest that Ms. Nairn be awarded physical care; and concluding that his petition was in the nature of a modification action with the accompanying burdens of proof.

I. The district court while not treating this action as a modification, held Mr. Elmquist to that burden of proof. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983) ("The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.").

This is an original custody action. Neither parent should have a greater burden in seeking to gain custody. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App.1985). A parent's role as primary caretaker is a factor to consider, but is not decisive. *See In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App.1992).

We believe that Mr. Elmquist should not be held to a higher standard than Ms. Nairn in this case. Therefore, we review the record de novo and determine the custody issue anew.

II. The controlling consideration in determining custody is the interest of the child. Iowa R. App. P. 14(f)(15). In deciding this question, we review the record de novo. Iowa R. App. P. 4. We give weight to the findings of the trial

court, but are not bound by them. *See In re Marriage of Novak*, 220 N.W.2d 592, 597 (Iowa 1974). There is no inference favoring one party as opposed to the other in deciding which one should have custody. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). We determine each case on its own facts to decide which parent can administer more effectively to the long-range interest of the child. *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). The critical issue is determining 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 an original custody proceeding. See *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). The criteria governing custody decisions is the same regardless of whether the parties are dissolving their marriage or are unwed. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988). *Petition of Purscell*, 544 N.W.2d 466, 468 (Iowa App. 1995)

The parent who has been the primary caretaker of the children during the marriage will not necessarily be designated the primary caretaker at the time of a divorce. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). The role of 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 care giver. *Id.*; *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995).

At the time of trial, Zachary was 3 years old, and apparently healthy, well adjusted and happy.

Ms. Nairn is in her early 20's, she has no reported problems in mental or physical health. She did not complete high school nor her GED. Her work

history is sporadic. She prefers to be at home with Zachary, having expressed her desire to be at home to raise her child on a full time basis. She has a child from a previous relationship who is in the care of its paternal great grandmother. She has not regularly paid child support for him as ordered. She married her husband, Michael, in November of 1996. Michael Nairn has received his initial promotion in the Marine Corps. He plans to make the marines a career. The benefits to Mr. and Ms. Nairn for so long as he continues in the marines include health and medical insurance for the family, housing, consumer "bargains" and the option of on-base schooling or local civilian schooling for Zachary. Given this situation Ms. Nairn can stay at home and provide full time parenting for Zachary.

Mr. Elmquist is a few years older than Ms. Nairn. He did not testify to any mental or physical problems. He has some college and is a self-employed electrician. He has paid child support regularly for Zachary and has exercised the visitation that he and Ms. Nairn arranged. He is ambitious and hard working, which has resulted in his being away from his home much of the time including Saturdays. Some of his dealings with Ms. Nairn suggest that he has used Zachary as a pawn to manipulate her. The trial court found that: "he gives the impression of endeavoring to be a controlling person in his relationships but without being concerned as to the outcome or impact upon others." He is married and lives with his wife and stepson. Both he and his wife are employed full time outside of the home.

Both parents seem capable of providing for the emotional and moral needs of Zachary as both have matured considerably since they lived together. Both parents appear to have good interpersonal relationships with Zachary. The

bond between Ms. Nairn and Zachary is stronger because she has been his primary care provider since birth.

Because the parties will be living so much farther apart, there will be a more substantial disruptive effect on Zachary. That effect would be further exacerbated if Zachary does not continue to reside with Ms. Nairn, who as mentioned has been his primary care provider.

It appears as though either party would provide Zachary with a stable and wholesome environment in which to live. While that environment may change from time to time because of a move occasioned by Mr. Nairn being in the Marines, it is at the same time enhanced by Ms. Nairn being at home on a full time basis.

The extended family members of all the persons involved in this matter live in Iowa. Zachary's move to North Carolina will to some extent affect the contact he would otherwise perhaps have with relatives. However, those contacts will most likely be maintained by reason of visitation exercised in Iowa and the periodic return to the state by Mr. and Ms. Nairn.

We have carefully reviewed the issues presented and conclude that the custody determination of the district court should be affirmed. We award no attorney fees in this case.

AFFIRMED.