IN THE COURT OF APPEALS OF IOWA

No. 1-169 / 00-614
Filed May 23, 2001

IN RE THE MARRIAGE OF DEBRA K. HUGHS AND DAVID T. HUGHS

Upon the Petition of
DEBRA K. HUGHS,
Petitioner-Appellee,

And Concerning
DAVID T. HUGHS,
Respondent-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

David Hughs appeals from a decree dissolving his marriage to Debra Hughs. He challenges the district court's rulings on physical care of the parties' children and attorney fees. **AFFIRMED.**

Ronald F. Walker, Knoxville, for appellant.

William A. Price, Des Moines, for appellee.

Heard by Mahan P.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

In this appeal from a dissolution decree, we must decide whether the district court (1) acted inequitably in placing physical care of the parties' two children with their mother; and (2) abused its discretion in ordering the father to pay a portion of the mother's attorney fees. We answer no to both questions and, accordingly, affirm.

I. Background Facts and Proceedings

David and Debra Hughs married and had two children, Cydne, and Courtney, born in 1993 and 1996 respectively. David worked the night shift at a warehouse and, for the latter part of the marriage, Debra worked as a customer service representative.

One night, while David was at work, Debra moved herself and the children out of the family home in Knoxville and into an apartment in Altoona, near Prairie Meadows Racetrack and Casino. She left a note advising David she was moving. Earlier that day, she had filed a divorce petition in Polk County.

Several months later, the district court awarded Debra temporary physical care of the children. Following trial, a different district court judge ruled Debra should continue as the physical caretaker, subject to reasonable visitation by David. The court additionally ordered David to pay $2,000 of Debra's attorney fees. David appealed.

II. Physical Care

David contends he should have been awarded physical care of Cydne and Courtney. We review the district court's ruling on this issue de novo. *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984).

David cites the following grounds in support of his contention that he would be the better physical caretaker: A) Debra's decision to leave the home surreptitiously shows she was not acting in the best interests of the children; B) Debra manipulated the court system when she stated she lived in Polk County rather than Marion County; C) the district court inappropriately based its physical care decision on gender; D) Debra's family background proves she is not the best person to provide for the children's long-term care; and E) Debra's urban environment is less suitable for raising children than the farmstead on which David lives. We will address each of David's arguments in turn.

A. Surreptitious Departure. Debra admitted she moved out of the Knoxville home in the middle of the night without giving David any advance notice. She conceded the way in which she moved was not beneficial to the children but urged if she had notified David, he would not have let the children leave.

We are troubled by Debra's hasty and surreptitious removal of the children from the parties' home. However, the move was mitigated somewhat by Debra's note, which explained where and why she was moving and included a telephone number where she could be reached. Additionally, after the removal, Debra facilitated frequent contact between the children and David and regularly communicated with him about developments relating to them. For these reasons, we conclude the removal was not grounds for awarding David physical care.

B. Manipulation of Debra's Residency. David contends Debra manipulated the court system by filing the dissolution petition in Polk County

rather than in Marion County. He suggests that by forcing him to defend the petition in a neighboring county, she gained an advantage, as reflected by the temporary physical care order in her favor.[1] However, David did not move for a change of venue. Additionally, he did not demonstrate how Debra's act of filing in Polk County adversely affected her fitness to care for the children or the best interests of the children. Accordingly, we reject this contention.

C. Gender Bias. David next contends the district court gave Debra physical care of the children based on her gender. In support of this contention, David points to the following language contained in the decree:

> The decision which was made by Debra in this situation, while very painful to David, probably was in the best interests of the children, who needed to go with their mother.

Gender is irrelevant in determining who should have physical care of children. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). There is no presumption that a mother is a more suitable caretaker than a father. *In re Marriage of Tresnak*, 297 N.W.2d 109, 112 (Iowa 1980). However, our courts have not ruled out consideration of a parent's role as primary caretaker. *In re Marriage of Wilson,* 532 N.W.2d 493, 495 (Iowa Ct. App. 1995).

It is clear from Debra's testimony that she felt she would be the better caretaker in part because of her gender. When asked why she believed the girls were better off with her, she stated, "I'm a woman. And when they start growing up and their bodies start changing, I think it would be easier to deal with their mother and with me." However, she also cited other reasons to support her

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[1] David also contends the district court judge who considered the request for temporary relief did not review the affidavits proffered by him. We decline to consider this contention, as no record was made on the issue. *See Wende v. Orv Rocker Ford Lincoln Mercury, Inc.*, 530 N.W.2d 92, 95 (Iowa Ct. App. 1995).

physical care request, namely her compassion and nonjudgmental outlook toward others. While Debra held the view gender was important in the physical care determination, we find no evidence that the district court shared this belief or awarded physical care on this basis. Instead, the court noted both parents were "fit and proper" custodians for the children and further found David was an active and involved parent.

Here, the record supports the district court's finding that Debra played the more active parenting role. She cared for Cydne for the first two years of her life, then worked part-time to accommodate her daughter's daycare schedule and her husband's work schedule. When Courtney was born, David and his mother cared for her during the day for approximately two years. Debra continued taking care of both children in the evening hours. She also was the parent who took the children to the doctor and stayed home with them when they were sick, although the record reveals David was willing and able to do so as well. Based on this evidence, we believe the district court acted equitably in finding Debra was the primary caretaker. *Cf. In re Marriage of Tresnak*, 297 N.W.2d 109, 113 (Iowa 1980) (awarding physical care to mother based on her role as primary caretaker, despite period when father had primary responsibility for children). We also conclude the court did not use this finding as a guise to rule on the basis of gender.

D. Debra's Family Background. David next contends Debra's family background does not render her as stable as him. He points to her constant moves as a child and her alcoholic and abusive step-father.

We find no evidence in the record to suggest Debra's tumultuous family history adversely affected her parenting skills. To the contrary, the record suggests it is precisely this background that strengthened her commitment to her children. Therefore, this ground is not a basis for awarding David physical care of the children. *Cf. Petition of Deierling*, 421 N.W.2d 168, 170 (Iowa Ct. App. 1988) (rejecting identical argument in absence of evidence mother was immoral or unwholesome person).

E. Rural vs. Urban Environment. Finally, David argues his environment is better suited to child rearing than Debra's. At trial, he painted a bucolic picture of life on his parents' farmstead and contrasted this picture to Debra's apartment complex near the casino and the children's institutional day care center. While the contrast is stark, we have stated "[w]e do not award custody by determining whether a rural or urban Iowa upbringing is more advantageous to a child." *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993). Therefore, we cannot fault the district court for refusing to give this evidence the weight David believed it should have.

The children are fortunate to be in a win-win situation. They have two parents who love them, who play an active role in parenting them, and who have willingly placed their children's interests above their own. The district court commended them on their commitment to the children and so do we. We believe it is in this type of close case, where both parents would prove effective caretakers, that the district court's findings on physical care are entitled to particular weight. As our court noted in the virtually identical *Engler* case, "[t]he trial court had the parties before it and was able to observe their demeanor and

was in a better position than we are to evaluate them as custodians." *Engler*, 503 N.W.2d at 625. After de novo review, we see no reason to reverse the district court.

III. Trial Attorney Fees

David contends the district court should not have ordered him to pay $2000 toward Debra's trial attorney fees. Our review of this issue is for an abuse of discretion. *In re Marriage of Fall*, 593 N.W.2d 164, 168 (Iowa Ct. App. 1999). In support of its award, the district court stated:

> [G]iven the added cost of day care which Debra must bear, as well as her current and future earning capacity, which is somewhat affected by her child care responsibilities, the Court finds that an award of $2,000 towards Debra's attorney fees by David is just and equitable.

We find no abuse of discretion in this ruling. The parties' testimony and their financial statements support the award. Additionally, although the trial did not last as long as Debra's attorney anticipated when he submitted his attorney fee affidavit, the court took that fact into consideration and reduced the requested sum by more than fifty percent. For these reasons, we affirm the award of trial attorney fees.

IV. Appellate Attorney Fees

Debra seeks appellate attorney fees. We consider a party's need, the adverse party's ability to pay and whether the party was obligated to defend the

district court's decision on appeal. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). After consideration of these factors, we deny Debra's request.

The dissolution decree is affirmed.

AFFIRMED.