IN THE COURT OF APPEALS OF IOWA

No. 8-375 / 97-2022

IN RE THE MARRIAGE OF MELISSA ANN HARTENHOFF AND NORMAN KIM HARTENHOFF

Upon the Petition of
MELISSA ANN HARTENHOFF,

Petitioner-Appellant/Cross-Appellee,

And Concerning
NORMAN KIM HARTENHOFF,

Respondent-Appellee/Cross-Appellant.

FILED
JUL 31 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

Petitioner appeals from the entry of a dissolution decree. **AFFIRMED AS MODIFIED.**

Michael C. Walker of Goebel, Koury & Walker, Davenport, for appellant.

James L. Tappa of Spector, Tappa & Nathan, for appellee.

Considered by Cady, C.J., and Streit and Mahan, JJ.

CADY, C.J.

Melissa Hartenhoff appeals the primary physical care provision of the district court's dissolution decree and requests appellate attorney fees. On cross-appeal Norman Hartenhoff claims he should have been awarded the income tax dependency exemptions for both children and Melissa should pay for the production of unnecessary portions of the appendix. We affirm as modified.

Norman and Melissa Hartenhoff married on September 28, 1986. The parties had two children: Savannah, born March 9, 1986, and Austin, born December 14, 1989. The district court dissolved the parties' marriage in August 1997.

Throughout the marriage Norman worked as a truck driver, providing the primary source of financial support for the family. He typically worked sixty to sixty-five hours per week. In 1996, he earned approximately $46,900. Prior to the marriage, Melissa was trained and employed as a hairdresser. She did not work outside of the home during the marriage. Melissa currently works for her father, earning approximately $150 per week.

Melissa moved in with her boyfriend, Michael McCourt, following the parties' separation. She currently resides with him. The children do not like McCourt. On several occasions he has used derogatory language towards Savannah. Between December 1996 and February 1997, the Department of Human Services (DHS) filed three founded reports of abuse or denial of critical care concerning the care Melissa and McCourt had provided the children. During one incident Melissa struck Austin in the mouth, causing a cut gum. Another incident involved the manner Melissa

restrained the children, including muffling their mouths with a pillow or duct tape. Melissa admits she has had problems disciplining the children since the dissolution. Additionally, both Melissa and Norman admitted to regularly smoking marijuana during the marriage.

The district court awarded Melissa temporary physical care of the children during the parties' separation. Following the final hearing, however, the trial court determined Norman could provide a more stable environment for the children and awarded him primary physical care. Although the trial court noted either party could provide primary physical care for the children, it found Melissa's personal life, residence, and employment were unsettled and temporary. In particular, the district court expressed concern over Melissa's relationship with McCourt. The trial court ordered Melissa to pay $50 per month in child support and awarded her the right to claim Savannah as a dependent for income tax purposes.

On appeal Melissa claims the district court erred by failing to award her primary physical care of the children. She also requests appellate attorney fees. On cross-appeal Norman contends he should have been awarded the right to claim both children as dependents for income tax purposes. He also maintains Melissa should be assessed costs for unnecessary parts of the appendix.

I. Primary Physical Care

We review this equitable matter de novo. Iowa R. App. P. 4. This requires us to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). At the

same time, we recognize the value in listening to and observing the parties and witnesses. Iowa R. App. P. 14(f)(7). Consequently, we give weight to the findings of the trial court, although they are not binding. *Id.*

In resolving child custody issues, the best interests of the children is the first and governing consideration. *In re Marriage of Fynaardt*, 545 N.W.2d 890, 892 (Iowa App. 1996). The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41. Iowa Code § 598.41 (1997). The critical issue in determining the best interests of the children is which parent will do better in raising the child. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa App. 1996). Gender is irrelevant in a custody determination and neither parent should have a greater burden in attempting to gain custody. *Fynaardt*, 545 N.W.2d at 892-93.

The objective should always be to place the children in the environment most likely to bring them healthy physical, mental, and social maturity. *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). Although not controlling, we give weight in deciding the issue of primary care to which parent served as the primary caretaker during the marriage. *See In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996).

Melissa claims the district court erred by failing to award her primary physical care of the children. She points out she has been the primary caretaker for the children during the marriage while Norman spent most of his time working or enjoying his hobbies. She further asserts Norman interfered with her relationship with the children by questioning them about her activities during his visitation and

failing to encourage a relationship between her and the children. Additionally, she maintains Norman's work schedule would necessitate others caring for the children. Finally, Melissa emphasizes her lifestyle is stable and her relationship with her boyfriend does not interfere with her ability to parent the children.

Norman contends the district court properly awarded him primary physical care of the children. Although Melissa had been the primary caretaker of the children during the marriage, he claims she has a poor relationship with the children and used inappropriate parenting techniques. He also points out Melissa continues a relationship with a boyfriend the children do not like, has no residence or means of transportation, and does not have any definite career goals. Additionally, Norman contends that he has spent more time with the children since the separation.

Melissa's status as the primary care giver to the children during the marriage and during the parties' separation gives us the opportunity to observe how well the arrangement has been working. Melissa's choices concerning her boyfriend, living arrangements, and lifestyle indicate her preference for a particular lifestyle over the long-term best interests of the children. These factors diminish the impact of her role as primary caretaker during the marriage. Melissa has placed her own interests before those of the children. Furthermore, she has repeatedly exhibited inappropriate parenting during the separation, and has struggled controlling the children in her living arrangement.

While Norman must work long hours, he provides a more stable environment for the children, thereby serving their long-term best interests. He has made

arrangements with his sister-in-law to care for the children while he works. Further, he spends time with the children when he is not working. Although the decision is close, in light of Melissa's current living arrangements and her troubled relationship with the children, we find the district court properly awarded primary physical care of the children to Norman.

II. Exemptions

We consider dependency deductions in determining child support. *In re Marriage of Kunkel,* 546 N.W.2d 634, 636 (Iowa App. 1996). If primary care remains with one parent, and the noncustodial parent is current on all child support obligations, the noncustodial parent may be awarded dependency exemptions. *In re Marriage of Pothast,* 539 N.W.2d 199, 203 (Iowa App. 1995). We have recognized an inequity may result by allowing exemptions to remain with the parent who stands to benefit the least. *In re Marriage of Rolek,* 555 N.W.2d 675, 679 (Iowa 1996).

In this case, Melissa pays only $50 in child support per month. She receives a tax savings of $189 by claiming Savannah as a dependent. Norman would save $714 by claiming Savannah as a dependent. In light of the small amount of child support Melissa pays each month, and considering the district court did not impute minimum wage to her for child support purposes, we find it equitable to award Norman the tax exemption for Savannah.

III. Attorney Fees & Costs

An award of appellate attorney fees is not a matter of right, but rests in our discretion. *In re Marriage of Kurtt,* 561 N.W.2d 385, 389 (Iowa App. 1997). In

determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Id.*

Considering Melissa's need and both parties' ability to pay, we find Norman should contribute $500 for her appellate attorney fees. Additionally, we agree with Norman concerning the length of the appendix and assess costs of its production to Melissa. Otherwise, costs of the appeal shall be divided equally.

AFFIRMED AS MODIFIED.