IN THE COURT OF APPEALS OF IOWA

No. 2-139 / 91-1512

920

IN RE THE MARRIAGE OF ANN MARIE TALLEY AND MICHAEL RANSOM TALLEY

Upon the Petition of

ANN MARIE TALLEY,

Appellee,

And Concerning

MICHAEL RANSOM TALLEY,

Appellant.

FILED
APR 28 1992
CLERK SUPREME COURT

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

Respondent appeals custody provisions of parties' dissolution decree. **AFFIRMED.**

Christopher Tinley of Pogge, Root, Fleming & Tinley, Council Bluffs, for appellant.

C.R. Hannan of Perkins, Sacks, Hannan, Reilly & Petersen, Council Bluffs, for appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J.

Michael and Ann Talley were married in 1975 and had two children; Peter, who is fourteen years old, and Christine, who is eleven. The district court dissolved the parties' marriage in September 1991 and awarded them joint custody of the children. However, the court placed each child with a different parent. The court awarded Peter's physical placement to Michael and Christine's physical placement to Ann.

Michael has appealed the custody provisions of the decree, asserting it would be in Christine's long-term best interests to be placed with him. We disagree and affirm the trial court.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

The factors to be considered by the court in deciding issues of custody are enumerated in Iowa Code section 598.41(3), in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983), 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 perform 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).

Michael argues Christine should be placed in his home with her brother. He argues the trial court's order separating the siblings is not in their best interests. In support of his position, Michael also notes Christine's stated desire to live with him.

Generally, it is in the interest of siblings to be placed in the same home, but when it is shown separation may better serve the long-term best interests of the children, a court may depart from this general rule. In re Marriage of Orte, 389 N.W.2d 373, 374 (Iowa 1986). Furthermore, "[c]hildren's expressed preferences are entitled to consideration but are not controlling; deciding custody issues is more complicated than merely asking the children which parent they wish to live with." In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981).

We are convinced the children's best interests necessitate they be placed in separate homes. Unfortunately, Michael waged a successful campaign to poison Peter's relationship with his mother. As a result of Michael's efforts, Ann is no longer able to discipline Peter, and Peter has stated a strong desire to live with his father. The animosity which Peter has for his mother makes it impossible for him to be placed in her home. We are convinced the trial court's placement of Peter in his father's home is the lesser of two evils.

On the other hand, the trial court found Christine exhibits a close relationship with her mother. Despite her preference to live with her father, the court placed Christine with Ann. The court believed placing Christine with Ann was necessary to prevent Michael from alienating her from her mother as well. We agree.

Iowa Code section 598.41(3)(e)(1991) directs the court to consider whether each parent can support the other parent's relationship with the children in determining what custody arrangement is in the children's best interests. We believe the trial court properly weighed this consideration, together with Christine's preference, see Iowa Code § 598.41.(3)(f)(1991), in arriving at a placement arrangement which best promotes her long-term best interests.

The trial court found, and we agree, the effects of the separation of the siblings will be mitigated by the close geographic proximity of the two households. Peter and Christine will surely be able to spend ample time together. On our review, we affirm the custody provisions of the dissolution decree.

Finally, Ann asks the court for an award of attorney fees on appeal. 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 order Michael to pay $1334.00 toward Ann's appellate attorney fees.

The costs of this appeal are taxed to Michael.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.