IN THE COURT OF APPEALS OF IOWA

No. 2-335 / 91-1161

FILED
OCT 27 1992
CLERK SUPREME COURT

IN RE THE MARRIAGE OF LISA JOHANNES AND SCOTT JOHANNES

Upon the Petition of
LISA JOHANNES,

Appellee,

And Concerning
SCOTT JOHANNES,

Appellant.

Appeal from the Iowa District Court for Mahaska County, James D. Jenkins, Judge.

The respondent husband appeals the custodial provision of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Alfredo Parrish and Robert P. Montgomery of Parrish & Kruidenier, Des Moines, for appellant.

Robert W. Conrad, Knoxville, for appellee.

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

SCHLEGEL, J.

The respondent husband appeals the custodial provision of the parties' dissolution decree. He contends the district court erred in: (1) denying joint legal custody of the parties' child; (2) awarding sole physical custody of the parties' child to the wife; and (3) awarding the wife attorney fees.

Scott and Lisa Johannes were married on November 8, 1989. The parties have one child: Andrew, born on July 31, 1990. At the time of the dissolution hearing, Lisa was nineteen years old and in good health. Lisa quit high school in her senior year and has not yet completed her GED. She has work experience as a waitress and a clerk. Lisa currently works two part-time jobs and nets approximately $135 per week.

At the time of the hearing, Scott was twenty-one years of age and in good health. Scott completed high school. He is employed driving a truck for a feed mill, and he assists his father on his father's one-acre, ten-cow dairy operation. Scott nets between $250 and $300 per week from his employment with the feed mill and lives with his parents.

On August 29, 1990, Lisa left with Andrew and took shelter at her parents' home. During the previous night, Scott had violently shaken Andrew when Andrew awoke for his night feeding. On August 31, 1990, Lisa filed this petition for dissolution. On September 28, 1990, the

district court, after reviewing affidavits, placed temporary custody of Andrew with Scott and awarded visitation to Lisa. At the conclusion of evidence, the court changed temporary custody and placed Andrew in Lisa's care pending the filing of the court's decision.

On June 28, 1991, the district court entered its decree dissolving the parties' marriage. The court determined Scott had both physically and emotionally abused Lisa during their relationship. In addition, the court found Scott had threatened suicide in an effort to compel Lisa's obedience to his demands. Scott denied he had abused Lisa or threatened suicide.

Scott is the putative father of a four-year-old child. Scott has not contributed to the support of this child nor sought visitation of his child. The district court found it impossible to believe Scott could completely ignore one child and genuinely love another.

The court found Andrew had been well cared for while living with Scott, but noted that Scott relied upon his mother, baby-sitters, and his girlfriends to care for Andrew. The court determined Scott had failed to demonstrate the ability to support himself or the capacity to raise Andrew. On the other hand, the district court believed Lisa sincerely cared for Andrew's well-being and decided Lisa would serve as the better custodian.

Based upon these findings, the district court awarded physical and legal custody of Andrew to Lisa. The court

did not believe the parties had demonstrated the ability to cooperate with each other regarding Andrew's basic needs and, therefore, declared joint custody to be inappropriate. The court established a visitation schedule, ordered Scott to pay $67 per week child support, and ordered Scott to pay $1,500 toward Lisa's attorney fees. Scott has filed this appeal.

Our review in child custody cases is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) (1991), in Weidner, 338 N.W.2d at 356, 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 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 a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

After examining the record in light of these principles, we conclude Andrew's long-range best interests will be most adequately served if the parties are granted joint legal custody of Andrew with Lisa receiving physical care of the child. Iowa Code section 598.41(5) (1991) provides:

> Joint legal custody does not require joint physical care. When the court determines such action would be in the best interest of the child, physical care may be given to one joint custodial parent and not to the other. If one joint custodial parent is awarded physical care, the court shall hold that parent responsible for providing for the best interest of the child. However, physical care given to one parent does not affect the other parent's rights and responsibilities as a legal custodian of the child. Rights and responsibilities as legal custodian of the child include, but are not limited to, equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction.

Having carefully studied all the evidence and having gained considerable insight into Scott's ability to raise Andrew, his temperament, and his level of maturity, we believe Scott is ill-equipped to provide for the best interests of Andrew regarding his physical care. However, we believe Scott ultimately cares about his son and is interested in participating in the primary decisions affecting Andrew's life. Awarding the parties joint legal

custody with Lisa receiving sole physical care of the child is commensurate with the child's best interests.

The record reveals that shortly after Scott and Lisa began cohabiting in February 1989 Scott began exercising complete control over Lisa, staunchly restricting her freedom. He prohibited Lisa from contacting her family and friends and demanded to know her whereabouts at all times. He enjoined Lisa from wearing makeup or styling her hair in fear other young men would find her attractive. Scott became so possessive and jealous that he even threatened to harm Lisa's friends and acquaintances in high school on one occasion.

In November 1989 Scott and Lisa married. Soon thereafter Scott escalated the psychological and emotional abuse into physical abuse as well. During the marriage, Scott shoved Lisa numerous times in outbursts of rage, intentionally inflicting physical pain upon her. On one occasion Scott even pushed Lisa out of their truck, leaving her lying on a gravel road. At other times Scott threatened suicide in efforts to compel Lisa's obedience to his demands.

Andrew was born in July 1990. Scott's physical, psychological, and emotional abuse of Lisa continued. On August 28, 1990, Scott became enraged when Andrew began crying during the night. Scott grabbed Andrew, placing Andrew's chest in both hands. Scott then shook Andrew repeatedly, while saying to the child other people in the

house needed their sleep. Andrew was four weeks old at the time.

While we find this evidence to be alarming, we must weigh it against the fact that Scott primarily provided for Andrew under the temporary custody order during ten of the first twelve months of the child's life. The testimony of Lisa and her parents (the child's maternal grandparents) indicates that Scott adequately provided for Andrew during this time. The record also reveals the parties possessed the ability to communicate regarding the visitation of Andrew during this period. In addition, the fact that the parties were essentially able to agree upon the distribution of their household goods prior to trial indicates the parties' substantial ability to cooperate and communicate.

Next, Scott contends the trial court erred in awarding Lisa attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

Scott argues the trial court's award of attorney fees to Lisa should be reversed and set aside since Lisa did not

make a specific request for attorney fees, nor did she submit an affidavit itemizing such fees. We find Lisa's general prayer sufficiently broad to permit an award of attorney's fees. The trial court reviewed the court file and is familiar with the approximate amount of time involved in the preparation of Lisa's case. Accordingly, the court acted within its discretion in directing Scott to pay $1,500 toward Lisa's attorney fees.

AFFIRMED AS MODIFIED.