

IN THE COURT OF APPEALS OF IOWA

No. 2-426 / 92-137

FILED

OCT 27 1992

CLERK SUPREME COURT

IN RE THE MARRIAGE OF DEBRA D. HARVEY AND FRANK D. HARVEY

Upon the Petition of
DEBRA D. HARVEY,

Petitioner-Appellee,

And Concerning
FRANK D. HARVEY,

Respondent-Appellant,

DEAN and SHARON HARVEY, Grandparents,

Appellants.

Appeal from the Iowa District Court for Plymouth
County, Terry L. Huitink, Judge.

The respondent husband appeals the findings of fact, conclusions of law, and decree dissolving the parties' marriage. The paternal grandparents also appeal, claiming they should be awarded separate and independent visitation rights. **AFFIRMED.**

Roger L. Carter and Ruth M. Carter of Carter, Rosenbaum & Carter, Sioux City, for appellants.

Judith A. Garnos of Murphy & Dull, LeMars, for appellee.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.,
but decided en banc.

SCHLEGEL, J.

The respondent husband appeals the findings of fact, conclusions of law, and decree dissolving the parties' marriage. He claims the court erred: (1) in denying his application for appointment of an attorney to represent the parties' minor child; (2) in giving primary physical care of the minor child to the wife; (3) by entering findings of fact unsupported by the evidence; (4) in failing to award adequate visitation; (5) in failing to adequately define the visitation that was awarded; and (6) by awarding excessive child support and attorney fees. The grandparents also appeal; claiming the district court erred in denying them separate and independent visitation rights. The wife seeks attorney fees on appeal.

Frank and Debra Harvey were married August 10, 1985. They have one child, Ashley, born on February 8, 1987. Debra is thirty years of age. She is employed as a medical aide and earns \$5.70 per hour. Her net monthly income from employment is \$757. Since the petition for dissolution was filed, Debra has had primary physical care of Ashley.

Frank is thirty-one years of age. He is a college graduate with a bachelor of arts degree in education. He is employed at a manufacturing company and spends a substantial amount of time working on his parents' farm. His net monthly income from the manufacturing company is \$1,343 per month. Frank is allowed to live rent free in a house owned by his parents; otherwise, the financial

arrangement he has with them is unclear. Frank's parents are lifelong residents of LeMars, Iowa. Since Ashley's birth, they have taken an active role in her upbringing.

On May 23, 1991, Debra filed a petition for dissolution. Thereafter, Frank filed an application for appointment of attorney to represent Ashley. The district court concluded that "no unusual circumstances or contentions" necessitated such an appointment.

At trial, several allegations were made by both Frank and Debra regarding the other party's incompetency to care for Ashley. Frank claimed Debra drank too much and had an eating disorder. Debra claimed Frank abused her and sexually abused Ashley. The trial court found all of the allegations to be unfounded. The trial court did find that if Frank was given custody of Ashley his mother would be given primary responsibility for raising her.

On January 16, 1992, the district court entered its findings of fact, conclusions of law and decree awarding the parties joint legal custody of Ashley, with Debra receiving primary physical care, and ordering Frank to pay \$320 per month in child support and \$2,500 toward Debra's attorney fees. The district court gave Frank visitation rights and allowed the grandparents visitation derivative of Frank's visitation rights. Frank and the child's paternal grandparents now appeal.

Our review in this matter is de novo. Iowa R. App. P. 4. 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 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 Vrbn, 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).

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).

Having carefully studied the record in light of these principles, we conclude the district court properly awarded the parties joint legal custody with Debra receiving primary physical care of Ashley. We agree with the trial

court's observation that Frank is both financially and emotionally dependent upon his parents. Frank's parents undoubtedly have a pervasive influence on his life which would inappropriately impede Frank's custodial responsibilities as primary caretaker. This is especially true in light of the fact Frank works fifteen-hour days and would rely substantially on his mother to care for Ashley.

Debra has been evaluated by Saint Luke's Gordon Recovery Center to determine whether she suffers from an eating disorder or substance abuse; the results of this evaluation do not indicate substance abuse or an active eating disorder. In addition, Debra has been evaluated to determine her level of emotional wellness and ability to provide parental nurturance for Ashley. The examiner found no reason to believe Debra could not effectively provide physical care for Ashley. The record is absent any credible evidence to the contrary. We believe the trial court's custody award, including liberal visitation to Frank, effectively ensures Ashley's continued physical and emotional contact with both her parents. The award is appropriate under the circumstances of this case.

Frank has requested this court to specify which party will be responsible for transportation of Ashley to and from her visitations. Frank shall be responsible for the arrangements and costs involved in transporting Ashley to visitation with Frank, and Debra shall be responsible for the arrangements and costs involved in transporting Ashley back home following Frank's visitation periods.

Secondly, Frank contests the court's child support award. The trial court correctly found Debra's net monthly income to be \$757 and Frank's net monthly income from his manufacturing job to be \$1,343. Applying the 1990 Iowa Child Support Guidelines to these figures indicates Frank's child support obligation is equal to 23.5 percent of his net income or \$315.61. However, as the trial court noted, the terms of Frank's financial arrangement with his parents regarding Frank's assistance on the family farm are vague and known only to Frank and his parents. In light of this fact, we find the court's child support award of \$320 per month to be appropriate.

Frank further contends he is entitled to an abatement of child support during his two months of summer visitation with Ashley and cites In re Marriage of Toedter, 473 N.W.2d 233, 235 (Iowa App. 1991), to support his contention. We disagree. "Generally the [child] support obligation is not reduced during periods of extended visitation [with the noncustodial parent], as the custodial spouse has the continuing obligation to maintain the house and other necessary expenses." Id. at 235 (citing In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976)). Recognizing that no two child support cases are alike, we made an exception to this general rule in Toedter because the custodial parent already owned his house--the children's primary residence--free and clear. The present case is clearly distinguishable from Toedter since Debra does not own a house.

Next, Dean and Sharon Harvey, Ashley's paternal grandparents, argue they should be awarded separate and independent visitation with the minor child pursuant to Iowa Code section 598.35 (1991). This section provides in pertinent part:

A petition for grandchild visitation rights shall be granted only upon a finding that the visitation is in the best interests of the child and that the grandparent had established a substantial relationship with the child prior to the filing of the petition.

Considering the obvious animosity which exists between the Harveys and Debra, an award of independent grandparental visitation is inappropriate in this case. Such an award would invite disruption into young Ashley's life and would intrude upon Debra's custodial responsibilities to the child.

We recognize the importance in a child's life of fostering the grandparent-grandchild relationship. In light of Frank's liberal visitation rights and his close relationship with the paternal grandparents, we are confident the relationship between Ashley and the Harveys will continue to grow. However, we are convinced Ashley's best interests will be served if her paternal grandparents are denied separate and independent visitation.

Finally Frank contests the district court's award of trial attorney fees to Debra, and Debra requests 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 affirm the district court's award of trial attorney fees to Debra and order Frank to pay \$1,000 toward Debra's appellate attorney fees. The costs of this appeal shall be paid by Frank.

We find the remainder of Frank's contentions to be without merit.

AFFIRMED.

All judges concur except Donielson and Hayden, JJ., who concur in part and dissent in part.

DONIELSON, J. (concurring in part and dissenting in part)

I concur with the majority's decision except for its denial of visitation to the grandparents. I would grant the grandparents separate visitation rights.

Iowa Code section 598.35 (1991) provides, in relevant part, that grandchild visitation rights "shall be granted only upon a finding that the visitation is in the best interests of the child" All parties agree it is in Ashley's best interests to have ongoing contact and some visitation with her grandparents. However, the majority asserts that, given the "obvious animosity" existing between the grandparents and Debra, independent visitation with the grandparents would be inappropriate.

I do not agree the grandparents should be precluded from visitation with Ashley because of their relationship with Debra. While it is clear Debra and Ashley's paternal grandparents do not get along, I do not agree separate visitation "would invite disruption into young Ashley's life and intrude upon Debra's custodial responsibilities to the child." Part of Debra's "custodial responsibilities" should include supporting a positive relationship between Ashley and both her father and her paternal grandparents, despite her personal feelings of animosity towards Frank and his parents. Similarly, of course, I would expect the grandparents to support a positive relationship between Ashley and her mother.

Under the current visitation schedule, Ashley will see her father on every other weekend, plus some holidays. Frank also has an extended visitation period during the summer months. During the periods when Frank has visitation only on the weekends, he should not always feel compelled to share his visitation periods with his parents. I would grant the grandparents separate visitation one weekend a month, with Frank and Debra alternately giving up one weekend every two months to provide for this visitation. By awarding this minimal amount of visitation, the grandparents will have an opportunity to spend time with Ashley without significantly infringing upon Ashley's time with either Frank or Debra. Because Frank has extended visitation during the summer months, I would not award separate visitation to the grandparents during that period.

I find it is in Ashley's best interests for her paternal grandparents to be awarded separate visitation rights. The custodial parent should not be able to use his or her own feelings of animosity towards the grandparents to establish that separate grandchild visitation is inappropriate and not in the child's best interests.

Hayden, J., joins this partial concurrence and dissent.