IN THE COURT OF APPEALS OF IOWA

000355

No. 7-787 / 97-0966

FILED
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CLERK SUPREME COURT

JUSTINE DAWN WEEKS,

Plaintiff-Appellee,

vs.

JAMES C. REED,

Defendant-Appellant.

Appeal from the Iowa District Court for Warren County, Dale B. Hagen, Judge.

James Reed appeals from a district court decree granting primary physical care of the parties' son to Justine Weeks. **AFFIRMED.**

Eric Borseth of Borseth & Genest Law Office, Pleasant Hill, for appellant.

James S. Dougherty of Ouderkirk, Ouderkirk & Dougherty, P.L.C., Indianola, for appellee.

Heard by Cady, C.J., and Sackett and Vogel, JJ.

CADY, C.J.

The sole question in this appeal is whether the trial court correctly designated the primary physical caretaker in a custody case between two unwed parents. We affirm.

James Reed and Justine Weeks lived together for several years. They had one child, Austin, born December 3, 1991. James and Justine eventually ended their relationship in January 1996. James took a job in Idaho and Austin remained under the care of Justine in Iowa. The parties agreed on a visitation arrangement.

In September 1996, James commenced custody proceedings in Idaho. The Idaho case was dismissed in November by the Idaho district court following a finding Iowa was a more appropriate forum for the proceedings. Justine had filed a petition in Iowa district court to determine custody pursuant to Iowa Code chapter 598A (1995) in September 1996.

Following the hearing, the trial court found both parties to be good parents and determined both had substantial involvement with Austin. It did not find one or the other to have been the primary care parent. The court recognized Austin's grandparents and extended family lived in Warren County, Iowa, where Justine lived, while James lived in Idaho where there was no extended family.

James contends he should be named the primary care parent. He asserts he offers Austin the better opportunity to nuture and enhance his emotional, social, and moral development. James argues the move from Iowa was for a job opportunity that

would improve life for him and his family, and he should not be penalized for having made the move.

Our goal in parent-child custody matters is to do what is in the best interests of the child. Many factors have been identified, both by statute and prior court decisions, to help determine which custodial or care arrangement would be in the best interests of the child. *See* Iowa Code § 598.41(3) (1995); *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). In the final analysis, the critical issue is which parent will do the better overall job in raising the child. *Ford*, 563 N.W.2d at 631.

This case illustrates how the balancing of the relevant factors does not always reveal clear conclusions. As the trial court acknowledged, as well as the custody evaluator, both parents possess strengths which would render them good primary caretakers of Austin.

One factor, however, which favors Justine over James in the arduous search for the best interests of Austin is Justine's ability to provide Austin an environment which will allow him to maintain close contact with his extended family. James, because he has elected to reside in Idaho, will be unable to foster the same environment. We recognize the best interests of children are promoted by placing them in an environment which includes the healthy support and influence of family members. *See In re Marriage of Guyer*, 238 N.W.2d 794, 796 (Iowa 1976). This factor is not pivotal, but is only one of many to consider, together with all the other

facts and circumstances. Nevertheless, in this case, it reveals an area which distinguishes Justine as the primary caretaker.

In the end, neither James nor Justine has a decisively superior claim. Yet, on our de novo review, we conclude the district court correctly placed primary care with Justine. In reaching this conclusion, we are helped by the finding of the trial court, who had the benefit of hearing and observing the parties first-hand. *See In re Marriage of Kleist*, 538 N.W.2d 273, 278 (Iowa 1995). This perspective draws added importance when the evidence is in near equipoise. *See In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa App. 1993).

AFFIRMED.

Vogel, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

The question in this initial custody determination is which parent is better equipped to have the primary physical care of Austin James Reed, born in December 1991. The trial court found both parties good parents and determined both had substantial involvement with Austin, despite the fact they had a rocky relationship. The court did not find one or the other to have been the primary care parent. The court premised its custody award on the fact Austin's grandparents and extended family were in Warren County, Iowa, where Justine lived, while James lived in Idaho where there was no extended family. This was the one factor the trial court found tipped the scale in Justine's favor.

James contends this was not a permissible factor for consideration in the primary care award and he, not Justine, should be named the primary care parent. He asserts he offers Austin the better opportunity to nurture and enhance his emotional, social, and moral development. James contends the move away from Iowa was for a job opportunity that would improve life for him and his family, and he should not be penalized for having made the move. I agree with James's argument.

While I recognize, as did the trial court, the importance of an extended family to a child, I do not find it should be the controlling factor where either parent, as here, has the ability to care for the child. There are positive and negative sides to any location. *See In re Marriage of Frederici*, 338 N.W.2d 156, 160 (Iowa 1983). Stability of a child can be nurtured other than by leaving them in their own

neighborhood and in close proximity to families with whom they have bonded. *See In re Marriage of Vrban*, 359 N.W.2d 420, 424-25 (Iowa 1984). Furthermore, this custody battle has strained relations between the extended families on both sides. Austin, in remaining with his mother, will obviously be kept a part of this animosity.

In assessing the record, I do not agree with the trial court and the majority that the parents offer Austin equal parenting. James, thirty years old and a high school graduate at the time of trial, presented a series of witnesses best described as friends who attested to his strong relationship with Austin and his honesty and stability. A custody evaluation requested by both parties and performed by Craig Rypma, a clinical psychologist who spent thirteen hours on his evaluation, found "James appears to be more stable in his current lifestyle and more capable of providing important consistency that will be needed while Austin is growing up." The evaluator found this recommendation difficult because it would take Austin out of the area where he has supportive extended family. The custody evaluator interviewed both parents and observed them playing with Austin. The evaluator found collateral data suggesting James was the psychological parent in Austin's early life. The evaluator found questionable heterosexual behaviors that he determined reflected on Justine's judgment. Both parties showed normal clinical scales on the MMPI-2, though Justine was elevated on certain scales, suggesting excessive use of repression and denial and a lack of flexibility as well as taking a defensive attitude. There were no elevated scales on James's test. The trial court found these findings accurate.

Like the custody evaluator, I am concerned by Justine's willingness to engage in a series of sexual encounters, including on at least two occasions having affairs with different bosses. I recognize there seems to be an attitude that sexual encounters between consenting adults should be ignored. Yet, a parent who is involved with a number of sexual partners exposes himself or herself to the results of jealousies and emotional and sometimes physical dangers that can come from such behavior.

I realize Austin was born out of wedlock and both parents were equally responsible for what happened. But, this factor does not make right the series of relationships Justine has been involved in since Austin's birth.

Like the majority, I give credence to the trial court's findings. In doing so, I have specifically noted the trial court agreed with the custody evaluator in all respects except for the evaluator's finding that the need to be near extended family should not weigh against James's being awarded physical care. The custody evaluator clearly found James the superior parent. I would award James primary physical care of Austin.