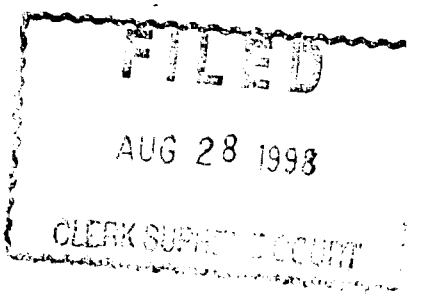
IN THE COURT OF APPEALS OF IOWA



No. 8-235 / 97-1819
Filed August 28, 1998

IN RE THE MARRIAGE OF JOHN CLIFFORD BUNTING AND JENNIFER DIANE HARTLEY-BUNTING

Upon the Petition of
JOHN CLIFFORD BUNTING,
Appellant,

And Concerning
JENNIFER DIANE HARTLEY-BUNTING,
Appellee.

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler, Judge.

The petitioner appeals from the entry of the dissolution decree. **AFFIRMED.**

Morris L. Eckhart of Milroy, Eckhart and Thompson, Vinton, for appellant.

John C. Wagner and Christopher L. Jorgensen of John C. Wagner Law Offices, P.C., Marengo, for appellee.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

STREIT, J.

John Bunting appeals the award of primary physical care of Jacob to Jacob's mother, Jennifer. Because Jennifer was Jacob's primary caregiver during the marriage and a review of all circumstances indicate it is Jacob's best interests to stay with Jennifer, we affirm the trial court.

I. Background Facts & Proceedings.

John and Jennifer were married on July 30, 1995. They have a three-year-old son, Jacob. The couple separated in June 1996. During the separation, they had a joint physical care arrangement. In its September 1997 divorce decree, the trial court granted Jennifer primary physical care of Jacob and ordered John to pay child support of $93.63 per week. John seeks primary physical care of Jacob and modification of his child support obligation on appeal.

II. Standard of Review.

Review of the primary physical care provision of a dissolution decree is de novo. Iowa R. App. P. 4. An appellate court considers the facts anew, but gives weight to the findings of the trial judge. Iowa R. App. P. 14(f)(7).

The governing consideration in a custody determination is the best interests of the child. Many statutory factors have been identified for courts to consider in determining the child's best interests. *See* Iowa Code § 598.41(3)(1995). Additionally, our prior appellate decisions have offered other factors. *See In re*

Marriage of Ford, 563 N.W.2d 629, 631 (Iowa 1997). The critical issue is which parent will do the better job in raising the child. *Id.*

III. Primary Physical Care.

A. Characteristics of Parents. As all people do, both of these parents have failings and attributes.

John is twenty-six years old and employed as an account manager at Access Direct, earning approximately $30,000 per year. His job is stable and financially secure. Jennifer is twenty-five years old and employed as a waitress, earning $3.10 per hour plus tips. She previously worked at Amana Refrigeration, earning $21,102 in 1996, but lost her job due to tardiness and absenteeism. Although Jennifer lost her job, she quickly got another job and it is not in question whether she would be able to financially provide for Jacob.

Jennifer has a history of depression which she has effectively managed. In 1990 she overdosed on Tylenol. In 1994, she was diagnosed with depression and began taking an anti-depressant. Again, in the summer of 1996, Jennifer consulted with a doctor about depression, and was diagnosed with an adjustment disorder due to a dysfunctional relationship. At the time of trial, Jennifer had been effectively managing her depressive symptoms for months. There is no evidence on the record Jennifer's depression has affected her ability to parent Jacob.

John had a history of abusive and vindictive behavior during the marriage. He verbally and physically abused Jennifer. For instance, he has punched holes in walls

at their residence and has thrown things at Jennifer during arguments. He threatened to kill Jennifer on the day the parties separated. He insists Jennifer has illicit sexual affairs, is a drug user, and plans to move out of the state with an alleged paramour. The record does not support these allegations. Shortly after the separation, John picked up Jacob from day care and took him to a motel. He did not let Jennifer to see Jacob for eight days. We have previously recognized domestic abuse as a factor in determining the custodial parent. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997); *see also* Iowa Code § 598.41 (1995).

B. Primary Caretaker. A parent's role as primary caretaker of the child during the marriage is an important consideration when fixing primary care. *In re Marriage of Volding,* 544 N.W.2d 457, 459 (Iowa App. 1995). Assessing who was the primary caretaker of the child reveals a track record of parental care and interest. *See In re Marriage of Knight*, 507 N.W.2d 728, 730 (Iowa App. 1993). The role of primary caretaker is critical in the development of a child. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995). In most cases it is in the best interests of the child to stay with the primary custodian because it provides continuity and stability in the child's life. *See In re Marriage of Love*, 511 N.W.2d 648, 650 (Iowa App. 1993).

Jennifer was Jacob's primary caretaker during the marriage. After Jacob was born, Jennifer provided substantially all of Jacob's care. She changed his diapers, got up with him in the night, fed and bathed him, arranged for and transported him to day

care. As Jacob has gotten older Jennifer plays with him, reads to him daily, engages him in musical activity, takes him bicycling, walking, swimming, and to other social activities. She takes him to the doctor. Jennifer and Jacob also attend church activities together.

John provided minimal care to Jacob during the marriage. He did not come home until late hours during the week and saw very little of Jacob except on weekends. He did not arrange for or transport Jacob to his day care or medical appointments. While the parties had joint custody, John did not arrange for or transport Jacob to his medical appointments, referring to those tasks as one a mother should do.

Jennifer's role as Jacob's primary caretaker during the marriage has weighed heavily on our decision to affirm the trial court's custody award.

*C. **Drug Use & Illicit Relationship.*** John characterizes Jennifer as a drug user, insists she had extramarital affairs, and planned to leave the state. Moral misconduct by a parent is a factor to be weighed in determining the primary caretaker. *In re Marriage of Roberts*, 545 N.W.2d 340, 343 n.1 (Iowa App. 1996). Added weight is given when the moral misconduct occurs in the presence of children. *Roberts,* 545 N.W.2d at 343 n.1. At the same time, moral misconduct does not preclude an award of primary care, but must be considered together with all other relevant factors and characteristics. *Lovett v. Lovett*, 164 N.W.2d 793, 802 (Iowa 1969). Both parties admitted they have used marijuana. John has presented no

evidence Jennifer currently uses marijuana. Jacob shows no signs of being from a home where drugs are abused. He is a happy, well-functioning toddler. John has not presented any credible evidence Jennifer had an extramarital affair or planned to move out of the state. For these reasons, Jennifer's alleged transgressions have not influenced the custody decision.

After de novo review, we determine the trial court correctly awarded primary physical care of Jacob to Jennifer, his primary caregiver. The child support provision ordering John to pay child support to Jennifer is affirmed.

IV. Attorney Fees.

The trial court ordered John to pay $5000 towards Jennifer's legal fees and expenses. Jennifer seeks attorney fees on appeal.

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 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).

Because we find no evidence the trial court abused its discretion in awarding Jennifer $5000 in attorney fees, we affirm.

In deciding whether Jennifer is to be awarded fees on appeal, 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 trial court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996). Attorney fees are not awarded as a matter of right, but rest within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994).

Jennifer has prevailed on appeal. She has minimal funds to pay attorney fees. She is awarded $1500 in appellate attorney fees. Costs are assessed to John.

AFFIRMED.