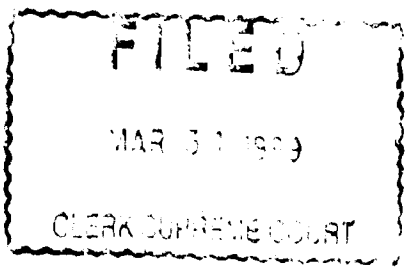
IN THE COURT OF APPEALS OF IOWA

No. 9-123 / 98-0941
Filed March 31, 1999



Upon the Petition of
HARLEY RICHARD HESS,

Petitioner-Appellant,

And Concerning
JENNIFER ANN GERDOM,

Respondent-Appellee.

Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

Petitioner appeals from a district court order awarding primary physical custody of the parties' minor child to respondent. **AFFIRMED.**

Richard J. Bell of Bell and Vilsack, Mt. Pleasant, until withdrawal, and then Thomas M. Walter of Johnson, Hester, Walter & Breckenridge, L.L.P., Ottumwa, for appellant.

Michael G. Dieterich of Cahill, Dieterich and Schilling, Burlington, for appellee.

Considered by Sackett, C.J., and Streit and Mahan, JJ.

SACKETT, C.J.

Petitioner-appellant Harley Richard Hess appeals challenging the district court's refusal to award him primary physical care of the child born to Harley and respondent-appellee Jennifer Ann Gerdom. We affirm.

The parties' child, Jacob Hess, was born in October 1993. At the time, Jennifer, then twenty, and Harley, then twenty-three, had been in a nineteen-month relationship. The pregnancy was unplanned and both parties had problems with the fact they were to have a child. To their credit, their unhappiness with the unplanned pregnancy did not set the stage for the relationship they would have with their son. The testimony at the hearing made it abundantly clear they both love him and are concerned about his care.

Harley and Jennifer continued to live together until August of 1994. At the time of their separation, Harley believed it was better for Jacob to live with Jennifer. In October of 1994, there was a paternity determination made and Harley was ordered to pay Jennifer child support of $60 a week. This amount has been paid and, in addition, Harley pays one-half of Jacob's child care and a share of his medical expenses. Harley also has exercised regular visitation with Jacob.

No physical custody determination was ever made and Harley was to testify he believed Jacob should be in Jennifer's primary care, until the Spring of 1997 when he heard things indicating Jennifer might not be giving Jacob proper care. Harley then filed a petition asking he be named primary care parent. In July of 1997, Jennifer

asked the court to increase Harley's child support obligation. The matters were consolidated for trial.

Following a hearing, the district court awarded the parties joint legal custody and placed primary physical care with Jennifer, subject to Harley's rights of visitation. Harley was ordered to pay $550 toward Jennifer's attorney fees. Harley's child support obligation was increased to $127.62 a week and made retroactive to December 17, 1997. He was also ordered to maintain medical and dental insurance for Jacob and be responsible for 75 percent of uncovered medical and dental expenses and prescription drugs.

Harley challenges only the award of primary physical care. He contends he, not Jennifer, is the better parent.

Our review of a custody order is de novo. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995); *In re Guardianship of Knell*, 537 N.W.2d 778, 780 (Iowa 1995). In reviewing the evidence we, of course, give deference to the trial court's assessments of the credibility of the witnesses. *See* Iowa R. App. P. 14(f)(7). The trial court had the opportunity to have the parties and their witnesses before it. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992); *In re Marriage of Anderson*, 509 N.W.2d 138, 142 (Iowa App. 1993).

The question is which parent based on the evidence before us will do a better job of caring for the child in the future. We look to the factors set forth in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). *See also In re Marriage*

of Riggert, 537 N.W.2d 789, 791 (Iowa App. 1995). The critical issue is which parent will do the better job of raising the child over the long duration. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). The parent who has the ability to do the better job of raising the child during his minority is the parent who should be granted custody. *In re Marriage of Kunkel*, 546 N.W.2d 634, 636 (Iowa App. 1996).

Harley, twenty-seven at the time of trial, lives in his own home in Mt. Pleasant. He has an electronic engineer technology degree from Hamilton Technical College and a degree in computer science from Iowa Wesleyan College. He works for Motorola as a semi-conductor buyer. He has strong family connections. He is financially stable.

Jennifer, an honor student in high school, entered college with a scholarship. She did not complete her college education but, like Harley, has maintained steady employment at Motorola. She assumed primary physical care of Jacob and, consequently, she had less freedom to pursue additional education. She has exhibited financial irresponsibility.

Harley, on occasion, has been willing to put his personal interests above spending time with Jacob. To Harley's credit, when Jacob was lagging in the development of speech patterns, Harley intervened and had Jacob evaluated at the AEA. He did not, but should have included Jennifer in the process. However, the positive result of Harley's intervention was that a change in day care arrangements was made and Jacob's speech has improved.

There are instances where Jennifer's immaturity has gotten in the way of giving sufficient priority to Jacob's needs. There are also situations where Harley has been less than supportive of Jennifer's role as Jacob's primary care parent.

Unfortunately, the parties have focused on the past negative attributes of the other. While past behavior does provide some gauge for future behavior, both Harley and Jennifer have matured since Jacob's birth. At the time of the custody hearing, it was obvious they both considered Jacob a central focus on their lives and each loved him very much. They both show current stability in their lives, although Harley appears to have a life that is more structured than Jennifer's.

While Jennifer tends to question Harley's motives for the attempted custody request, a review of the record shows in making the request Harley believed he could do a better job caring for Jacob than could Jennifer and the request was not for some less-than-noble purpose.

We find, as did the district court, that Harley and Jennifer both have the ability to care for their son. They both have adequate living quarters and each has job stability. Harley has a greater earning potential primarily because he made the effort to complete his post-high school education.

The trial court had the parties before it and was able to observe their demeanor and was in a better position than we are to evaluate them as custodians. *See In re Marriage of Forest*, 201 N.W.2d 728, 730 (Iowa 1972); *In re Marriage of Engler*, 503

N.W.2d 623, 625 (Iowa App. 1993). We find no valid reasons to disagree with the district court's decision and affirm.

Jennifer has requested appellate attorney fees. We award her $750.

AFFIRMED.