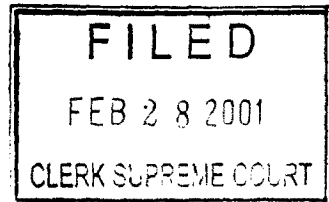


IN THE COURT OF APPEALS OF IOWA

No. 1-035 / 00-793
Filed February 28, 2001

**IN RE MARRIAGE OF TAMMY LYNN HUINKER
AND KEVIN RICHARD HUINKER**



**Upon the Petition of
TAMMY LYNN HUINKER,
Petitioner-Appellant/Cross-Appellee,**

**And Concerning
KEVIN RICHARD HUINKER,
Respondent-Appellee/Cross-Appellant.**

Appeal from the Iowa District Court for Delaware County, John Bauercamper, Judge.

The petitioner appeals, and respondent cross-appeals, from the child custody, property distribution and visitation provisions of their dissolution decree.

AFFIRMED AS MODIFIED.

Frank J. Nidey of Nidey Peterson Goldberg, P.L.C., Cedar Rapids, for appellant.

William D. Werger of Hanson & Werger, Manchester, for appellee.

Heard by Streit, P.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

Kevin and Tammy Huinker challenge the custody, visitation, and property distribution provisions of their divorce decree. We affirm as modified.

I. Background Facts and Proceedings

Kevin and Tammy, both correctional officers in Iowa's prison system, married in 1996. Devin was born a year later. Tammy stayed at home with Devin for twelve weeks, then returned to working an 11 P.M. to 7 A.M. shift. As Kevin worked the 3 P.M. to 11 P.M. shift, he cared for Devin during the days. Tammy's mother babysat between the two shifts for approximately three hours, leaving both parents sufficient time to get to and from work.

Soon, friction developed between Kevin and his mother-in-law, based on Kevin's belief she was usurping his time with Devin. The parties separated, with Kevin moving into a rented home in his hometown and Tammy returning to her mother's home.

Tammy sought a divorce. The district court initially concluded both parties had been Devin's primary caretakers and granted them joint temporary physical care. Following trial, the district court ordered Kevin to assume physical care of Devin, subject to liberal visitation with Tammy. The court further ordered Tammy to pay child support and divided the parties' property and debts. Both parties appealed. Our review is de novo. Iowa R. App. P. 14.

II. Primary Care

Tammy contends the district court should have awarded her physical care of Devin. Our primary consideration in determining who should have physical

care is the best interests of the child. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999).

The district court found "[e]ach parent is well suited to be a custodial parent for Devin and can properly provide for his care and development." We agree with this finding. Both parties are similarly situated in terms of their work hours and pre-divorce care of the child. Although Tammy stayed home with Devin during the first three months of his life and took Devin to most of his doctor appointments, both parties were actively involved with his care until they separated. Kevin generally looked after Devin in the mornings and early afternoon until he went to work. Tammy cared for Devin from approximately 2 P.M. until 9 P.M., when her mother took over. This schedule does not tip the scale in favor of either parent.

Nevertheless, this is not a case for joint physical care. The parties admitted at trial that the joint physical care arrangement initially ordered by the district court proved difficult given the distances between both homes and the parties' employment. See *In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa Ct. App. 1998).

Therefore, we look to other factors relevant to determining the physical care issue. While we believe either parent could afford Devin a stable and nurturing environment, we conclude Kevin displayed more responsible conduct following the separation. He immediately decided he wished to live in his hometown, rented a home close to his parents, and arranged to have his mother care for Devin in the evenings. He also made alternate day care arrangements in the event his mother was unavailable and began saving funds for the future.

While Tammy transferred to the day shift to coordinate her hours with Devin's eventual school hours, she did not take steps to reorder her finances and appeared unsure of her ultimate housing plans until a month before trial.

It is true Kevin has his weaknesses. The record suggests Kevin has not always fostered Devin's relationship with Tammy. See *In re Marriage of Fynaardt*, 545 N.W.2d 890, 894 (Iowa Ct. App. 1996). He has called her derogatory names in front of Devin, suggested to the parties' physician that she is irrational and unconcerned about Devin's welfare, and appeared unwilling to communicate with Tammy about the details of Devin's daily life while in his care.¹ He also has displayed a quick temper on occasion and consumed alcohol regularly and sometimes excessively. Despite these failings, we note Kevin did not impede the temporary joint care arrangement ordered by the court. Additionally, Tammy conceded the parties' communication, at least concerning Devin's health, had improved by the time of trial. As Tammy stated, he appeared to have "gotten over the hate part of the separation." As for his temper, Kevin recognized his emotional vulnerability and sought treatment for depression associated with the impending divorce. Finally, he testified he stopped drinking alcohol several months before trial. Therefore, these weaknesses do not alter our conclusion that the district court acted equitably in awarding physical care of Devin to Kevin.

¹ Tammy's physician testified he was surprised at how reasonable and concerned Tammy was when he spoke to her, given comments Kevin had made about her.

III. Visitation

The district court ordered Tammy to have visitation on alternate weekends and two days per week and granted six weeks of extended visitation at any time of the year. Tammy seeks overnight visitation on her midweek days off in addition to her weekend visitation. Kevin agrees the midweek visits should include an overnight stay but asks us to eliminate the weekend visitation, arguing that time will primarily be spent with Tammy's mother in light of Tammy's weekend work schedule. Both parties agree the extended visitation should take place during the summer, once Devin enters school.

Visitation should be liberally granted where appropriate. Iowa Code § 598.41(1). Nothing in the record would warrant deviation from this principle. Accordingly, we modify the decree to provide for overnight midweek visitation for two consecutive days corresponding to Tammy's days off. We decline to reduce Tammy's weekend visitation as requested by Kevin. Devin has developed a close bond with Tammy's mother. Therefore, the fact Devin will spend a portion of his weekend visits with his maternal grandmother is to be lauded rather than criticized. Finally, we modify the decree to provide that once Devin starts school, extended visitation will take place in the summer.

IV. Property Distribution

Kevin argues the district court acted inequitably in requiring him to pay the \$3300 balance on an Associates National credit card. He maintains most of the items charged to the credit card were purchased by Tammy after they separated. Tammy responds that Kevin received a larger share of the parties' assets and had more income than Tammy.

The district court has a statutory duty to equitably divide the parties' property, including their debt. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa Ct. App. 1997). The joint disclosure statement filed by the parties immediately before trial allocated the Associates National Credit Card debt to Tammy. Additionally, Tammy testified the credit card was in her name and acknowledged the debt was her debt. Accordingly, we conclude Tammy should have been held responsible for this balance and we modify the decree accordingly. *Cf. In re Marriage of Huittinga*, 574 N.W.2d 920, 921 (Iowa Ct. App. 1997) (noting wife required to pay credit card debt accumulated during pendency of divorce).

V. Appellate Attorney Fees

Tammy seeks \$2500 in appellate attorneys. Such an award rests within the court's discretion. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). We consider the needs of the requesting party, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Barry*, 588 N.W.2d 711, 714 (Iowa Ct. App. 1998). Given the parties' virtually equal earnings, we decline to order Kevin to pay Tammy's attorney's fees.

Costs are taxed equally to both parties.

AFFIRMED AS MODIFIED.