FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

280

IN RE THE MARRIAGE OF WILLIAM D. REUTER AND SUZANNE G. REUTER

UPON THE PETITIONER OF)
WILLIAM D. REUTER,) Filed February 24, 1982
Petitioner/Appellee/Cross-Appellant,) 1-450
66961
AND CONCERNING)
SUZANNE G. REUTER,)
Respondent/Appellant/Cross-Appellee.)

Appeal from Polk District Court, Gene L. Needles, Judge.

Respondent-mother appeals the trial court's decree contending: (a) the trial court should have awarded her sole custody of the parties' minor child; (b) overnight visitation rights should not have been awarded to the father; (c) the child support provisions were inadequate and (d) attorney fees should be awarded to her. AFFIRMED WITH MODIFICATION.

Kenneth A. Johnson and Gordon E. Allen, Des Moines, for petitioner/appellee/ cross-appellant.

David J. Jennett, West Des Moines, for respondent/appellant/cross-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Respondent-mother appeals the trial court's decree contending: (a) the trial court should have awarded her sole custody of the parties' minor child; (b) overnight visitation rights should not have been awarded to the father; (c) the child support provisions were inadequate and (d) attorney fees should be awarded to her. We affirm the trial court's custody award, denial of attorney fees, and its taxation of costs equally to each party and modify its order concerning visitation.

Petitioner-cross-appellant, William D. Reuter (Doug), and respondent-appellant, Suzanne G. Reuter, were married January 26, 1980. Almost from the beginning of the marriage the parties began having problems. In May of 1980, Suzanne discovered she was pregnant. The parties separated on June 1, 1980, and neither party has had direct contact with the other since that time.

In August of 1980 Doug filed a petition for dissolution of the marriage. Doug requested custody of the child upon its birth. The child, Dustin Reuter, was born December 31, 1980. Suzanne did not tell Doug of the birth of Dustin until January 5, 1981, when Doug indicated he intended to obtain a court order for visitation of Dustin. On January 7, 1981, Doug filed an application for visitation privileges with the child. The trial court approved a stipulation permitting visitation of one-half hour each Saturday afternoon in Suzanne's home. The order also provided for an investigator to be appointed to conduct a study of the environment of each party's home. On February 3, 1981, the trial court ordered Doug to pay $50 per week temporary child support. On March 20, 1981, the trial court filed an order granting temporary visitation on Wednesday evenings and overnnight from 6:00 p.m. Fridays to 6:00 p.m. Saturdays. Suzanne then filed for annulment of the temporary order, which was subsequently denied.

The case went to trial and a decree of dissolution was rendered on May 7, 1981. The trial court found each party to be capable of raising the child. The court, however, ordered:

> "legal custody of this child, Dustin, shall remain in both Petitioner and Respondent, with Respondent being the primary physical custodian, subject, however, to the Petitioner exercising reasonable and frequent visitation; that the parties are ordered to work out a plan for visitation and submit the same to the Court for review and approval; and that if the parties are unable to reach an agreement, with regard to the visitation schedule, the Court reserves the jurisdiction over this matter to enter an order fixing the visitation schedule."

The court's order also indicated Doug was to pay $25 per week child support, costs were to be split and each party was to be responsible for his or her respective attorney fees.

On June 8, 1981, the trial court denied Suzanne's motions for a new trial and for judgment N.O.V., and granted Doug overnight visitation every other weekend. On June 18, 1981, Suzanne filed a motion requesting a stay of the trial court's order pending appeal, which was denied. Suzanne claimed overnight visitation should be denied since Dustin had to be breast fed because of an allergic reaction to formula. On July 22, 1981, Chief Justice Reynoldson granted Suzanne's application for a stay pending appeal, staying the trial court's grant of overnight visitation, pending appeal or until the child reaches the age of one year. Doug was granted visitation from 9:00 a.m. to 5:00 p.m. every other Saturday and Sunday.

Suzanne now appeals the trial court's order claiming: (a) the trial court erred by establishing an essentially joint custody situation; (b) overnight visitation should not have been awarded to Doug; (c) the child support is inadequate and (d) attorney fees should have been awarded. Doug cross-appeals contending he should have custody of Dustin or, alternatively, he should have more extensive visitation rights.

Our review is de novo. Iowa R. App. P. 4. We are not bound by the trial ccourt's findings of fact, but we give weight to them, especially with regard to the credibility of witnesses. Iowa R. App. P. 14(f)(7). In reviewing a child custody determination, we apply the criteria set out in In re Marriage of Winter, 223

N.W.2d 165, 166-67 (Iowa 1974). Our primary concern is the best interest of the child. Iowa R. App. 14(f)(15).

I. Custody and Visitation

A. Suzanne initially contends the trial court's order established a joint custody situation without making a determination as to the appropriateness of joint custody in this case which is required by In re Marriage of Burham, 283 N.W.2d 269, 274 (Iowa 1979). We do not believe the test provided in In re Marriage of Burham, 283 N.W.2d at 274, is relevant to this case. We are not convinced the trial court established a joint custody situation. Joint custody is defined as a situation where both parents share the legal responsibility for the care of their children and alternate the physical custody of the children. In re Marriage of Burham, 283 N.W.2d at 271. The difference between joint custody as defined and the normal situation where one parent has sole custody of the child subject to the other parent's right of visitation, may only be a matter of degree. However, we need not address the precise distinction between joint custody and split custody with rights of visitation in this opinion. In this case, the emphasis of the trial court's order is clearly upon placing the sole custody of Dustin with Suzanne subject to visitation by Doug. Therefore, Suzanne's claim the trial court erred in creating, in substance, a joint custody situation without applying the joint custody test of In re Marriage of Burham, 283 N.W.2d at 274, is without merit.

B. Doug cross-appeals on the issue of awarding custody of Dustin to Suzanne We agree with the trial court's conclusion that Suzanne, under the record presented, will "minister more effectively to the long-range best interests of the children." In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). Accordingly, we affirm the trial court's award of custody of Dustin to Suzanne.

We agree with the trial court's conclusion both Doug and Suzanne would be capable parents. We feel, however, the stability and maturity Suzanne can offer

Dustin is greater than Doug presently offers. Of some concern to us is the indication of Ann Willer, the custody investigator, that Doug exhibited a lack of interest in the child by failing to contact Suzanne during the pregnancy or offer any other form of support. We also express some concern over Doug's uncertainty as to his future drug use, but laud his honesty and candor on the subject. We are also impressed with the course of study he undertook to prepare himself for custody of Dustin. However, upon a complete review of the record, we feel the environment Suzanne and her parents offer Dustin and her experience in raising a child is more conducive to ministering to Dustin's long-range best interests. Custody of Dustin is affirmed in Suzanne.

C. We think the visitation rights provided by the trial court are adequate. We expect the parties to fully cooperate with each other in allowing Dustin to profit from the fullest possible association with each parent.

II. Child Support.

Suzanne contends the child support award order of $25 per week is inadequate. In reviewing child support provisions of a dissolution decree, we consider the factors articulated in In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974). In re Marriage Vrban, 293 N.W.2d 198, 203 (Iowa 1980). In light of those criteria as applied to the facts of this case, the trial court's award should be increased. Therefore we hereby order child support in the amount of $40 per week.

III. Attorney Fees

Suzanne seeks reimbursement for her attorney fees incurred during trial and on appeal. We note the trial court has considerable discretion respecting awards of attorney fees. In re Marriage of Schissel, 292 N.W.2d 421, 428 (Iowa 1980). Our primary consideration in making that determination is each party's resources. In re Marriage of Williams, 303 N.W.2d 160, 167 (Iowa 1981). Assessing the parties'

resources in this case, we affirm the trial court's denial of attorney fees Suzanne incurred during trial and reject her request for attorney fees incurred as a result of this appeal. The trial court's taxation of costs is affirmed. Costs of this appeal are to be equally divided.

AFFIRMED WITH MODIFICATION.