

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MICHELE E. SCHAFFER AND GREG A. SCHAFFER

Upon the Petition of)

MICHELE D. SCHAFFER,)

Petitioner-Appellee,)

And Concerning)

GREG A. SCHAFFER,)

Respondent-Appellant.)

Filed November 26, 1986

6-351
86-595

227

Appeal from the Iowa District Court for Union County (No. CD-10136)

- James W. Brown, Judge.

Respondent husband appeals from a dissolution decree, challenging the provision which places the parties' young child in the wife's primary physical care. In the alternative, he contends that his parents should be awarded grand-parent visitation in addition to his own visitation rights. Petitioner wife requests attorney's fees on appeal. **AFFIRMED.**

Arnold O. Kenyon III of Kenyon, Kenyon & Kenyon, Creston, for respondent-appellant.

John P. Paul of John P. Paul Law Offices, Creston, for petitioner-appellee.

Heard by Snell, P.J., and Schlegel and Hayden, JJ.

PER CURIAM

The parties to this appeal, Michele and Greg Schaffer, were granted a dissolution of their marriage by the District Court for Union County on February 26, 1986. The district court, in the dissolution decree, granted the parties joint legal custody of their then four-and-one-half-year-old son, Cody, with Michele having primary physical custody. The district court also established Greg's visitation rights, divided the marital property, and imposed financial obligations for child support, Michele's attorney's fees, and costs on Greg. Following an unsuccessful motion for a new trial, Greg brought this appeal challenging the district court's award of physical custody and denial of independent visitation rights to the paternal grandparents. Our review is de novo. Iowa R. App. P. 4. Although we are not bound by the district court's findings of fact, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

We begin our analysis of the custody issue with the recitation of what is certainly one of the most firmly-established propositions in the jurisprudence of our state: In child custody cases, the best interests of the child is the first and governing consideration. Iowa R. App. P. 14(f)(15); In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). The general principles applicable to the custody issue are summarized in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), and In re Marriage of Bowen, 219 N.W.2d 683, 687-88 (1974), and need not be set out at length here. In addition to the cases, we find guidance in the statutes. Iowa Code Chapter 598 (1985).

Greg's contention of district court error is bottomed on his concern with the environment Cody is exposed to as a result of Michele's live-in relationship with Jim Cox. The nature of each proposed environment, including its stability and wholesomeness, is a proper factor for our consideration in child custody

cases. Winter, 223 N.W.2d at 166. Greg contends that in light of this criterion the record evidence of Cox's alcohol and drug abuse coupled with a shooting incident and Cox's tendency to keep loaded firearms within Cody's reach, mandate an award of primary physical custody to Greg. Although our review of the record convinces us that Greg's concern is a sincere one with some factual basis, we do not believe it warrants a modification of the district court's custodial arrangement.

The record contains but one incident of Cox's alcohol and drug abuse, that being an aborted suicide attempt during the dissolution of his second marriage. This was prior to his relationship with Michele. Although there is additional testimony as to his beer consumption, we find it to be short of a showing of abuse. The shooting incident occurred when Cox fired a shotgun at trespassers who had threatened him, according to the testimony of Cox and Michele, as a result of Cox's intervention in a domestic dispute being held over the citizens band radio. We find no record evidence to the effect that Cox leaves loaded firearms within Cody's reach. We acknowledge the fact that Greg's anxiety is based upon a sincere concern for Cody's well-being. Moreover, we emphasize that we share his desire that the shooting incident, or occurrences like it, not be repeated. We think, however, that an application of all the relevant factors outlined in Winter, its progeny, and the statutes leads us to agree with the district court's custody determination.

The record persuades us that, as between Greg and herself, Michele has had primary responsibility for the care of Cody throughout his young life. Although a good share of his life has apparently been spent at day care centers and baby-sitters, we are convinced that the evidence shows Michele has demonstrated a superior ability to provide for Cody's daily needs. In addition, she is presently attending college in an attempt at bettering her situation, and we

find nothing which would lead us to believe she will not succeed in that pursuit. In short, our de novo review of the record leads us to agree with the district court that Cody's best interests will be served by awarding primary physical custody to Michele subject to liberal visitation rights, as set forth by the district court, in Greg.

The district court also refused to grant the paternal grandparents visitation rights independent and in addition to those of Greg. Greg contends this was error. The courts of this state are given the authority to order such visitation by Iowa Code section 598.35 (1985), which provides, in pertinent part, that

[t]he grandparents of a child may petition the district court for grandchild visitation rights when:

1. The parents of the child are divorced, or
2. A petition for dissolution of marriage has been filed by one of the parents of the child, or

* * *

A petition for grandchild visitation rights shall be granted only upon a finding that the visitation is in the best interests of the child.

The district court denied the request for additional visitation based upon the conclusion that additional scheduled visitation might interfere with Cody's routine and the absence of any showing that the grandparents will not be able to enjoy significant visitation under the visitation rights given Greg.

Our supreme court has noted that section 598.35 "was enacted to ameliorate the harshness of the common law in situations where grandparents could not seek derivative visitation rights from the parent who is their child," Olds v. Olds, 356 N.W.2d 571, 574 (Iowa 1984), and that the statute "presuppose[s] a disruption of the family unit that deprives the grandparent of that natural avenue for seeking visitation." Id. The statute is to apply in those situations where there has arisen "a dispute over visitation between the grandparents and a

custodian of the children who is not the child of the grandparents." Id. Its application is committed to the sound discretion of the court. Patterson v. Keleher, 365 N.W.2d 22, 24 (Iowa 1985). We agree with the district court that there has been no showing that a dispute over visitation exists between Michele and the paternal grandparents. Accordingly, we concur with that court's denial of separate visitation rights for the grandparents.

Finally, Michele requests attorney's fees for this appeal. She has supported her application with an itemization of the time and services involved. In evaluating such a request, 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 district court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). We conclude that Michele is entitled to an award of \$1,000 to apply towards her attorney's fees upon this appeal. Costs are assessed one-half to each party.

AFFIRMED.