IN THE COURT OF APPEALS OF IOWA

No. 1999-511 (9-768) / 99-0612
Filed December 27, 1999

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CLERK SUPREME COURT

MATHEW TROY RIDNOUR,

Petitioner-Appellee,

vs.

SUSAN TURNER n/k/a SUSAN McNEECE,

Respondent-Appellant.

Appeal from the Iowa District Court for Boone County, Dale E. Ruigh, Judge.

The respondent appeals from a district court custody order. **AFFIRMED.**

Michael J. Moon of Moon Law Office, Marshalltown, for appellant.

Bryan J. Humke of the Nyemaster Law Firm, Ames, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

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MAHAN, J.

Susan Turner appeals a district court custody order. She contends the court erred in awarding primary care of the parties' child to Mathew Troy Ridnour. We affirm.

Troy and Susan are the parents of Gavin, born December 1, 1996. They were never married to each other and separated in August of 1997. Susan married Mark McNeece in October of 1998. Susan and Mark have a child together, and Mark also has two children from a prior marriage. These children live with their mother. Troy lives with his fiancee, Jody Herman.

When Gavin was two months old, he suffered two broken bones in his right forearm. The injury occurred while Troy was playing with him. Both Susan and Troy were home at the time and both were aware Gavin had suffered some sort of injury because Troy stated, "I think I did something to his arm." Gavin screamed and became fussy when the arm was touched or moved. It was three days before Gavin received medical attention. As a result, Gavin was removed from the home and was later adjudicated to be a child in need of assistance based on Susan and Troy's failure to exercise a reasonable degree of care in supervising him. Troy was not found to have intentionally injured Gavin.[1]

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[1] This matter was extensively investigated by the Boone County Department of Human Services and the sheriff's department. In addition, it was reviewed by the juvenile court in a CINA proceeding and the district court in the instant custody proceeding. The conclusion reached by all concerned, including the doctors, was there was no evidence to suggest Troy purposefully inflicted this injury upon the child. In addition, Susan does not claim there is any evidence of an intentional act by Troy. The same was conceded in oral argument.

Gavin was removed from his parents' home and placed in foster care in March of 1997. He remained in foster care until May 27, 1997, at which time the juvenile court entered a stipulated adjudicatory and dispositional order which returned Gavin to his parents' custody and directed the Department of Human Services (DHS) to continue to provide services and counseling to the parents as deemed necessary. Troy met regularly with social worker Mark Albaugh. Susan initially received services, but failed to follow through as suggested.

The parties lived together from Gavin's return until August 29, 1997, at which time they separated, and Susan moved out of the home. Gavin was left with Troy, and Susan exercised visitation. During this time, Troy continued his involvement with DHS. In early March 1998, Susan failed to return Gavin following visitation. Troy then filed the instant custody action. The district court entered a stipulated order in April of 1998, placing temporary custody of Gavin with Troy.

Troy completed his involvement with Mark Albaugh in March of 1998, and the juvenile court action was terminated in April of 1998, at the request of DHS.

Troy and Susan were awarded joint custody of Gavin, with Troy as the primary physical caretaker. Susan was awarded liberal visitation and ordered to pay a child support obligation of fifty dollars per month.

Susan appeals the custody order.

I. Standard of Review. Our review is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings, but we do give them deference considering

its opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995).

II. Primary Physical Care. The critical issue before us is the best interests of the children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This must, of necessity, be the first and controlling consideration in our discussion. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41; *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); and *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The issue in determining the best interests of the children is which parent will do better in raising the child; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. *Winter*, 223 N.W.2d at 167. The objective should always be to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). Each custody decision is based on its own particular facts. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

Susan argues the district court erred in awarding primary care of Gavin to Troy. She contends Troy's previous alcohol abuse, the fact she was Gavin's primary

caretaker the first months of his life, and Troy's inflexibility on visitation are all factors which should have weighed in her favor in the custody decision.

We have carefully reviewed this difficult case. The district court properly considered all of the important factors of the case and determined Troy was best suited to be the primary caretaker of Gavin.

The district court made findings, in part, as follows:

> Gavin's present day care provider, as well as previous providers, all speak in positive terms of the child's hygiene, happiness, and development. They all opine that Troy is a good caretaker for Gavin. Troy's alcohol abuse appears to have stopped. Hopefully, such will continue permanently. *In contrast with his behavior before the parties' separation, Troy is now giving top priority to Gavin's needs. He has developed into a loving and competent caretaker.*

(Emphasis added.) The district court made the following conclusions with regard to the custody issue:

> In making a child custody decision, the Court's primary goal is to establish a custodial arrangement which will inure to the child's best interest. Neither parent enjoys a custodial preference based on gender. The Court must evaluate each party's parenting skills to determine which parent can minister more effectively to the child's long term best interests. Several factors relevant to this evaluation are set forth in Iowa Code section 598.41.
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> Having considered all of the relevant circumstances, the Court concludes that Gavin's best interests will be served by being placed in the parties' joint custody and his father's primary physical care. Although Susan was Gavin's primary caretaker during the first few months of his life, Troy has filled that role for the last 18 months. After the above-described Juvenile Court case, Troy worked diligently on his parenting skills. *While those skills were quite undeveloped in early 1997, they are now at a much higher level. Gavin has fared very well in Troy's primary care during the last 18 months. Even Susan described her son as "thriving."* While both parents deserve credit for

> that situation, the fact that Gavin has been living with his father for an extended period of time cannot be ignored. All in all, the Court concludes that Gavin will be better served by remaining in his father's home. Susan should not construe this conclusion as in any demeaning her as a parent. She will continue to have an important role to play in her son's life via liberal contact.

(Emphasis added.)

The juvenile court, district court, and counselor Mark Albaugh complimented Troy for the progress he had made. In addition, the day care providers speak positively concerning Troy's care of Gavin. We note, as did the district court, Susan was Gavin's primary caretaker the first few months of his life. However, Gavin was born in December of 1996, and Troy has been his primary caretaker since August 29, 1997. We further note the district court concluded Troy's previous alcohol abuse appears to have stopped. The district court also concluded the problems with visitation had improved and both parties reported they had been able to communicate relatively well about Gavin's needs in the few months preceding trial. We trust this cooperation will continue.

In summary, we agree with the district court that Troy's dramatic progress in addressing his previous problems, improving his child care skills, and making Gavin his top priority supports the custody decision in this case. Gavin has thrived in his father's care. The objective has been met to place the child in the environment most likely to ensure a healthy physical, mental, and social maturity. *Kunkel*, 555 N.W.2d at 253.

AFFIRMED.