IN THE COURT OF APPEALS OF IOWA

No. 0-643 / 00-0193
Filed January 24, 2001

WILLIAM F. VONNAHME,
Appellee,

vs.

MICHELLE L. STEPHENSON,
Appellant.

FILED
JAN 24 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Carroll County, Gary L. McMinimee, Judge.

The respondent appeals a district court order in petitioner's action to establish paternity and custody granting petitioner physical care of their minor child. **AFFIRMED.**

Stacey N. Warren of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellant.

Robert H. Laden of Laden & Pearson, P.C., Des Moines, for appellee.

Considered en banc.

MILLER, J.

Michelle L. Stephenson appeals a district court order in William F. Vonnahme's action to establish paternity and custody, which granted William physical care of their minor child. We find the trial court made a proper determination that the best interests of the child would be met with William as the primary care parent, and we find the visitation provided by the trial court's order to be liberal, equitable and reasonable. We affirm.

Background facts. William and Michelle were involved in a relationship for a period under two years in duration, but were never married. Tucker was born in February 1999. William and Michelle ended their relationship about four months after Tucker's birth. William filed a petition to establish paternity and for custody in August 1999. The trial was held on October 20, 1999 with a ruling issued on December 17, 1999, granting joint legal custody to the parties with William being responsible for Tucker's physical care. Michelle now appeals.

Scope of review. The controlling consideration in determining custody is the best interest of the child. Iowa R. App. P. 14(f)(15). In deciding this question, we review the record de novo. Iowa R. App. P. 4. We give weight to the findings of the trial court, but are not bound by them. *See In re Marriage of Novak,* 220 N.W.2d 592, 597 (Iowa 1974). There is no inference in favoring one party as opposed to the other in determining which one should have custody. *See In re Marriage of Bowen,* 219 N.W.2d 683, 688 (Iowa 1974). We determine each case on its own facts to decide which parent can administer more effectively to the long-range interest of the child. *In re Marriage of Winter,* 223 N.W.2d 165, 166

(Iowa 1974). The critical issue is determining 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 an original custody proceeding. *See In re Marriage of Ullerich,* 367 N.W.2d 297, 299 (Iowa App. 1985). The criteria governing custody decisions is the same regardless of whether the parties are dissolving their marriage or are unwed. *Lambert v. Everist,* 418 N.W.2d 40, 42 (Iowa 1988).

Physical care of the minor child. At the time of trial, Tucker was less than one year old. Michelle argues the trial court should not have awarded physical care of Tucker to William. She claims the trial court improperly focused on the poor home life she had as a child and the mixed ethnicity of Paige, Michelle's six-year-old daughter. William contends the trial court correctly ruled that he is better able to provide a more stable environment for Tucker.

Michelle alleges she is a very capable, concerned parent and provides the best environment possible for her children, as is evidenced by her older child, Paige. The record contains several witnesses who testified as to the excellent parenting Paige has received and, in turn, what a pleasant child she is. Michelle asserts that she has been Tucker's primary caretaker, she and Paige have formed a strong bond with Tucker and it is in his best interests to allow him to retain that half-sibling relationship by granting physical care to Michelle. She argues that while William is a good father, she is better able to provide for his physical needs on a daily basis.

William asserts he was the primary caretaker for Tucker prior to the trial, taking care of nighttime feedings, changing diapers, bathing and dressing him. While he feels Michelle has done a good job parenting Paige, he asserts he can provide Tucker with a more stable environment, offering a stable residence, financial security, family support and a better value system. He claims Michelle's history has demonstrated instability in many facets, including employment, living arrangements, financial matters and family relationships. William asserts he supports Tucker's sibling relationship with Paige and would work to continue their relationship.

The trial court, in its decree, set forth the relevant legal factors, including those established by Iowa Code section 598.41(3) and case law. *See Winters,* 223 N.W.2d at 166-67. In considering these factors, the trial court determined that both William and Michelle love Tucker and are able to provide for his physical needs. The court did not render a determination as to which parent was the primary caretaker for Tucker prior to the trial. It did consider the sibling relationship and the preference that siblings should be kept together unless it is not in the child's best interest to do so. *In re Marriage of Riddle,* 500 N.W.2d 718, 720 (Iowa App. 1993). In making its final decision, however, the trial court found William had demonstrated greater stability in work, living arrangements, finances and family support. It also found William exhibited a higher level of maturity, which would allow him to better provide care for Tucker. In addition, it noted William's good work ethic and his ability to have flexible work hours as a self-employed farmer.

We find the trial court rendered its decision based on the appropriate legal factors and assessment of credibility. Because the trial court had the opportunity to observe the demeanor of the witnesses, we give weight to its findings, particularly with respect to credibility. *In re Marriage of Murphy,* 592 N.W.2d 681, 683 (Iowa 1999). Accordingly, we affirm the physical care decision of the trial court.

Visitation. The trial court ordered that, "Michelle shall have liberal visitation, which shall include:" alternating weekends from six p.m. Friday to six p.m. Sunday; six weeks during the summer; alternating holidays, consisting of six named holidays and with the Thanksgiving visitation to be four days in length; one-half the Christmas holiday vacation each year; Mother's Day, but not Father's Day; Tuesday evenings from four p.m. to seven p.m.; and all other times agreed upon by the parties. Michelle argues the trial court should have ordered that she have mid-week overnight visitation two consecutive nights each week instead of one mid-week evening each week.

The visitation times specified by the trial court are liberal and reasonable and, before even considering any mid-week time or "other times agreed upon by the parties," assure that Michelle will have Tucker with her about thirty percent of the time. The trial court's language that visitation "shall include" certain specified times, and that in addition there should be visitation at "[a]ll other times agreed upon by the parties," makes it clear that the court contemplated visitation beyond the specified times. The record does not indicate that the parties are unable or unwilling to communicate and cooperate. Under these facts and circumstances

we should, as the trial court did, leave it to the parties to work out the additional times in a manner that works for both of them and serves the child's best interests.

The reason urged by Michelle for modifying the trial court's visitation order is to meet Tucker's "need to bond sufficiently with both parents." However, such a modification would decrease Tucker's time with William and thus would not assist in their bonding. Further, such a modification is not necessary for Tucker to bond with Michelle. Michelle asserted at trial and asserts on appeal that she and her daughter, Paige, are closely bonded with Tucker, assertions that are fully supported by the record. Finally, even if we were to assume, contrary to Michelle's assertions and the evidence, that she is not closely bonded with Tucker, surely having him with her thirty percent of the time plus one evening each week, as ordered by the trial court, is sufficient for the stated purpose.

The dissent would grant part, but not all, of the modification sought by Michelle. In support of such modification the dissent cites *In re Marriage of Toedter*, 473 N.W.2d 233, 235 (Iowa App. 1991). In *Toedter* we modified the trial court's visitation order by adding one overnight visitation per week. For two reasons we should not rely on *Toedter* as precedent. First, *Toedter* is clearly distinguishable on relevant and material facts. In *Toedter* the trial court had provided no mid-week visitation. In this case the trial court provided mid-week visitation each and every week. Second, we tread on dangerous ground when we cite visitation provisions from any particular case in an apparent assertion that what was done in that case must or should be done in the case currently before

us. When dealing with visitation issues prior cases have little precedential value and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Petition of Holub*, 584 N.W.2d 731, 732 (Iowa App. 1998). Although *Toedter* may support ordering specified mid-week visitation, other cases can readily be found which reject mid-week visitation under circumstances that arguably make a stronger case for it than do the facts in *Toedter* or the facts in this case. *See, e.g., In re Marriage of Gulsvig*, 498 N.W.2d 725 (Iowa 1993). In *Guslvig* the supreme court rejected any mid-week visitation for a child very similar in age to the child in this case even though visitation as modified on appeal included substantially less visitation at Thanksgiving, at Christmas, and during the summer than the specified visitation times ordered by the trial court in this case. *Gulsvig*, 489 N.W.2d at 726-27.

The trial court's goal and duty is to do equity and achieve a fair and appropriate result, not to decide each and every detail exactly the same as we would if sitting as the trial court. Although the court's comment dealt with an economic matter (spousal support) rather than visitation, what our supreme court said in an earlier case seems particularly appropriate here:

> Even though our review is de novo, we accord the trial court considerable latitude in making this determination and will disturb the ruling only when there has been a failure to do equity. This deference to the trial court's determination is decidedly in the public interest. When appellate courts unduly refine these important, but often conjectural, judgment calls, they thereby foster appeals in hosts of cases, at staggering expense to the parties wholly disproportionate to any benefit . . . .

In re Marriage of Benson, 545 N.W.2d 252, 257 (Iowa 1996) (internal citation omitted).

A trial court has a certain range of discretion within which to fashion a visitation order, as long as the order provides for visitation that is equitable and reasonable under the particular facts and circumstances. The trial court's order provides for such visitation, and accordingly we affirm without modification.

AFFIRMED.

Huitink, Streit, Mahan, Zimmer and Vaitheswaran, JJ. concur; Vogel, J., Sackett, C.J. and Hecht, J. dissent in part.

VOGEL, J. (dissenting in part)

I respectfully dissent in part.

In the event we affirmed the trial court on the custody provisions, Michelle urged this court to reconsider the amount of visitation she is entitled to with Tucker. In addition to summer and holiday time, the trial court granted visitation with Michelle every other weekend and Tuesday of every week from 4:00 to 7:00 p.m. Michelle argued this limited schedule would not allow enough time with Tucker to promote a healthy parental and sibling bond. She requests a visit of two consecutive overnights during the week, as well as every other weekend. William asserts such a schedule would be unduly disruptive to Tucker. The majority denied Michelle's request. I would modify to include one overnight visit per week.

Our cardinal consideration should be the effect on the child resulting from parents no longer residing in the same home. We then consider how visitation can be reasonably arranged to promote maximum contact with both parents. Iowa Code section 598.41(1)(a) (1999) addresses this concern.

> The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, and which will encourage parents to share the rights and responsibilities of raising the child . . .

Unless midweek visitation with the non-physical care parent is unduly disruptive, such visitation is appropriate where the parents live in close proximity to each other. *See In re Marriage of Muell*, 408 N.W.2d 774, 778 n.1 (Iowa App.

1987) (finding liberal visitation including one overnight visit per week was in the best interests of the children); *see also Fitch v. Fitch,* 207 Iowa 1193, 1197, 224 N.W. 503, 504 (Iowa 1929) (stating unless visitation with the non-custodial parent will in some way injure the child, it is not to be prohibited.)

In this case we have a very young child, approximately nine months old at time of trial. The court did not determine whether one parent was the primary care giver prior to trial. In consideration of Tucker's young age and his need to maintain strong bonds with both parents, I would modify to increase Michelle's visitation to one overnight visitation per week, in addition to every other weekend as ordered by the trial court. *See In re Marriage of Toedter,* 473 N.W.2d 233, 235 (Iowa App. 1991) (recognizing a healthy parent-child relationship is to be encouraged and nourished and granting overnight visitation during the week). Both parents, as joint custodians, are charged with maintaining the best interests of the child through liberal visitation rights. *Id.* at 234. "Visitation should include not only weekend time, but time during the week when not disruptive to allow the noncustodial parent the chance to become involved in the child's day-to-day activity as well as weekend fun." *In re Marriage of Ertmann,* 376 N.W.2d 918, 922 (Iowa App. 1985). The record indicates Michelle and William are able to communicate concerning the needs of their child and the record contains no documented problems during the visitation exchange. Additionally, modifying the midweek visit from three evening hours to an overnight would not increase the number of contacts between the parties to transfer Tucker. Therefore, I would find such an arrangement will not be unduly disruptive to Tucker and, indeed, in

his best interests to maintain a strong bond through maximum contacts with both parents. I would affirm the remaining provisions of the majority opinion.

Sackett, C.J. and Hecht, J. join this partial dissent.