IN THE COURT OF APPEALS OF IOWA

FILED
JAN 29 1986
CLERK SUPREME COURT

IN RE THE MARRIAGE OF STEVEN J. ORTE AND TERESA ANN ORTE

UPON THE PETITION OF
STEVEN J ORTE,

Petitioner-Appellant,

AND CONCERNING
TERESA ANN ORTE,

Respondent-Appellee.

Filed January 29, 1986

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5-473
85-57

Appeal from the Iowa District Court for *Jefferson* County - James Jenkins, *Judge*

The dissolution decree placed the parties' one child in joint custody and in the wife's physical care. The husband has appealed from this provision and the court's award of attorneys fees. **AFFIRMED AS MODIFIED.**

Michael J. Schilling, Burlington, for the petitioner-appellant.

J W McGrath, Keosauqua, for the respondent-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

The parties appellant Steven Orte and appellee Teresa were married in 1981. The marriage was Steven's first and Teresa's third. The parties are the parents of one child, Shawn, born in April 1982. Teresa has two children from prior marriages. A son Ricky is in her custody; a daughter Jody lives with Teresa's parent.

I. Custody

The dissolution decree placed the parties' one child, Shawn, in joint custody and in Teresa's physical care.

Our review is de novo. Iowa R. App. P. 4. When considering the credibility of witnesses, we give weight to the trial court's findings but are not bound by them. Iowa R. App. P. 14(f)(7).

We find as did the trial court that either party would be an acceptable custodian. The critical issue 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).

Steven is a high school graduate. He has a stable work record. He maintains a close relationship with his family.

Shortly after the parties' separation, Teresa commenced a relationship with a 17-year-old man who is twelve years her junior. The relationship has been continuing. Teresa has exhibited little stability in financial matters. Teresa was not employed outside the home during the marriage and assumed primary care of Shawn. The record reflects, however, Steven assumed significant child care and household responsibilities. The trial court made the following findings:

> The petitioner faces the problem faced by all employed fathers who seek custody of their minor children.

> The petitioner finds himself in a Catch-22 position. In order to provide the material needs for his child, he must, of necessity, be employed. When he is employed, he is then away from his child and must delegate the responsibility of child care to relatives or paid baby sitters. Petitioner's problem is particularly acute in view of his working hours. Because he is a baker by trade, he must work at night and sleep in the day. He stated that were he awarded custody, he would be able to have Shawn stay with his sister, a capable mother of three. While she is no doubt a good sitter, she is not Shawn's mother, but instead his aunt.
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> Respondent, on the other hand, is unemployed. She is supported by public assistance, receiving ADC, food stamps, and living in subsidized housing. She is a capable, loving, caring mother who has, by all accounts, done a fine job in raising both Shawn and his half brother, Ricky.

Steven contends the court put too much weight in the relationship of Shawn with his half-brother Ricky and that the facts support an award of custody of him. Generally, siblings should not be separated from each other. In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981). Steven argues if we adopt that rule in cases of half-brothers and half-sisters, then the parent who had the half-child would always be at an advantage in a custody determination. He claims the parent without the half-child is placed in an inequitable position and must carry a greater burden in proving his or her custodial capabilities.

In a child custody determination, we must never lose sight of the best interest of the child. In trying to foster children's best interests, we ordinarily endeavor to keep children of broken homes together. This rule is not ironclad, however, and circumstances may arise which demonstrate that separation may better promote the long-range interests of children. In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981).

In Wells v. Wells, 168 N.W.2d 54, 61 (Iowa 1969), half-brothers were living together and got along well, and the Iowa court determined this fact was of some significance in awarding custody. In Craig v. McBride, 639 P.2d 303, 306-07

(Alaska 1982), the Alaska court determined it would be inappropriate to accord undue weight to the desirability of keeping siblings together. The court stated the issue of custody of the older half-sister was not before the court and determined if their policy with regard to keeping siblings together were to overrule all other indications of the child's best interest, a parent with a child who is either a step- or half-sibling of the child in dispute would invariably obtain custody. Id. They determined such a result would not comport with the court's ascertaining the best interest of the child. Id. In Albright v. Commonwealth, 491 Pa. 320, 327-28, 421 A.2d 157, 160-61 (1980), the Pennsylvania court held that in the absence of compelling reasons to the contrary, siblings should be raised together whenever possible, and this rule was not diluted by the fact that the children may be half-siblings.

In this state we determine the best interest of the child requires we look carefully at the relationship the child would enjoy in each parent's home with the other siblings whether they be full- or half-siblings. We must consider these relationships not in isolation but with all other relevant factors. See In re Marriage of Winter, 223 N.W.2d 165, 166 (Iowa 1974).

We are not determining the custody of Ricky. While we have considered his relationship with Shawn, we have considered it only as it relates to Shawn's best interest.

A careful reading of the record convinces us Shawn has the chance to enjoy a more stable environment in his father's custody. His father has exhibited personal and financial stability. He has demonstrated his ability to care for the child. He maintains a meaningful relationship with his parents and siblings. They are supportive of his efforts to obtain custody. We consider the factors in the whole spectrum. We modify the custody award to provide Steven shall have physical care.

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II. Attorney Fees

Steven also says the court erred in awarding $1,000 of attorneys fees to Teresa since she did not specifically ask for such an award nor itemize what services were provided.

The court in making its award noted Teresa had prayed for such other relief as might be deemed equitable.

The factors to consider in determining whether one party shall contribute to the fees of another include the resources of the spouses, and each party's ability to pay. Locke v. Locke, 263 N.W.2d 694, 696 (Iowa 1978). The court considered the fact that the petitioner was gainfully employed, while appellee was not. We affirm the trial court's award of attorney fees in the amount of $1,000.

Teresa has further asked for attorney fees on appeal. We consider the needs of the requesting party, the party's ability to pay, and whether the requesting party was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). In considering the relevant factors, we determine no further fee award is appropriate.

Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J., (dissenting).

I dissent. The majority states that the father in this case has shown Shawn will have a more stable environment in his father's home, adding he has shown personal and financial stability and shown the ability to care for the child. I find the record supports the trial court's conclusion that the mother has been the primary caretaker of the boy. I find ample support for its statement:

> While petitioner (Steven) has helped from time to time, it has been the respondent (Teresa) who has had both boys' day to day care. She is the one who has tended Shawn's needs, changed his diapers, washed his clothes, wiped his nose, and stayed with him over night when he was hospitalized. She has cooked the meals, made the beds, vacuumed the house, washed the windows, and washed the clothes. She has demonstrated she is a capable and loving parent.

The father's involvement has not been extensive and the evidence shows he will continue to have little contact with the child except for weekends. As a baker, he must work nights and sleep days. While he says the child's aunt will be a good babysitter, I find no reason why the child should have minimal contact with both parents. If custody is left with the mother, he will have maximum contact with both parents. The mother has proven herself to be a an attentive and caring mother.

The record also shows considerable evidence of the close relationship between Ricky and his sister. Considering the substantial advantages the boy will have if placed in his mother's care, I do not find her friendship with a young man to be adequate support for disturbing the court's award.