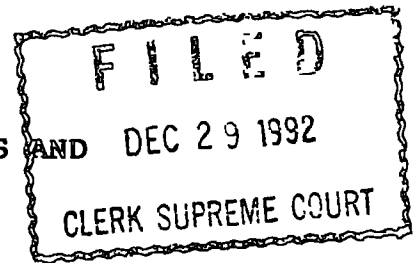


IN THE COURT OF APPEALS OF IOWA

No. 2-573 / 92-662

IN RE THE MARRIAGE OF TROY A. MIDTHUS AND
CARMEN L. MIDTHUS



Upon the Petition of

TROY A. MIDTHUS,

Appellant,

And Concerning

CARMEN L. MIDTHUS,

Appellee.

Appeal from the Iowa District Court for Bremer County,
Paul W. Riffel, Judge.

The husband appeals from the child custody and child
support provisions of the parties' decree of dissolution.

AFFIRMED.

Frances L. Gohlke of Carney & Gohlke, Waverly, for
appellant.

Ralph E. Laird of Laird & Laird, Waverly, for appellee.

Heard by Oxberger, C.J., and Hayden, J., and Keefe,
S.J.* Schlegel, J., takes no part.

*Senior Judge from the 1st Judicial District serving on
this court by order of the Iowa Supreme Court.

KEEFE, S.J.

Troy and Carmen Midthus were married on October 10, 1987. One child, Taylor, was born to this marriage on March 21, 1988.

Troy was born in November 1966. Since 1987, Troy has generally worked the 4:00 p.m. to midnight shift at Carnation Company in Waverly, Iowa. Troy has incurred some layoffs during his employment and has worked other shifts on occasion. Troy earned about \$27,000 in 1990. His projected income for 1991 was about \$22,822. When not laid off, Troy has net income of \$1,548 per month.

Carmen was born in August 1970. From 1987 to 1991, Carmen worked at Hardee's in Waverly. At trial, she was working full-time at Wartburg College where she earns about \$11,960. Her net income is \$724 per month.

Troy filed a petition for dissolution of marriage in March 1991. While the case was pending the parties' had divided physical care of Taylor. Troy would take care of Taylor during the day, while Carmen was working, and Carmen would take care of Taylor during the evening.

The district court entered a decree of dissolution on March 25, 1992. The court awarded the parties joint legal custody of Taylor, with Carmen having primary physical care. Troy was awarded extensive visitation. Because the parties anticipated Troy would continue to care for Taylor during the day until Taylor is old enough to attend school,

the court ordered Troy to pay only \$182 per month child support until Taylor entered kindergarten. Once Taylor entered kindergarten, Troy was ordered to pay \$364 per month, which is the amount required by the child support guidelines. Troy has filed this appeal.

I. Our review of this equitable action is de novo. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992). We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. Id.

II. Troy contends the district court should have awarded the parties divided physical care of Taylor. He states that currently each party cares for Taylor about one-half of the time. Troy believes the custody provision of the dissolution decree should reflect the parties' actual agreement. In the alternative, Troy asks to be awarded primary physical care of Taylor.

In child custody cases, the best interests of the child is the first and governing consideration. In re Marriage of Rodgers, 470 N.W.2d 43, 44 (Iowa App. 1991). The Iowa appellate courts have expressed opposition to divided physical care, except under the most unusual circumstances. In re Marriage of Westcott, 471 N.W.2d 73, 75 (Iowa App. 1991). Divided physical care grants physical care to one parent for a period of time and to the other

parent for a period of time. In re Marriage of Will, 489 N.W.2d 394, 397 (Iowa 1992). While in most cases a child's best interests will be served by associating with both parents, an attempt to provide equal physical care may be harmfully disruptive in depriving the child of a necessary sense of stability. In re Marriage of Burham, 283 N.W.2d 269, 272 (Iowa 1979); In re Marriage of Muell, 408 N.W.2d 774, 776 (Iowa App. 1987).

In this case, we find divided physical care is not in the best interests of Taylor. Our focus is on the long-range best interests of the child. In re Marriage of McElroy, 475 N.W.2d 221, 222 (Iowa 1986). While Taylor may spend a nearly equal amount of time with each parent now, it will not be too long before he is attending school. The parties recognize that once Taylor starts kindergarten, Troy will not be able to spend as much time with him. The district court's decree takes this future condition into consideration. We affirm the district court's decision to grant primary physical care of Taylor to Carmen.

III. Troy also asks us to decrease the amount he was ordered to pay in child support. Troy was ordered to pay \$182 per month until Taylor begins kindergarten, and then he must pay \$364 per month. Troy states that even after Taylor begins school he will be providing a home and some meals for him. He requests that his child support obligation not be increased to \$364 per month after Taylor begins kindergarten, but remain at \$182 per month.

Currently, during the work week, Troy has the care of Taylor until 4:00 p.m., when his shift begins. Thus, Troy is providing a noon meal and care for Taylor during the day. For this reason, the district court did not order Troy to pay the full amount of child support required by the child support guidelines. As we found above, however, once Taylor begins school, Troy will not be providing as much care for him.

There is a rebuttable presumption that the amount of child support which would result from the application of the guidelines prescribed by the supreme court is the correct amount of child support to be awarded. In re Marriage of Bergfeld, 465 N.W.2d 865, 869 (Iowa 1991). We agree with the district court that once Taylor begins kindergarten, Troy has not advanced any sufficient reason to depart from the guidelines. We affirm the district court's order regarding child support.

IV. Each party has requested that the other pay for his or her attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We must 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 trial court's decision on appeal. Id. We order

Troy to pay his own attorney fees and to pay \$750 toward Carmen's attorney fees for this appeal. Costs of this appeal are assessed to Troy.

AFFIRMED.