FILED
JUN 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KELLY ANN WELBES AND KENT RICHARD WELBES

Upon the Petition of)
KELLY ANN WELBES,) Filed June 29, 1982
Petitioner-Appellant,)
And Concerning)
KENT RICHARD WELBES,) 2-202
Respondent-Appellee.) 3-67616

202

Appeal from Benton District Court - Larry J. Conmey, Judge.

Petitioner-mother, Kelly Ann Welbes, appeals from the child custody and visitation provisions of the decree dissolving her marriage to respondent-father, Kent Richard Welbes. She asserts that the best interests of the parties' minor child require an award of custody to her. In the event that custody is affirmed in respondent, the petitioner seeks more extensive visitation than provided by trial court. Petitioner also seeks attorney fees on appeal. AFFIRMED.

Sharon A. Mellon of Mellon & Spies, Iowa City, for petitioner-appellant.

Morris L. Eckhart of Milroy & Eckhart, Vinton, and Gregory M. Lederer of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for respondent-appellee.

Heard en banc.

PER CURIAM

Petitioner-mother, Kelly Ann Welbes, appeals from the child custody and visitation provisions of the decree dissolving her marriage to respondent-father, Kent Richard Welbes. She asserts that the best interests of the parties' minor child require an award of custody to her. In the event that custody is affirmed in respondent, the petitioner seeks more extensive visitation than provided by trial court. Petitioner also seeks attorney fees on appeal. We affirm.

The parties were married on February 11, 1978, when they were 18 and 20 years old respectively. The minor child, Holly JoAnn Welbes, was born August 16, 1978. Petitioner filed her petition on May 23, 1980. Respondent left the state of Iowa shortly thereafter and lived in Florida for nearly nine months. Upon his return to Iowa, the parties stipulated to temporary joint custody in June, 1981. In a decree filed October 8, 1981, trial court awarded permanent custody of the minor child to respondent, subject to specified visitation by petitioner. Trial court also provided that neither party should remove the minor child from the state of Iowa on a permanent basis without prior order of the court. Upon respondent's subsequent application for permission to remove the minor child from Iowa, petitioner filed a stay order with the supreme court. On March 15, 1982, the supreme court entered an order staying the custody provisions of trial court's decree, ordered custody of the minor child to be with petitioner pending resolution of this appeal, and prohibited removal of the minor child from Iowa during pendency of this appeal.

I. Scope of Review. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on those issues which are properly preserved. In Re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While we give weight to the findings of trial court, especially where credibility of

witnesses is involved, we are not bound by them. In Re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974).

II. Resolution of Custody. Petitioner asserts that custody of the parties' minor child should have been awarded to her. We disagree. Our first and governing consideration in determining custody is the best interests of the child involved. Iowa R. App. P. 14(f)(15). In deciding the custody issue, we seek neither to punish one parent nor reward the other. In Re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973). There is no inference favoring one parent as opposed to the other in deciding which is the more fit custodian, except that arising from the particular facts of the case. In Re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974). The facts relevant to the custody determination are listed in In Re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), with the ultimate question being, based on the entire record, which of the parents can administer more effectively to the long-range best interests of the child. Id.; Iowa R. App. P. 14(f)(15).

Trial court found that both parties are loving parents, concerned about the welfare of their child, capable and willing to provide her with a good home, and capable of being attendant to the physical needs of the child. Nonetheless, trial court found that respondent is more capable of providing a stable environment for the child. We agree with this conclusion.

The petitioner's record during the parties' separation and pending dissolution suit has been unstable at best. The petitioner has changed her residence several times during the pendency of the action. During these frequent moves she has utilized different babysitters to attend to Holly's needs in her absence. During the parties' separation and while retaining custody of Holly, petitioner has engaged in immature and injudicious conduct which has included such acts as frequent intoxication, bringing Holly to the different taverns with her, and keeping

overnight male guests. The dissent would ignore such activity by claiming that petitioner's behavior during the separation is understandable in light of her age and circumstances. We do not believe that such activity, especially in petitioner's circumstance, is excusable.

Respondent on the other hand has assumed the responsibility of caring for Holly's needs by himself or with his parents' assistance. While in his custody, Holly was rarely left with a babysitter. The trial court found that Holly has developed a good relationship with the paternal grandparents and from the record it can be inferred that the relationship should continue in the future. In respondent's short term day to day experience with Holly, he has shown sufficient ability to care for her. Respondent's ability to care for Holly when combined with the stability and affection his parents have displayed, clearly makes respondent the parent best prepared to care for Holly's long-term best interest. We, therefore, affirm the trial court's findings and allow respondent to retain custody of his daughter.

III. Visitation. Petitioner requests that we liberalize the trial court's visitation schedule if she is not awarded custody. The trial court made the following order regarding visitation:

> A. The petitioner shall have the right to visit the minor child of the parties the second and fourth weekend of each month from six o'clock p.m. on Friday to six o'clock p.m. on Sunday; said visitation to begin October 23, 1981.
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> B. In addition, the petitioner shall have the right to visit the minor child of the parties for three consecutive weeks in the summertime; provided, however, that the petitioner give written notice to the respondent of such intent at least ten (10) days in advance of said visitation period.
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> C. The petitioner shall have the right to visit with the minor child of the parties on the odd-numbered holidays listed below in the odd-numbered years, such as 1981; and the even-numbered holidays in the even-numbered years, such as 1982. Such holidays are as follows:

1. Easter
2. Memorial Day
3. Fourth of July
4. Labor Day
5. Thanksgiving
6. Christmas Eve
7. Christmas Day
8. New Year's Eve
9. New Year's Day
10. The birth date of the minor child

D. The petitioner shall also be allowed to exercise her visitation right with the minor child on each Mother's Day.

The court encourages the respondent to permit the petitioner additional visitation times so as to allow the petitioner to foster a loving and continuing relationship with her daughter.

E. It shall be the responsibility of the petitioner to provide the transportation for each visitation period with the minor child.

We see no need to expand on what is already a liberal visitation schedule and affirm the trial court.

IV. Attorney Fees. Finally, petitioner has requested that respondent pay her attorney fees incurred in this appeal. Such an award depends upon the parties' relative financial circumstances. In Re Marriage of Williams, 303 N.W.2d 160, 167 (Iowa 1981). Based upon this consideration, we deny petitioner's request.

AFFIRMED.

All judges concur except Johnson, J., and Oxberger, C.J., who dissent.

JOHNSON, J. (dissenting)

From my review of this record, I believe trial court's award of custody to respondent was based primarily on his performance during the limited period of joint custody and with the assistance provided by his parents. While I do not believe that petitioner's life style presents the best of all worlds, her behavior during the separation is understandable in light of her age and circumstances. Her performance and track record indicate a continued willingness and adequate ability to be a full-time parent. Respondent, on the other hand, left for Florida without telling petitioner, remained there for some nine months with little or no contact with his minor daughter, returned for the purpose of attempting to obtain custody, and has relied heavily upon the support and assistance of his parents. While I do not diminish the valuable input that grandparents can have in a child's life, I do not believe this record establishes respondent's superior ability to care for the minor child on his own.

In summary, respondent has never had sole care of the child on a day to day basis. He has never been a single parent attempting to manage a full time job, a child and a home by himself. While petitioner may have engaged in immature and injudicious conduct during the time of the parties' separation, I believe the evidence shows that the child's long-term best interests would be served in petitioner's custody.

Oxberger, C.J., joins in this dissent.