

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF WILLIAM SCOTT MONTGOMERY
AND MARTHA CLAIRE MONTGOMERY

FILED

JUL 30 1987

CLERK SUPREME COURT

Upon the Petition of)

WILLIAM SCOTT MONTGOMERY,)

Petitioner-Appellee,)

And Concerning)

MARTHA CLAIRE MONTGOMERY,)

Respondent-Appellant.)

Filed July 30, 1987

139

7-189
86-1605

Appeal from the Iowa District Court for Pottawattamie County (No. 605),
James M. Richardson, Judge.

Respondent wife appeals from the decree dissolving the parties' marriage.

AFFIRMED AS MODIFIED.

Michael J. Winter, Council Bluffs, for appellant.

Gary K. Anderson, Council Bluffs, for appellee.

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

OXBERGER, C.J.

In this appeal, respondent Martha Montgomery challenges the trial court's decree in the underlying dissolution proceeding, arguing that the court erred in naming petitioner William Scott Montgomery physical custodian of the parties' minor child, Jesse. We agree with Martha's arguments in this respect, and accordingly, we modify this aspect of the trial court's decree.

The principles governing our review in cases of this nature are well established. Our pivotal consideration in resolving questions of child custody is the best interest of the child or children involved. Iowa R. App. P. 14(f)(15); In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985). The factors upon which this determination is predicated are set forth in section 598.41(3) of the Iowa Code and in In re Marriage of Winter, 223 N.W.2d 165, 167 (Iowa 1974). In deciding this question, we review the record de novo. Iowa R. App. P. 4. Accordingly, we are not bound by the findings of fact made by the trial court, but we do give them weight, particularly, where the credibility of witnesses is implicated. Iowa R. App. P. 14(f)(7). It is our ultimate responsibility to examine each case on its peculiar facts and to ascertain therefrom which parent is most capable of effectively administering to the long-range best interests of the children. In re Marriage of Welbes, 327 N.W.2d 756, 758 (Iowa 1982).

After examining the record in light of these principles, we conclude that Jesse's best interests will be most adequately served if Martha is named physical custodian. Initially, we note that throughout the parties' marriage, Martha served as the primary caretaker of Jesse and tended to his daily needs. See Iowa Code § 598.41(3) (1985). In addition, we are troubled by the aggressive and violent behavior which Scott has exhibited since the parties' separation. The record reflects that Scott has physically abused Martha and that he has attempted to turn Jesse against her. In these circumstances, we conclude without equivocation

that Martha is more capable of providing Jesse with a suitable and stable environment. Accordingly, we modify the trial court's decree to name her physical custodian of Jesse.

In addition, we agree with Martha's assertion that Scott should be ordered to contribute to the support of Jesse. The factors governing the proper amount of each parent's support obligation are set forth in Iowa Code section 598.21(4). We have carefully considered the finances and obligations of both parties, and conclude that Scott should be ordered to contribute \$375 per month for child support. We think that this amount adequately addresses Jesse's needs without unduly burdening Scott. See In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984).

Finally, Martha requests that Scott be ordered to pay her attorney's fees and the court costs incurred in connection with this appeal. In evaluating such a request, we must consider the needs of the party seeking the payment of fees and the ability of the other party to pay. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Having done so, we conclude that Scott should pay \$500 of Martha's appellate attorney's fees. In addition, costs are taxed to Scott.

AFFIRMED AS MODIFIED.

Schlegel, J. concurs; Sackett, J. dissents.

SACKETT, J. (dissenting)

Unlike the majority, I seek not to chastise these parents. Rather, I feel our job is to carefully analyze the record to determine which parent can minister more effectively to the long-range interests of the child. Iowa R. App. P. 14(f), (15); In re Marriage of Ellerbroek, 377 N.W.2d 257, 258 (Iowa App. 1985). It is Jesse's life we are dealing with and not that of his parents. Id.

An extensive child custody investigation was ordered. The investigator determined both parents to be loving and capable parents. The trial court, after hearing extensive evidence found both parties to be capable and loving parents. They both want what is right for their child. They both deserve to be commended for their care and concern.

The alleged assaultive behavior occurred during the separation period when Scott came to pick up the child for a scheduled visitation. William was disturbed about Martha's desire to dissolve the marriage and the fact she sought other male company during the separation period. William's actions at that time were not justified. However, we must recognize the emotional trauma parties suffer during the divorcing process, particularly a party who does not want the marriage dissolved. William's actions during the separation period must not be isolated from his overall behavior but must be viewed in the proper context.

Both parents have strong attributes. We can be assured Jesse will receive proper care with either parent.

The trial court had the opportunity to view the parties and hear their testimony. I therefore would affirm the trial court's decision.