IN THE COURT OF APPEALS OF IOWA

No. 0-341 / 99-1392
Filed July 26, 2000

FILED
JUL 26 2000
CLERK SUPREME COURT

IN RE THE MARRIAGE OF ANN L. BISHOP AND JOHN W. BISHOP

Upon the Petition of
ANN L. BISHOP n/k/a ANN L. DOLAN-BISHOP,
Petitioner-Appellant,

And Concerning
JOHN W. BISHOP,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

Ann appeals the district court's order of specific visitation. She contends the court erred in granting John excessive visitation. **AFFIRMED.**

Dennis Jasper of Stafne, Lewis, Jasper, Preacher & Rowe, Bettendorf, for appellant.

Penelope C. Souhrada, Davenport, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

SACKETT, C.J.

Petitioner-Appellant, Ann L. Dolan-Bishop, the mother of five-year-old Katelyn Bishop, challenges the visitation granted the child's father, Respondent-Appellee, John W. Bishop. Ann contends the visitation granted by the district court is too liberal in light of the fact Katelyn has been diagnosed with type I juvenile diabetes. Ann advances John is not able to monitor and treat Katelyn's condition. We affirm.

The marriage of Ann and John was dissolved on October 20, 1997. The district court awarded joint legal custody of Katelyn with physical custody to Ann and ordered the parties to commence mediation and then determine visitation. John appealed. We held the district court should not have ordered mediation in order to determine visitation after the final decree was entered. *See In re Marriage of Bishop*, No. 97-2244 (Iowa App. Jan. 27, 1999). We remanded to the district court for a hearing and entry of a visitation schedule. *See id.*

The district court on August 10, 1999 entered a visitation order providing:

a. Visitation by the non-custodial parent on alternate weekends from Friday at 5:30 p.m. to Sunday at 6:30 p.m.
b. One weekday night from 5:15 p.m. to 7:30 p.m.
c. Mother's Day the child shall be with the mother and Father's Day the child shall be with the father. In the event this provision requires the child to be the custodial parent when it is the non-custodial parent's normal weekend visitation, the non-custodial parent shall return the child by 9 a.m. on Mother's Day. In the event that this provision requires the child to be with the non-custodial parent on the custodial parent's weekend, said non-custodial parent shall receive the child at 9 a.m. on the day and shall return them at 7 p.m. on said day.
d. The parents shall have the child on holidays as follows: Even years the custodial parent shall have President's Day weekend, Memorial Day weekend, Labor Day weekend, Christmas Eve from 5 p.m. on the last day of school until 9 p.m. Christmas Eve and New Year's Eve from noon on

December 31 until noon on January 1. The non-custodial parent shall have Easter from Thursday night to Sunday night, Fourth of July...., Thanksgiving Day from Thursday at 9 a.m. to Sunday night, Christmas Day from 9 p.m. Christmas Eve until noon on December 31 and New Year's Day from noon January 1 until noon on January 2. The above schedule shall be reversed at to the custodial parent and non-custodial parent for odd years.

e. The non-custodial parent shall have an extended visitation each summer commencing the summer of 2000, same shall be for two consecutive weeks and shall not interrupt school schedules. The non-custodial parent shall notify the custodial parent of the time thereof by April 15 or every year of the proposed summer visitation or forfeit same.

f. The parties shall alternate Spring Break with Respondent receiving Spring Break of the school year 1999-2000.

g. Both parties shall be diligent in having the child ready and available at the appointed times and the transporting party shall be prompt in picking up and delivering the child provided, however, that the transporting parent for visitation shall have a grace period of thirty (30) minutes. In the event the visiting parent exceeds the grace period, the visitation for that weekend is forfeited unless prior notification and arrangements have been made. Repeated violations by either parent shall be cause for granting a modification of the custody order either by changing custody or curtailing visitation, as the case may be.

Prior to this order John had visitation with Katelyn on Tuesdays and Thursdays from 8 a.m. to 4 p.m., and every other Saturday for two hours initially to be from 8 a.m. to 10 a.m.

Ann contends the visitation provided by the August 10 order is excessive. She proposes visitation be from 12:15 p.m. to 4:15 p.m. on Tuesdays and Thursdays and every other Saturday from 8:30 a.m. to 11:30 a.m. until Katelyn starts first grade or should John get a full-time job. She contends then visitation could be every Saturday from 8:00 a.m. to 4:00 p.m. Ann also proposes John have limited visitation with Katelyn during the Christmas season and in the summertime.

Ann contends John is not capable of following the strict procedures required of a person caring for a diabetic child. Katelyn currently receives three injections of insulin a day, is on a special diet (carbohydrate intensive) consisting of three meals and three snacks. Her blood glucose level is checked and recorded four times a day and she needs daily exercise.

John contends the visitation awarded is reasonable and he is able to meet Katelyn's special needs.

Our review in this matter is de novo. Iowa R. App. P. 4; *In re Marriage of Buttrey*, 538 N.W.2d 322, 324 (Iowa App. 1995). 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 Marriage of Holub*, 584 N.W.2d 731, 732 (Iowa App. 1998). We give weight to the trial court's findings of fact, but we are not bound by them. Iowa R. App. P. 14(f)(7).

Iowa Code section 598.41(1) (1999) provides in pertinent part:

> 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 direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent.

John is a parent who is also a joint legal custodian. This gives him rights to Katelyn as well as responsibilities. *In re Marriage of Holub*, 584 N.W.2d at 732. As Katelyn's joint legal custodian, John has the right to continuing physical and emotional contact with Katelyn and is entitled to share the rights and responsibilities of raising her. *See id.*

John has a good relationship with his daughter. He took instructions at the University of Iowa Hospitals and Clinics on care of diabetic children. The instructor there did not express any concerns about John's ability to care for Katelyn's special needs. He has checked her glucose levels and kept records. A twenty-four hour hotline is available should either parent experience problems with Katelyn's health. John has contacted the clinic at Iowa City with questions. He has been present at Katelyn's four-month visits to the clinic. The district court found John's concern for Katelyn sincere. The court also found he had been following the required regimen. We agree with the district court. The restrictive nature of Ann's requested visitation fails to promote the goal advanced by Iowa Code section 598.41(1). The schedule set by the district court is reasonable and is affirmed.

John requests appellate attorney fees. An award of attorney fees is not a matter of right, but rests in our discretion. *In re Marriage of Wendell*, 581 N.W.2d 197, 201 (Iowa App. 1998). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Id.*

Ann was not successful in her appeal, but there is no evidence she has a superior ability to pay. Furthermore, she has primary responsibility for Katelyn's expenses. The costs of appeal are taxed to Ann. Consequently we award no appellate attorney fees.

AFFIRMED.