

IN THE COURT OF APPEALS OF IOWA
IN RE THE MARRIAGE OF SALLY ANN FENTON
AND GREGORY PAUL FENTON

FILED

APR 22 1987

CLERK SUPREME COURT

Upon the Petition of)

SALLY ANN FENTON,)

23

Petitioner-Appellee,)

And Concerning)

Filed April 22, 1987

GREGORY PAUL FENTON,)

6-532

86-552

Respondent-Appellant.)

Appeal from the Iowa District Court for Appanoose County (No. CD 449-0685) - James D. Jenkins, Judge.

Respondent husband appeals from the decree dissolving the parties' marriage, asserting that the trial court should have set up a joint custody arrangement with petitioner wife having physical care of the parties' child, rather than awarding petitioner wife sole custody of the child and that the court should have allowed him more visitation. **AFFIRMED AS MODIFIED.**

Marvin V. Colton of Colton Law Office, Albia, for appellant.

D W. Harris of Bloomfield for appellee.

Considered by Oxberger, C.J., and Snell and Schlegel, JJ.

OXBERGER, C.J.

The primary issue in this appeal concerns the propriety of the trial court's decision to award sole custody of the parties' minor child, Erica, to petitioner Sally Fenton; respondent Gregory Fenton argues that the court erred in failing to provide the parties joint custody of Erica. In the alternative, Gregory maintains that he should have been granted more extensive visitation. We affirm as modified.

The principles governing our review are familiar and well established. As with any issue concerning child custody, our first and foremost consideration is the best interest of the child involved. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983); Iowa R. App. P. 14(f)(15). In ascertaining how the child's best interests will be served, 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). In cases of this nature, we recognize that precedent is of little value; rather, we must base our decision upon the peculiar circumstances of this particular case. Weidner, 338 N.W.2d at 356.

It is undisputed that our statutes express a preference for joint custody over other custodial arrangements. See Iowa Code § 598.41(2)(1985); see also In re Marriage of Miller, 390 N.W.2d 596, 598 (Iowa 1986). Accordingly, although section 598.41(1) of the Code recognizes that in certain circumstances the best interests of the child may militate against joint custody, the legislature has made it incumbent upon a trial court to set forth explicit reasons justifying its decision to deny a request for joint custody. Furthermore, it is the court's duty to cite "clear and convincing evidence . . . [indicating] that joint custody is unreasonable and not in the best interests of the child." Iowa Code § 598.41(2)

(1985). A number of factors to be considered in determining what custodial arrangement will best suit the interests of the particular child are delineated in section 598.41(3) of the Code. We have recognized that no single factor should be given undue weight, In re Marriage of Ertmann, 376 N.W.2d 918, 920 (Iowa App. 1985), but rather that each should be considered in conjunction in order to evaluate the overall quality of the family custodial setting. Weidner, 338 N.W.2d at 358.

In the present controversy, Gregory argues that the trial court unduly stressed the fact that he and Sally had difficulty communicating with respect to Erica's needs; Gregory contends that the court predicated its refusal to award joint custody solely upon this consideration. In support of his assertion that the court's decree is thus erroneous, Gregory relies upon our decision in In re Marriage of Ertmann, 376 N.W.2d 918 (Iowa App. 1985). In Ertmann, we noted that the usual acrimony accompanying a divorce is not alone a sufficient reason to warrant the denial of joint custody. 376 N.W.2d at 920; see also In re Marriage of Bolin, 336 N.W.2d 441, 446 (Iowa 1983) ("Tension between the parents is not alone sufficient to demonstrate [joint custody] will not work."). Although we are cognizant of the friction existing between the parties in the present case, we are not persuaded that the record contains clear and convincing evidence indicating that a joint custody arrangement is not workable. Accordingly, we modify the trial court's decree.

It is apparent from the record that both Gregory and Sally enjoy a close and successful relationship with Erica. Although Sally provided for Erica's primary care during the marriage, the record reflects that Gregory too spent time with Erica and shared in the decisions concerning her well-being. In addition, the record discloses that during the parties' separation, Gregory's visitation with Erica proceeded well, and that Erica enjoyed spending time with her father.

The trial court found, however, that because a number of unpleasant incidents arose when Gregory and Sally came into contact after their separation, a joint custody arrangement was not feasible. It is apparent that throughout the separation and the trial, Gregory adamantly opposed dissolving the parties' marriage. Sally testified that when Gregory came to pick Erica up or brought her back following visitation, he often tried to force his way into Sally's mobile home. *On one occasion, he pulled Sally into the bedroom and sat on her, telling her that he would be saved for attempting to salvage the marriage whereas she would "go to hell."* Not surprisingly, Sally testified that this behavior bitterly upset Erica.

We concur with the trial court's finding that Gregory's actions are particularly disturbing given Erica's extraordinary needs. The record discloses that Erica is mildly retarded, hyperactive, and has inhibited motor and speech coordination. As a result of these problems, she functions at a developmental level nearly two and one-half years behind her age group; at the time of trial, Erica was six years old but functioned at the level of a three and one-half to four-year old. In these circumstances, we condone the trial court's sensitivity to Erica's special needs and to the importance of providing her a stable environment. In addition, we recognize the trial court's superior position in assessing the credibility of the witnesses. See In re Marriage of Miller, 390 N.W.2d at 600. Nevertheless, we are unpersuaded that the tension between Gregory and Sally is anything greater than the difficulties which we found insufficient in Ertmann. Cf. In re Marriage of Weidner, 338 N.W.2d 351, 357-59 (Iowa 1983) (workable joint custody arrangement found unforeseeable). Furthermore, we think that Erica will be benefited by having both of her parents actively participate in her development. See In re Marriage of Fish, 350 N.W.2d 226, 230 (Iowa App. 1984). We are necessarily troubled by the parties' past inability

to treat one another civilly and with respect, and we encourage them to overcome these difficulties for Erica's sake.

Gregory additionally argues that the trial court granted him insufficient visitation with Erica. The record discloses that during the separation, Gregory enjoyed rather liberal visitation. In entering its decree, however, the court determined that these visits had been too frequent given Erica's developmental age. Accordingly, the court reduced Gregory's visitation as follows: from every weekend, Saturday at 5:00 p.m. to Monday at 8:00 p.m., to every other Sunday from 1:00 p.m. to 5:00 p.m.; from 4:00 p.m. to 9:00 p.m. on alternate Wednesdays to 4:30 p.m. to 7:00 p.m. on such days. In addition, the court determined that Gregory should have seven hour periods on alternating holidays with Erica, but that such visitation should not commence until 1988. Finally, the court also granted Gregory two weeks of visitation during the summer months. Gregory argues that the record contains no evidence supporting this reduction.

Again, although we recognize the trial court's superior position in observing the witnesses, particularly Erica, see Lamansky v. Lamansky, 207 N.W.2d 768, 771 (Iowa 1973), we are nevertheless persuaded that Erica's best interests require that Gregory's visitation rights be increased. We are concerned that the trial court's decree, as it stands, puts an unnecessary amount of distance between Gregory and Erica. Hence, we believe that Erica's interests will be better served if Gregory is allowed weekend visitation with her on alternate weekends from 1:00 p.m. on Saturday until 8:00 p.m. on Sunday. In addition, we think that Gregory's alternate holiday visitation should immediately be effective rather than waiting until 1988. It is our conclusion that the remaining visitation provisions should not be disturbed.

AFFIRMED AS MODIFIED.

Schlegel, J. concurs; Snell, J. dissents.

SNELL, J. (dissenting in part; concurring in part)

I believe the court's imposition of joint custody in this case places an unjustifiable amount of tension into an already highly sensitive situation. Accordingly, I respectfully dissent from that part of the court's opinion which establishes joint custody.

Initially, I believe the court's statement that "[i]t is undisputed that our statutes express a preference for joint custody over other custodial arrangements" is misleading and of dubious relevance to the case at bar. My reading of the pertinent statutes, and the case law interpreting them, convinces me that such a preference exists only in those cases in which one or both of the parents request such an arrangement. As the district court correctly noted, the present case is one in which "[b]oth [parents] seek custody in themselves." Accordingly, I do not believe the preference for joint custody is operative in this case.

In In re Marriage of Miller, 390 N.W.2d 596 (Iowa 1986), our supreme court discussed the principles governing the application of the preference for joint custody. I note that Miller is a case which vacated this court's imposition of joint custody, contrary to the district court's determination that joint custody was inappropriate, in a fact situation not entirely unlike the present case. Two statements made by the Miller court lead me to believe the preference applied by the majority today is not justified. First, that court noted that

[i]n marriage dissolution actions, our present statutory scheme directs the court to provide ample visitation with both parents and, upon the request of one parent, to consider granting joint custody, subject to the considerations of the best interests of the child and reasonableness.

Id. at 598 (emphasis supplied). The court goes on to point out that

[t]he statute emphasizes maximum physical and emotional contact between each parent and child, and gives preferences to a joint custody arrangement, when such an arrangement is requested by either parent.

Id. (emphasis supplied); see also Iowa Code § 598.41(1)-(2) (1987). In cases prior to Miller, our courts rejected the suggestion that the legislature had created a presumption that joint custody is in the best interests of the child. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). I am willing to assume that joint custody remains an option which the district court, in its discretion, may consider even in cases where neither parent requests it. I find no support, however, for an application of the joint custody preference in cases such as this where neither parent has requested it. Although Gregory argues in his appellate brief for an award of joint custody, he did not do so in the district court. Our review in cases such as this is limited to those issues that have been properly presented to the district court and preserved for appeal. In re Marriage of Phipps, 379 N.W.2d 26, 27 (Iowa App. 1985).

Moreover, even had joint custody been requested by either party in this case, the Miller decision clearly states that joint custody is only granted "subject to the considerations of the best interests of the child and reasonableness." Miller, 390 N.W.2d at 598. Such considerations persuade me that the present case is not an appropriate one for this court's reversal of the district court's order granting sole custody to Sally.

Gregory argues that the trial court unduly stressed the fact that he and Sally had difficulty communicating with respect to Erica's needs. In support of his assertion that the court's decree is thus erroneous, Gregory relies upon our decision in In re Marriage of Ertmann, 376 N.W.2d 918 (Iowa App. 1985). In Ertmann, we noted that the usual acrimony accompanying a divorce is not alone a sufficient reason to warrant the denial of joint custody. 376 N.W.2d at 920; see also In re Marriage of Bolin, 336 N.W.2d 441, 446 (Iowa 1983) ("Tension between the parents is not alone sufficient to demonstrate [joint custody] will not work."). I think that Ertmann is factually distinct; my review of the record

in the matter sub judice persuades me that the problems between Gregory and Sally are more severe than the ordinary hostility accompanying a divorce.

It is apparent from the record that throughout the trial, Gregory adamantly opposed dissolving the parties' marriage. The record reflects that during the separation, Gregory continually tried to convince Sally to change her mind. Sally testified that when Gregory came to pick up Erica or brought her back following visitation, he pulled Sally into the bedroom and "sat on her," telling her that he would be saved for attempting to salvage the marriage whereas otherwise she would "go to hell." Not surprisingly, Sally testified that this behavior bitterly upset Erica. I concur with the trial court's finding that Gregory's actions are particularly disturbing given Erica's extraordinary needs. The record discloses that Erica is mildly retarded, hyperactive, and has inhibited motor and speech coordination. As a result of these problems, Erica functions at a developmental level nearly two and one-half years behind her age level; at the time of trial, Erica was six years old but functioned at the level of a three and one-half to four-year-old. Given these circumstances, the trial court was rightly sensitive to Erica's special needs and to the importance of providing her with a stable and suitable environment. Moreover, I think that when Gregory's conduct is considered in conjunction with Erica's condition, it clearly evidences much more than the difficulties which we found insufficient in Ertmann; rather, this case is more comparable to the set of facts considered by the supreme court in Weidner. In that case, the court affirmed a trial court's decision denying joint custody where the parties' inability to overcome their differences resulted in a number of unpleasant events which involved the children, either directly or indirectly. Weidner, 338 N.W.2d at 357. The court concluded that in such circumstances, a workable joint custody arrangement simply was not foreseeable. Id. at 359. Similarly here, the parties' past acts convince me that a joint custody

arrangement is not workable. Accordingly, the decision to award Sally sole custody should be affirmed.

I do, however, concur in that part of the court's opinion which awards Gregory additional visitation.