IN THE COURT OF APPEALS OF IOWA

No. 5-189 / 94-1538

FILED
MAY 30 1995
CLERK SUPREME COURT

KEVIN LEE RAYMOND,

Petitioner-Appellee,

vs.

TERESA DIANE CRILL,

Respondent-Appellant.

Appeal from the Iowa District Court for Henry County, R. David Fahey, Judge.

Teresa Diane Crill appeals from a district court order awarding custody of her daughter, Brittany, to Brittany's father, Kevin Raymond. **REVERSED AND MODIFIED.**

Craig Arbuckle, Washington, for appellant.

Steven E. Ort of Bell, Hansen & Ort, P.C., New London, for appellee.

Heard by Habhab, P.J., and Cady and Huitink, JJ.

HABHAB, P.J.

Brittany Crill Raymond was born on March 28, 1990. She is the daughter of Kevin Raymond and Teresa Crill. Kevin and Teresa had Brittany while Kevin was married to Tracy Raymond.

On May 24, 1990, Kevin Raymond and his mother, Betty Hornaday, filed a petition concerning custody of and visitation with Brittany. An order was entered on July 9, 1990 granting joint legal custody, primary physical care by Teresa, and visitation by Kevin and Betty. Kevin and Betty dismissed the custody petition on January 23, 1992, allegedly because Teresa agreed to allow visitation.

The State subsequently brought a paternity and child support action against Kevin. The action resulted in a consent order establishing Kevin's paternity of Brittany and setting his support obligation.

After Teresa began to refuse visitation, Kevin filed a petition on August 2, 1993, seeking primary physical care of Brittany. Kevin also obtained a temporary order enjoining Teresa from removing Brittany from the State. The parties stipulated to an order providing Kevin with visitation during the proceedings. The district court ordered a psychological evaluation of the parties to be prepared.

Kevin and Teresa were both twenty-six years old at the time of trial. Kevin had been working for seven years at MacKay Envelope. Kevin is a high school graduate with one year of college experience. Teresa also is a high school graduate who was unemployed at the time of trial.

On August 22, 1994, the district court entered its findings, conclusions and decree. The court noted at the outset that either party could provide adequate physical care for Brittany, but also emphasized both parties had significant shortcomings. The court remarked on Kevin's "almost continual" extramarital affairs,

including the long-term affair with Teresa. The court also found both parties had engaged in significant drug abuse, and believed both were probably still using drugs. The court also stated Kevin's marriage to Tracy appeared to be unstable due to stress from the custody battle and financial difficulties.

The court acknowledged Teresa had provided adequate care for Brittany for over four years. The court noted, however, that Brittany's behavior had deteriorated during the year prior to trial. The court believed Teresa's behavior had probably led to her losing several jobs. The court was particularly concerned with Teresa's recent behavior, including her near abdication of parental responsibility as the trial drew near. The court ultimately awarded custody of Brittany to Kevin subject to visitation by Teresa. The court directed a hearing be scheduled on support because inadequate financial information was provided.

Teresa filed a notice of appeal on September 20, 1994, appealing the August 22 order. She also sought a temporary injunction preventing Kevin from taking Brittany to Minnesota. Kevin and Tracy were moving to Minnesota because Kevin had accepted a promotion. On October 11, 1994, the district court entered an order denying the temporary injunction.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Teresa first argues the district court did not correctly determine the burden of proof. Teresa contends custody had previously been agreed upon by the parties which meant the present action was a modification, rather than an original custody proceeding. We, however, determine the record reveals the parties agreed at the

district court level that custody had not previously been ruled upon in a court of law and that, as a result, the present action was an original custody proceeding. Therefore, we treat it as such.

I

Kevin's petition asked for joint custody, primary physical care of Brittany with him, and visitation for Teresa. The district court, however, only awarded "custody" of Brittany to Kevin, and gave Teresa visitation.[1] In giving Kevin custody of Brittany, we assume the district court was referring to sole custody. In addition, since no mention was made of primary physical care, we also assume the district court implicitly awarded Kevin primary physical care of Brittany.

In awarding custody of minor children, the district court is to be reasonable and act in the best interests of the child. Iowa Code § 598.41(1) (1993). The district court is to:

> [O]rder 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 . . . unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result . . . and which will encourage parents to share the rights and responsibilities of raising the child.

Id. If joint custody is not ordered, the district court is required to cite clear and convincing evidence that joint custody is unreasonable and not in the best interests of the child. Iowa Code § 598.41(2) (1993). We do not believe such evidence has been presented.

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[1] The decree stated, "IT IS ACCORDINGLY ORDERED that custody of Brittany L. Crill-Raymond is placed with her father Kevin Lee Raymond subject to visitation rights granted to her mother as outlined in Petitioner's Exhibit 14 attached."

In determining whether joint custody is in the best interests of the child in situations where one of the parents do not agree to joint custody, the district court is to consider nine factors. Iowa Code § 598.41(4) (1993). They are:

a. Whether each parent would be a suitable custodian for the child.
b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.
c. Whether the parents can communicate with each other regarding the child's needs.
d. Whether both parents have actively cared for the child before and since the separation.
e. Whether each parent can support the other parent's relationship with the child.
f. Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.
g. Whether one or both [of] the parents agree or are opposed to joint custody.
h. The geographic proximity of the parents.
i. Whether the safety of the child, other children, or the other parent will be jeopardized by the awarding of joint custody or by unsupervised or unrestricted visitation.

Iowa Code § 598.41(3) (1993). This statute has been interpreted to express a preference for joint custody. *In re Marriage of Will,* 489 N.W.2d 394, 397 (Iowa 1992); *In re Marriage of Weidner,* 338 N.W.2d 351, 356 (Iowa 1983); *In re Marriage of Fish,* 350 N.W.2d 226, 229 (Iowa App. 1984). The overriding concern is the best interests of the child. Iowa R. App. P. 14(f)(15).

In order to be denied joint custody, there must be clear and convincing evidence that joint custody is both unreasonable and not in the best interests of Brittany. We do not believe sufficient evidence exists in the record to support a finding denying Teresa joint custody of Brittany. The statutory preference is for joint custody. As a result, we modify the district court's ruling by granting Kevin and Teresa joint custody of their child Brittany.

We now must address the issues of primary physical care and visitation.

II

In child custody cases, the best interests of the child are the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3), in *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983), and in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).

All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985).

We believe placement of Brittany with Teresa would provide Brittany with a much more stable environment than placement with Kevin. Neither party is perfect. Both have had histories of substance abuse, Kevin has had repeated extramarital affairs, and Teresa has been found to have a fragile mental make-up. We believe, however, placement with Teresa would be in Brittany's long-term best interests. Teresa has been the primary caretaker for nearly all of Brittany's life.

Teresa's testimony reveals that she has attempted to act in Brittany's best interests by placing Brittany with Kevin. Teresa stated that, after a discussion with a psychologist about some problems Brittany was experiencing, they decided Brittany needed to spend more time with her father. Rather than acting in her own best interests to enhance her position in the custody dispute by keeping Brittany in her care, Teresa acted in Brittany's best interests and allowed Kevin to spend more time with Brittany and provide more care for her. We find this episode to be a positive reflection on her ability to parent.

After a de novo review of the record, we conclude it is in Brittany's best interests for Teresa to have primary physical care and we modify the decree accordingly. We further modify the district court's ruling to give Kevin the same visitation rights Teresa had under the district court's decision. As a result of our decision, we must also reverse and modify the district court's order of October 20, 1994 regarding the fixing of Teresa's child support.

III

In conclusion, we reverse and modify the district court's ruling and order joint custody of Brittany to be held by both parents, and primary physical care of Brittany to be given to Teresa subject to the visitation rights of Kevin. We note that Kevin's child support obligation was fixed at $72 a week in the "Consent Order Establishing Paternity Current and Accrued Support" dated August 12, 1992. That amount shall stand as Kevin's child support obligation unless either party within twenty days after procedendo issues files an application with the district court for a redetermination, in which event the district court shall fix anew Kevin's child support obligation consistent with the Child Support Guidelines then in effect. We do not retain jurisdiction.

Teresa also requests appellate attorney fees on 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 Miller,* 524 N.W.2d 442, 445 (Iowa App. 1994); *In re Marriage of Gilliam,* 525 N.W.2d 436, 439 (Iowa App. 1994). We determine each party should pay his or her own attorney fees for this appeal. Costs on appeal are assessed to Kevin.

REVERSED AND MODIFIED.