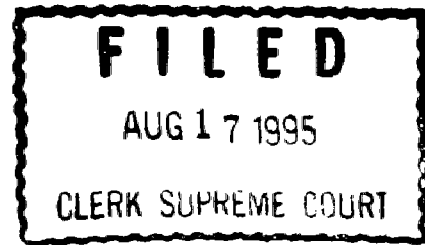


IN THE COURT OF APPEALS OF IOWA

No. 5-360 / 94-2006



**IN RE THE MARRIAGE OF TIMOTHY F.
DEUTMEYER AND LISA A. DEUTMEYER**

Upon the Petition of
TIMOTHY F. DEUTMEYER,

Petitioner-Appellant.

vs.

LISA A. DEUTMEYER,

Respondent-Appellee.

Appeal from the Iowa District Court for Delaware County, William G.
Klotzbach, Judge.

Petitioner appeals the child custody provisions of the parties' dissolution decree.

AFFIRMED AS MODIFIED.

James L. Wagner of Gartelos & Wagner, Waterloo, for appellant.

Sherry L. Schulte of White & Johnson, P.C., Cedar Rapids, for appellee.

Considered by Sackett, P.J., and Habhab. and Cady, JJ.

CADY, J.

Timothy Deutmeyer appeals from the child custody provisions of the parties' dissolution decree. Upon our review of the record, we affirm and modify the trial court's order.

Timothy and Lisa Deutmeyer were married on January 19, 1989. They have one child, Victoria, born July 14, 1989. Timothy was twenty-nine years of age at the time of trial, and Lisa was twenty-six. Timothy grew up on a farm in Delaware County, Iowa. Lisa is from California.

Following their marriage, Timothy and Lisa moved to Ft. Hood, Texas, where Timothy was stationed with the military. In March 1989, Timothy was deployed to Panama and returned two weeks after Victoria's birth. In October 1989, Timothy was again deployed to Panama and the Virgin Islands. He was subsequently transferred to the Persian Gulf and was gone for six months. During this time, Lisa was the child's primary caretaker.

In November 1992, Timothy was discharged from the military, and he and Lisa moved in with his mother and siblings on the family farm in Delaware County. Timothy helped on the family farm, and obtained employment with Bertch Manufacturing in Waterloo. Lisa obtained employment with PMI, Inc., a medical billing firm.

In March 1993, the family moved to an apartment in Manchester. They lived there until May 1993 when Lisa decided to leave Timothy. She emptied their bank account and fled with Victoria to Texas. Lisa eventually returned with Victoria. In July 1993, Lisa again left with Victoria. This time they went to California.

On August 17, 1993, Timothy filed a petition for dissolution, but because he did not know Lisa's address in California, she was not served until September 7, 1993. He hired a private investigator to locate his wife and daughter.

On September 21, 1993, Timothy's application for temporary custody came before the court. At the time of the hearing, Lisa stated she did not plan to come back to Iowa. The district court granted Timothy temporary custody of Victoria provided he resided on the farm with his mother.

The court also ordered that Karen Fischer of the Adult Child and Family Mental Health Center conduct an evaluation of the family. Karen had numerous visits with Timothy, Lisa, and Victoria and prepared a parenting assessment report for the court. She recommended physical care be placed with Lisa.

At trial, Lisa testified that Timothy was verbally abusive to her and that on several occasions he used excessive force to punish Victoria for getting in his way. She stated that although she considered her flight to California a big mistake, she had done so out of concern for her and Victoria's safety. Lisa also testified she planned to live in Waterloo and obtain employment.

required to pay forty-eight dollars per week in child support. The court also ordered that Lisa could not take Victoria out of state unless it was for family visitation. Timothy appealed.

His primary contention is the district court erred in awarding physical care of Victoria to Lisa. He points out her bad judgment and erratic behavior. Timothy notes that Lisa attempted to discourage a good relationship between Victoria and himself while he allowed Lisa to exercise her visitation. He also asserts the district court did not place adequate restrictions on Lisa's ability to remove Victoria from Iowa. Finally, he argues the trial court made several errors in the visitation schedule. Timothy claims the court should have granted him six weeks of summer visitation; visitation on the first and third weekends of each month rather than every other weekend; and alternating visitation on Christmas Eve and Christmas Day.

I. Scope of Review

We review this equity proceeding de novo. Iowa R. App. P. 4. We examine the record made at trial and determine the issues presented on appeal anew. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). The findings of the trial court, however, are recognized and given weight, especially when considering credibility of witnesses. Iowa R. App. P. 14(f)(7); *In re Marriage of Urban*, 359 N.W.2d 420, 423 (Iowa 1984). The trial court is "greatly helped in making a wise decision about the parties by listening to them and watching them in person." *In re Marriage of Callahan*, 214 N.W.2d 133, 136 (Iowa 1974).

II. Custody

Timothy's appeal focuses on the physical placement of Victoria. He asserts he and not Lisa should have been awarded primary physical care of Victoria.

Our paramount consideration in child custody cases is the best interest of the child. Additional factors used to assist in determining custody are set out in Iowa Code section 598.41(3) (1993). Our determination is made on a case-by-case basis. *In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). Resolution of which parent will do better in raising the child depends on what the evidence actually reveals in each case. The record is searched for evidence of which parent will do better in raising the child into a stable, healthy, young adult. *In re Marriage of Rodgers*, 470 N.W.2d 43, 44 (Iowa App. 1991). In the end, the court strives to determine what will be in the long-term best interest of the child. *Vrban*, 359 N.W.2d at 424.

We recognize the custody decision in this case is a difficult one. The record reveals both Timothy and Lisa love Victoria and desire to be her primary caretaker. Each parent has demonstrated characteristics that would make him or her a suitable custodian for Victoria, as well as traits that weigh against placing Victoria in his or her care.

Lisa was Victoria's primary caretaker until Timothy received custody following the temporary hearing. In this role, she prepared and planned meals, dressed, bathed, arranged medical care, educated, disciplined, and spent time with Victoria. We recognize the role of primary caretaker is critical in the development of children and

deserves careful consideration. See *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). Additionally, allowing a parent to continue as the primary caretaker after the divorce adds needed continuity to the lives of children at what can be a difficult and confusing time for them. *In re Marriage of Burkle*, 525 N.W.2d 439, 442 (Iowa App. 1994).

Lisa further demonstrated her commitment to Victoria by moving back to Iowa to exercise visitation after Timothy was granted temporary custody and by determining to live and work in Iowa in order to receive custody and allow Victoria to continue a close relationship with both parents. Lisa also demonstrated an awareness of Victoria's emotional and development problems and sought help in addressing them. Finally, her employment schedule is less rigorous than Timothy's and allows her to spend more one-on-one time with Victoria.

On the other hand, Lisa exercised poor judgment and failed to recognize Victoria's needs when she traveled to California and Texas, separating Victoria from Timothy for extended periods of time. She also lacks a familial support network to assist her in caring for Victoria.

During the temporary custody period, Timothy also successfully took on the role of primary caretaker. He was, however, aided significantly by his mother. While we believe his family's support is a positive factor, we are left with doubts as to whether he can care for Victoria on his own. Timothy works ten hours per day four days per week at Bertch Manufacturing and additional hours on his mother's farm.

The evidence regarding Timothy's temper also presents concern. Lisa and a family friend, Mary Wolverton, testified that Timothy was verbally abusive to Lisa and occasionally used excessive force in punishing Victoria. Timothy denied this; however, the court found Lisa's and Mary's testimony more credible. We pay close attention to the trial court's assessment of the credibility of the witnesses. *Vrban*, 359 N.W.2d at 423.

Considering all the evidence, we agree with the trial court that Victoria's best interest will be served by awarding primary care to Lisa.

III. Multiple Visitation Schedule Issues

In a 179(b) motion, Timothy raised several issues pertaining to the visitation schedule. He requested the trial court to grant him six weeks of summer visitation, visitation on the first and third weekend of the month rather than visitation every other weekend, and alternating Christmas Eve and Christmas Day holidays. The district court failed to rule on this motion prior to Timothy's appeal. However, in its February 7, 1995, order, on Timothy's motion for contempt of court, the court included a ruling on the 179(b) motion. It sustained Timothy's motion with regard to alternating the Christmas Day and Christmas Eve holidays and denied the remaining issues.

Upon our review, we affirm the Christmas visitation schedule as amended by the court. We also affirm the four-week summer visitation schedule.

We amend the trial court's ruling with regard to the weekend visitation schedule. At trial and on appeal, Timothy requested visitation with Victoria the first and third weekends of each month, rather than every other weekend. We note that in her response to Timothy's 179(b) motion Lisa did not object to this schedule. Timothy's visitation with his daughter from his first marriage occurs on the first and third weekends of each month. We believe switching Timothy's weekend visitation with Victoria to coincide with this schedule is appropriate. It will allow Victoria to have maximum contact with her half-sister and father.

IV. Restrictions on Moving from Iowa

In its order the district court held Lisa could "not remove [Victoria] from the state of Iowa other than for purposes of family visitation without first advising [Timothy], and giving him an opportunity to request a hearing prior to any change in residence." Timothy contends this order is ambiguous and does not place sufficient restrictions on Lisa's ability to leave the state with Victoria. He suggests, in addition to the court's restrictions, Lisa should be given only one week per year to exercise visitation with her family outside of Iowa, and she should notify him in writing one month before she wishes to exercise this visitation.

In her answer to Timothy's 179(b) motion, Lisa indicated she did not object to notifying Timothy one month in advance of any time she would be exercising visitation for greater than a two-week period outside of Iowa. Considering Lisa's history of leaving without notice, we affirm the trial court's restrictions. Additionally,

we believe it is appropriate for her to provide Timothy with one month's written notice before she exercises family visitation outside of Iowa. She should also provide Timothy with her departure and return information and an address and telephone number where she can be contacted.

V. Attorney Fees

Lisa requests \$2000 in appellate attorney fees. An award of attorney fees is not a matter of right but rests within the court's discretion. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). Our decision is guided by the financial needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981). Considering these factors, we award Lisa \$1000 in attorney fees.

We affirm the district court order as modified. Costs are assessed to Timothy.

AFFIRMED AS MODIFIED.