IN THE COURT OF APPEALS OF IOWA

No. 4-181 / 93-1684

FILED
MAY 26 1994
CLERK SUPREME COURT

IN RE THE MARRIAGE OF MICHAEL LEASE AND CATHY LEASE

Upon the Petition of MICHAEL LEASE,

Petitioner-Appellant,

And Concerning CATHY LEASE,

Respondent-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Gilbert K. Bovard, Judge.

Former husband appeals from the custody provisions of dissolution decree. **AFFIRMED.**

Mark A. Young of Pappajohn, Shriver, Eide & Nicholas, P.C., Mason City, for appellant.

Michael P. Short, Keokuk, for appellee.

Heard by Donielson, C.J., and Hayden and Habhab, JJ.

HABHAB, J.

In the dissolution of marriage action, the petitioner-father appeals asserting the district court erred in awarding physical custody of the parties' minor child to the respondent-mother. We affirm.

Michael and Cathy Lease were married on February 14, 1991. This was Michael's fifth marriage and Cathy's second. The parties have one child, Shawna, born September 3, 1991. The household also included Grant, Cathy's child from her previous marriage, who is just over four years older than Shawna.

In October 1992 the parties separated. They achieved a temporary reconciliation, but in March 1993 this dissolution proceeding was begun.

At the time of trial Michael was thirty-seven years old and Cathy was thirty-four years old. Both parties are in good physical health.

The district court determined that both parents had successfully and actively cared for Shawna and either would be a suitable physical custodian for her. The court expressed "serious concerns as to whether the parents can set aside their personal differences" and admonished both parties, and in particular Cathy, not to deny Shawna maximum physical and emotional contact with the other parent.

The district court concluded: "In this extremely close case, the court is inclined to favor awarding custody to

Cathy, primarily because of the court's belief that to separate Shawna from both her mother and her brother would result in greater emotional disturbance than would the separation from Michael."

The court awarded primary custody of Shawna to Cathy and ordered Michael to pay child support pursuant to the child support guidelines. The court divided the parties' property. Michael appeals.

Our review in this matter is de novo. Iowa R. App. P. 4. In child custody cases, the best interests of the child is 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, 355-56 (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).

Michael contends the district court erred in failing to award primary physical custody of Shawna to him. He

contends the district court inappropriately gave weight to the step-sibling relationship between Shawna and Cathy's son Grant. He argues this gives Cathy, as the natural parent of the half sibling an unfair advantage in the contest for physical care of Shawna.

In In re Marriage of Orte, 389 N.W.2d 373, 374 (Iowa 1986), our supreme court examined the issue of how much weight should be given to the preference for keeping siblings together in the case of half siblings. The court found the general principles governing the separation of siblings should govern, regardless of the advantage given to the parent of the half sibling. Id. The court found, in order to depart from the preference for keeping siblings together, "it must appear that separation 'may better promote the long-range interests of the children.'" Id. (quoting In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981)).

Michael contends giving Cathy physical care is not in Shawna's best interest because Cathy has denied him the opportunity for maximum continuing contacts with Shawna. We have reviewed the record in this regard and admonish Cathy for her inappropriate behavior. We note, however, the district court's finding, "Except for the improper secrecy imposed by Cathy and the contrived transfer procedures situated at the police station, [visitation] has been going generally well." We, like the district court, find this case a "close call." However, we find Shawna's best interest favor awarding Cathy primary physical care.

We remind Cathy that liberal visitation rights are in the best interest of the child. Iowa Code §598.41(1) (1993). Both parents, as joint custodians, are charged with maintaining that interest. In re Marriage of Riddle, 500 N.W.2d 718, 720 (Iowa App. 1993). Unless visitation with the noncustodial parent will in some way injure the child, it is not to be prohibited. Id. (citation omitted).

Cathy seeks attorney fees for this 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 Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We award Cathy $500 for appellate attorney fees.

Costs of this appeal are assessed to appellant.

AFFIRMED.