

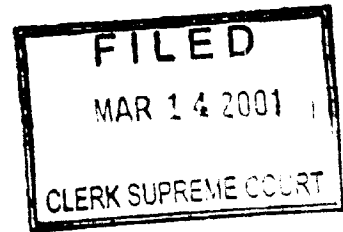
IN THE COURT OF APPEALS OF IOWA

No. 1-013 / 00-0156
Filed March 14, 2001

TROY KELLY,
Petitioner-Appellant,

vs.

MELODY STOUT,
Respondent-Appellee.



Appeal from the Iowa District Court for Cerro Gordo County, John S. Mackey, Judge.

Troy Kelly appeals from the district court's order on his petition to establish custody or visitation. He contends the district court erred in awarding physical care of the parties' daughter to her mother, Melody Stout. **AFFIRMED.**

DeDra Schroeder of Schroeder Law Office, Charles City, for appellant.

Mark A. Young, Mason City, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

MILLER, J.

Petitioner Troy Kelly appeals from the district court's order granting physical care of the parties' minor child to Respondent Melody Stout. Melody seeks appellate attorney fees. We affirm.

I. BACKGROUND FACTS

Troy Kelly and Melody Stout are the unmarried parents of Miranda Marie Stout. Neither party has any other children. Miranda was born October 5, 1992 and was seven years old at the time of trial. Miranda was conceived during the end of the parties' initial relationship at a time when Melody was dating other men and she was born after the parties were no longer romantically involved. Troy did visit the child on occasion prior to his paternity being established but did not contribute to her support until ordered to do so. Troy's paternity was established and he began paying support when Miranda was one and one-half years old. He has been current in his payment of monthly child support and his arrearages since then.

Although never married, the parties did later resume their relationship and reside together for approximately two years beginning when Miranda was three and one-half years old. Troy moved out of the parties shared residence approximately thirteen months before trial and was living in Clear Lake at the time of trial. At the time of trial Melody was still residing in the residence in which she and Troy lived together, also in Clear Lake. Miranda has lived with Melody during her entire lifetime with Melody as her primary caretaker.

The parties were able to agree on a visitation schedule between Miranda and Troy after Troy moved out. It included every other weekend and some

weekdays. Melody also offered Troy the opportunity for extra visitation on occasion but Troy declined to avail himself of that opportunity. Melody informed Troy in July 1999 that she planned to move to San Diego, California with Miranda to live with her new husband, Bruce Thome, who was stationed there with the U.S. Navy. Troy filed a "Petition to Establish Custody or Visitation" on October 6, 1999. He requested that the court "grant joint custody [and] enter appropriate orders regarding primary placement" The court temporarily enjoined the parties from taking Miranda outside of Iowa while the custody proceedings were pending.

Following hearing on the matter, the district court awarded the parties joint legal custody and placed physical care of Miranda with Melody. The court also dissolved the temporary injunction and established child support and a visitation schedule. Troy filed a 179(b) motion asking the court to amend its findings to grant him physical care of Miranda and to require Melody pay for all costs of transportation for his visitations. The court found that each party should pay one-half the cost of transportation for visitations, but did not change the order concerning physical care. Troy appeals from the district court's rulings contending the court erred in awarding Melody physical care of Miranda.

II. SCOPE AND STANDARDS OF REVIEW

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). 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). This is because

the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value, except to provide a framework for analysis, and our decision must be based on the particular facts and circumstances before us. *Id.*

III. MERITS

Miranda's best interests are paramount in our decision and the objective is to place her "in the environment most likely to bring her to healthy physical, mental, and social maturity." *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995). The critical issue in determining the best interests of children is which parent will do better in raising them; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996).

There are numerous factors to be taken into account when determining which parent should serve as the long-term primary caretaker of the child. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997); see Iowa Code § 598.41 (1999). The criteria governing physical care determinations are the same whether the parents are dissolving their marriage or have never been married to each other. *Jacobson v. Gradin*, 490 N.W.2d 79, 80 (Iowa Ct. App. 1992); *Hodson v. Moore*, 464 N.W.2d 699, 700 (Iowa Ct. App. 1990). We give some factors greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *Daniels*, 568 N.W.2d at 54; *Will*, 489 N.W.2d at 397. We base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

The parent who has been the primary caretaker of the child will not necessarily be awarded physical care of the child. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). "The role of the primary caretaker is, however, critical in the development of children, and careful consideration is given in custody disputes to allowing children to remain with the parent who has been the primary caregiver." *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995).

Melody has clearly been Miranda's primary caregiver throughout Miranda's life. It is also clear from the testimony of the parties and their witnesses that Miranda is a very intelligent, sociable and delightful little girl who is thriving in all respects. Melody must be given primary credit for this success. Troy, on the other hand, has only lived with Miranda for two of her seven years and did not begin in earnest to have consistent visitation with her, or pay support for her, until she was one and a half years old.

It is clear from the record that both parties genuinely care for Miranda and would be able to adequately provide for her needs. However, based on the history of the parties' relationships with Miranda it is clear to us that she is more closely bonded with Melody than with Troy. Melody is clearly the parent who has been Miranda's primary psychological parent and the parent with whom Miranda has more closely bonded. We give these facts substantial weight in a physical care decision. See generally *In re Marriage of Riddle*, 500 N.W.2d 718, 720 (Iowa Ct. App. 1993); *In re Marriage of Oakes*, 462 N.W.2d 730, 732 (Iowa Ct. App. 1990).

In determining Miranda's best interests we consider the emotional and environmental stability offered by each parent. *In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App. 1998).

Minimal changes in physical environment may result in greater emotional stability. However, our case law places greater importance on the stability of the relationship between the child and the primary caregiver over the physical setting of the child. To that end, that which is least disruptive emotionally to the child should be given greatest consideration in achieving the ultimate goal of the child's long-term best interests.

Id. (citations omitted).

Miranda's emotional stability should take precedence over her physical setting. In order to achieve that stability she should remain with Melody, the parent who has been her primary caregiver throughout her life, the parent under whose care she has flourished, and the parent to whom she necessarily has the stronger emotional bond. See *In re Marriage of Mayfield*, 577 N.W.2d 872, 874 (Iowa Ct. App. 1998) (affirming the trial court's refusal to change physical care despite substantial change in circumstances resulting from custodial parent's decision to move child from community where he grew up to five hundred miles from other parent, because child was flourishing in custodial parent's care). Troy's recent interest in becoming more involved in Miranda's day-to-day care cannot diminish Melody's role as her primary caretaker since birth and the fact Melody is primarily responsible for Miranda developing and thriving.

In support of his argument that the trial court erred in awarding physical care to Melody, Troy points to Melody's January 1999 acute incident of depression for which she voluntarily admitted herself for treatment. Troy asserts this condition adversely affects Melody's ability to be Miranda's primary

caretaker. However, the record shows that Melody has had episodic bouts of depression for approximately the past ten years and yet Troy never challenged her ability to parent Miranda until she informed him she and Miranda were moving to California.

Melody's treating psychiatrist during her hospitalization, Dr. Larsen, testified at hearing that Melody sought appropriate treatment for her common condition¹ of depression, that it was positive she recognized she was having these issues and was willing to deal with them, and that her symptoms could be expected to abate. In addition, Dr. Larsen testified there was no evidence that Melody's acute episode endangered Miranda in any way. We also note Melody made appropriate caretaking arrangements for Miranda with her mother and babysitter prior to her voluntary stay at the hospital.

We find Melody took the appropriate steps in recognizing and seeking treatment for her depression and there is no evidence that her occasional bouts of depression have ever endangered Miranda. Furthermore, the evidence does not show that Melody's history of intermittent depression has detrimentally affected Miranda's development or sense of security. Our conclusion is further supported by the fact Troy expressed no concern that Melody's condition affected her ability to care for Miranda until Melody informed him she planned to move.

Upon our de novo review of the evidence we agree with the trial court that Miranda's best interests will be served by placing her physical care with Melody.

¹ The doctor testified that major depression could be expected to be found at some time in twenty percent of all women in the United States.

IV. APPELLATE ATTORNEY FEES

Melody asks for attorney fees for this appeal. Appellate attorney fees are discretionary. *In re Marriage of Ask*, 551 N.W.2d 643, 646 (Iowa 1996). 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 Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). We find Melody was obligated to defend the trial court's decision due to Troy's appeal and has done so successfully. We award Melody \$750 in appellate attorney fees.

V. CONCLUSION

Based on our de novo review of the entire record, we find the district court properly placed physical care of Miranda with Melody and affirm on this issue. We award Melody \$750 appellate attorney fees.

AFFIRMED.