

IN THE COURT OF APPEALS OF IOWA

No. 2-241 / 91-1550

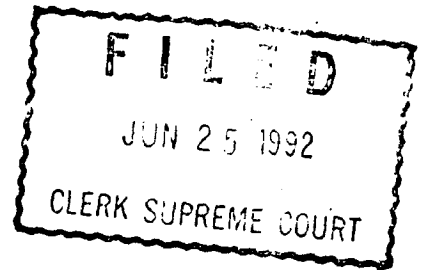
KEVIN O. BREITFELDER,

Appellant,

vs.

CARRIE ANN RUPP,

Appellee.



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Appeal from the Iowa District Court for Dubuque County,
Robert J. Curnan, Judge.

Kevin Breitfelder appeals the district court's order
awarding primary physical custody of his minor child to
Carrie Rupp, the child's mother. **AFFIRMED.**

Mark S. Beckman of Fitzsimmons & Beckman, Dubuque, for
appellant.

Robert L. Day, Jr., of Day & Beacham, Dubuque, for
appellee.

Heard by Schlegel, P.J., and Habhab, J., and McCartney,
S.J.*

*Senior judge from the 2nd Judicial District serving on
this court by order of the Iowa Supreme Court.

HABHAB, J.

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FACTS

Carrie Rupp and Kevin Breitfelder are the parents of Kyle Breitfelder. Kyle was born on June 19, 1989. Carrie and Kevin never married. Since the birth of Kyle, Carrie has been the primary caretaker of the child. On December 10, 1990, Kevin filed a petition requesting custody of Kyle. Carrie filed an answer acknowledging Kevin's paternity of Kyle but stated she should have sole custody of the child.

Kevin was born October 11, 1965. He is a high school graduate and attended Loras College but did not graduate. He is the manager of Arby's restaurant in Dubuque. Carrie was born on April 17, 1969. She is a high school graduate. On July 27, 1991, Carrie received her dental assistant degree. She was interviewing at the time of trial.

Following Kyle's birth, the relationship between Carrie and Kevin deteriorated rapidly. Kevin plead guilty to assault with intent to cause injury, following an argument between Kevin and Carrie. A no-contact order was put in place. However, both parties violated that order. Kevin was arrested a second time after he broke down Carrie's apartment door following an argument over the phone.

Following a protracted hearing, the district court filed its judgment and decree on September 5, 1991. It found both parties loved Kyle and were capable of

appropriately parenting him. The district court rejected the evidence concerning Carrie's high school reputation and pregnancy termination. It found Carrie demonstrated better emotional control than Kevin and had demonstrated the necessary parenting abilities to be Kyle's primary care giver. Based upon these facts, the district court awarded primary physical custody of the child to Carrie with joint legal custody in both parties.

The district court ordered Kevin to pay \$325 per month for child support and set up a visitation schedule. The district court also ordered Kevin to pay Carrie \$2000 for her attorney fees.

Kevin has filed this appeal. We affirm.

SCOPE OF REVIEW

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

I. Child Custody.

Kevin contends the district court erred in awarding physical custody of Kyle to Carrie. Kevin argues Carrie's immoral conduct, her pregnancy terminations and her high school reputation warrant placing physical custody of Kyle with him. Kevin also argues that his superior parenting skills dictate that he be awarded physical custody of Kyle. We disagree.

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, 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 Vrbanc, 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).

Carrie has been the primary caretaker of Kyle since his birth. Dr. Murray, the only expert witness at trial, confirmed Carrie was a good and loving mother. The

district court, in its findings of fact, stated "the child appears to be in good health and nothing in the evidence suggests other than that he is properly and appropriately developing." Further, Carrie has properly cared for Kyle since his birth. After hearing all of the evidence, the district court ultimately determined it was in the best interests of the child for physical care to be placed with Carrie.

Kevin has demonstrated a tendency to put his own emotional needs ahead of Kyle's needs. There was a time when he willfully refused to pay support when he had the ability to make payments and Carrie was clearly in need of such support.

Moreover, Kevin has a history of assault and violence. On October 9, 1989, the parties got into an argument over the phone, and Kevin went to Carrie's apartment and kicked her door down, despite being under a no-contact order. Shortly thereafter, Kevin was arrested. In November 1989 Kevin again forced his way into Carrie's apartment. He grabbed her by the neck and threatened to kill her in the presence of Kyle and another witness. At 4 a.m. on January 1, 1990, Kevin pounded on Carrie's door until she threatened to call the police. He was arrested again for violation of a no-contact order. In March of 1990 Kevin began harassing Carrie by phone. Consequently, she got an unlisted phone number. Thereafter, as advised by her attorney, Carrie wrote Kevin a letter detailing how he

could reach her to set up visitation. However, Kevin never contacted her to arrange visitation. In October 1990 Carrie attempted to arrange a regular visitation schedule, but it apparently broke down. We find it is in Kyle's best interest for primary physical custody to remain with Carrie. We affirm the district court on this issue.

II. Visitation.

Kevin contends the district court erred in establishing a specific visitation schedule. We disagree.

In its findings of fact, the district court stated "it is in the child's best interest that he have liberal visitation with the Petitioner." The district court then noted specific visitation rights are necessary due to the inability of the parties to agree or communicate on matters. Consequently, the district court ordered the following visitation schedule:

Petitioner shall have visitation with the child every other weekend from such time on Friday evening as the parties are able to agree until 6:00 p.m. on Sunday evening. In the weeks where there is no weekend visitation, Petitioner if available through his employment, shall have visitation with the child for as much time on Wednesday as his schedule will allow so long as the child is returned at a reasonable and agreeable hour on Wednesday evening given the child's age and sleeping needs. Petitioner shall also have visitation with the child four weeks every summer to be worked out by the parties. If the parties are unable to work this out between themselves, the Court Orders that the same shall be the last two weeks of June and the first two weeks of August. A week shall be deemed to commence and end at 6:00 p.m. on a Sunday evening unless the parties are able to otherwise agree.

Petitioner shall also have visitation with the child on alternate holidays, to change on alternate years. The holidays are New Year's Day, Easter, Thanksgiving, Memorial Day, Labor Day, Fourth of July, Christmas Eve and Christmas Day. Each of the parties shall have access to the child on the child's birthday regardless of in whose physical care the child is at that time. Finally, reasonable telephone contact between the Petitioner and the child shall be allowed. Visitation shall be at Petitioner's expense.

We find the visitation schedule ordered by the district court to be appropriate in this case.¹ We affirm the district court on this issue.

III. Attorney Fees.

Kevin argues the district court erred in ordering him to pay \$2000 of Carrie's attorney fees. We disagree.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982) (citation omitted).

We are unable to conclude the district court abused its

1. Appellant asserts the district court erred in not following the recommendations of the parties as it relates to visitation. However, he fails to direct to our attention any passage in the transcript where such recommendations may be found.

discretion in ordering Kevin to pay \$2000 of Carrie's attorney fees. Furthermore, we note each party is responsible for his or her own appellate attorney fees incurred during this appeal. We affirm the district court on this issue.

CONCLUSION

After considering all issues presented, we affirm the district court in all respects.

Costs of this appeal are taxed to the appellant.

AFFIRMED.