IN THE COURT OF APPEALS OF IOWA

No. 6-672 / 96-0661

000227

PAUL JOSEPH McDERMOTT,

Plaintiff-Appellant,

vs.

REVA MARIE LYONS,

Respondent-Appellee.

FILED
JAN 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Dubuque County, Lawrence W. Fautsch, Judge.

Paul McDermott appeals the district court ruling denying his petition for custody of his minor child and awarding custody to the child's mother, Reva Lyons. **REVERSED AND REMANDED.**

Scott J. Nelson of Hammer, Simon & Jensen, Dubuque, for appellant.

Davin C. Curtiss of O'Connor & Thomas, P.C., Dubuque, for appellee.

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

SACKETT, P.J.

Plaintiff-appellant Paul McDermott appeals, challenging the district court's decision placing physical care of his daughter Brianna, born in January 1991, with her mother, respondent-appellee Reva Marie Lyons. Paul contends he, not Reva, is the better custodian. He further contends Reva is incapable of insuring he continues to have maximum contact with Brianna. We agree and reverse and remand.

Paul and Reva never married. Reva left high school before she finished the tenth grade. She has held various jobs, but has never stayed with one for more than two months. She has made unsuccessful attempts to obtain a GED. Paul is a graduate engineer from the University of Iowa.

Paul and Reva lived together through some of Brianna's childhood. Their relationship has been strained, and at times they engaged in physical combat with Paul and Reva both receiving injuries. Paul has furnished court-ordered support for his daughter when she and Reva lived apart from him.

Paul graduated from the University of Iowa in 1992 and was hired by Motorola in Oak Brook, Illinois, as an electrical engineer. Reva and Brianna moved with Paul to a Chicago suburb. Reva was hired by Motorola but worked only a few months.

The relationship between the parties deteriorated, and in June 1995, Reva and Brianna returned to Dubuque where Reva had lived earlier. Paul began paying Reva child support of $100 per week.

Paul ultimately filed a petition for permanent physical care of Brianna. The parties agreed to child support payments in the amount of $502 per month until the hearing.

At the custody hearing, Paul testified that Reva hangs out with a criminally violent crowd who sell and abuse controlled substances. He argued Reva smoked marijuana frequently in front of Brianna and continued to indulge in cocaine. He maintained Reva has no motivation to obtain employment or continue her education. Paul asserted he is afraid Reva will pass her bad attitudes and habits to Brianna.

Reva testified that Paul smoked marijuana with her on numerous occasions. She also testified Paul physically abused her. Photographs were introduced showing injuries they both received. She maintained Paul did not show significant interest in Brianna for nearly five years and exercised visitation only when it was convenient.

The district court concluded that despite the acrimonious allegations of the parties, both Paul and Reva were good people who would make good parents. The court awarded Reva physical care of Brianna and awarded Paul visitation every other weekend and alternating holidays. Paul's child support payments were set at $670 per month retroactive to November 1995. Paul has appealed.

Paul argues the custody decision is not in his daughter's best interests. He maintains Reva continues to use illegal drugs and is not motivated to obtain a GED or secure stable employment. Paul advances Reva's entire lifestyle does not bode well

for Brianna's future. Paul argues he would be able to give Brianna a proper upbringing and would insure she would receive a good education. He argues Reva would not guarantee Brianna would be afforded maximum contact with him.

We review de novo. Iowa R. App. P. 4. The question in this initial custody determination is which parent can better provide for Brianna's long-term needs. *See In re Leyda*, 355 N.W.2d 862 (Iowa 1984). The criteria for deciding physical care are the same whether the child was born to a marriage or not. *See Heyer v. Peterson*, 307 N.W.2d 1 (Iowa 1981); *Yarolem v. Ledford*, 529 N.W.2d 297 (Iowa App. 1994). We treat this as an original custody determination despite Reva's suggestion we should treat it as a modification. The question is which parent can better care for Brianna. *See In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985).

Paul and Reva both love their daughter. Their lifestyles are remarkably different. Paul has shown stability in obtaining an education and employment. He is disciplined and is concerned about education. Reva has shown little stability. She has frequently set goals for herself but shows little follow-through.

Reva has assumed a substantial portion of Brianna's physical care since birth. To Reva's credit, the child has thrived. The trial court found the fact Reva assumed a substantial portion of Brianna's care tipped the scales in the physical care decision.

Reva testified she has plans for employment and further education. She has had similar plans at other times but was not able to reach her goal. There is evidence

she was involved in the drug culture and with persons charged with criminal behavior. The trial court recognized these serious shortcomings but was of the opinion Reva had given up drug usage and hoped to better herself.

Our review of the record fails to assure us that Reva's current goals for education and employment will materialize. We have concerns about the people she has chosen to associate with, and while these associations do not seem to have been harmful to Brianna at this time, such associations will have more impact on her as she matures.

Paul offers the better role model and proven stability to Brianna. We reverse the trial court and find Paul should be the parent having physical care. We remand to the trial court to fix Reva's child support obligation.

We award no attorney fees on appeal. Appellate costs shall be paid one-half by each party.

REVERSED AND REMANDED.

Huitink, J., concurs; Cady, J., dissents.

CADY, J., (dissenting)

I respectfully dissent. The majority has failed to give weight to the findings of the district court. I would affirm the decision of the trial court.

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