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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 6-488 / 96-0178

IN RE MARRIAGE OF DARCY LYNN SPAIN AND JOHN ERIC SPAIN,

Upon the Petition of
DARCY LYNN SPAIN,

Appellee,

And Concerning
JOHN ERIC SPAIN,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

John Spain appeals from the decree dissolving his marriage to Darcy Spain.

AFFIRMED AS MODIFIED AND REMANDED.

David A Roth, Waterloo, for appellant.

Christy R. Liss, Waterloo, for appellee.

Considered by Sackett, P..J., and Huitink and Streit, JJ.

HUITINK, J.

Respondent John Eric Spain appeals the custodial provisions of the decree dissolving his marriage to the Petitioner, Darcy Lynn Spain. He also appeals the provision equally dividing an alleged debt payable to his father, Dr. Ronald D. Spain. We affirm as modified and remand for further proceedings.

Darcy and John Spain were married on August 5, 1986. They have one child, Eric, born on February 28, 1990.

At the time of the dissolution hearing, Darcy was thirty-six years old and lived with her mother and stepfather in Waterloo. Darcy was employed full time at Atwood Automotive in West Union and earned $6.77 per hour plus overtime. Darcy spent Monday through Saturday in West Union and returned to her mother's residence on Saturday and Sunday. Darcy's mother, Sandy Boatright, usually supervised Eric and he also attended day-care.

John was thirty years old. He resided in Missouri and earned $6.60 per hour as a security guard. He also was attending school for a degree in law enforcement. John planned to marry Susan Davis. The main issue at trial concerned which parent would get primary physical care of Eric

The court found neither party provided a sterling model of a parent. The court noted both had been involved with alcohol and drugs throughout their marriage. Darcy had been addicted to crack cocaine through 1993. The court found neither parent had

been responsive to Eric's needs when he was young and both were immature and self-centered. The court noted the physical care decision was particularly problematic because Darcy's mother was the actual primary care provider. The court also found Darcy might be facing incarceration due to her "ongoing criminal activity."

The district court found John had established a stable relationship with another person he intended to marry. The court stated that John "appears to have addressed his immaturity and has some direction and goals in his life." The court then noted the testimony of a day care director to the effect that Eric has trouble adjusting to changes. The court awarded joint legal custody but gave primary physical care of Eric to Darcy. The decree provided that if Darcy was incarcerated, primary care would be transferred to John.

The decree provided unsupervised visitation for John and ordered him to pay child support. The court also determined Darcy would be responsible for restitution for any forgeries or other illegal activities she participated in but concluded the parties would be equally responsible for embezzlements from John's father. The district court denied John's Iowa Rule of Civil Procedure 179(b) motion because it was untimely and without merit. The court entered a nunc pro tunc order on January 19, 1996.

John appeals. He contends the district court erred in awarding Darcy primary care of Eric. He maintains the court's decision de facto awarded primary care to Darcy's mother in contravention of the statutory preference favoring parental custody.

He also maintains the court gave inadequate weight to Darcy's criminal history and other shortcomings, including her actions which limited his visitation with Eric. Finally, he suggests the court erred in ruling he should be responsible for half of any restitution due his father, Dr. Spain, as a result of Darcy's forgery. Darcy maintains John waived error on this issue.

Our review in this case is de novo. Iowa R. App. P. R.4. 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). We give weight to the trial court's findings of fact, but we are not bound by them. Iowa R. App. P.14(f)(7).

The critical issue is not which parent possesses the greater right to the child, rather the controlling consideration must be the best interest of the child. *Heyer v. Peterson,* 307 N.W 2d 1, 7 (Iowa.1981). This decision requires selection of a custodial parent who can minister more effectively to the long range best interest of the child. The objective should always be to place the child in the environment most likely to bring that child to healthy physical, mental and social maturity. *See In re Marriage of Winter,* 223 N.W.2d 165, 167 (Iowa 1974). The court should also consider the characteristics and needs of the child, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the child, the relationship of the child

with each parent, the nature of each proposed environment and the effect of continuing or changing an existing custodial status. *Id.*

After reviewing the record we are unable to reconcile the district court's physical care award with its own findings. The record clearly distinguishes John as the more stable and mature parent. The evidence indicates that he has addressed his alcohol and substance abuse. He is in school and his career prospects are promising. Much of the change noted in John's circumstances is attributable to his relationship with Susan Davis The district court described her in the following terms:

> She works for the post office and also as a substitute bus driver and teacher at the local school in Missouri. She has three children from a prior marriage and is in her second year of law enforcement. Susan is perhaps the most stable individual that the court heard from in the course of the trial and it appears she is an excellent mother who maintains a nice home and manages to balance working, going to school, and her family in a very effective manner.

We are similarly impressed. Moreover, Susan appears to be sincere and enthusiastic about the prospect of including Eric in her family on whatever terms the court allows

In contrast, Darcy offers a much less settled and unstable environment for Eric. She has, of necessity, deferred substantial physical care of Eric to her mother The district court was expressly concerned about the prospects of Darcy's incarceration because of unspecified "ongoing criminal activity." The negative implications for Darcy's credibility render the sincerity of her testimony suspect. We are left with serious doubts as to her continued ability and availability to care for Eric.

We are also mindful of the consequences for Eric resulting from a change in his custodial status. Eric has special needs presently met at his preschool in Waterloo. There is, however, no evidence indicating that John lacks the necessary insight into Eric's needs or that he does not have access to similar resources in Missouri.

We gather from the district court's findings that physical care was awarded to Darcy to preserve the benefits of Eric's relationship with his grandmother. The record is replete with evidence of her unselfish devotion to Eric's welfare. There is no question that she has established a substantial relationship with Eric prior to the initiation of these proceedings. We also find visits with her are in Eric's best interest.

The district court's dissolution decree is accordingly modified to award Eric's physical care to John. We are unable, based on this record, to modify the visitation provisions of the decree to accommodate Darcy's visitation schedule because of our determination that Sandy Boatright should be awarded grandparent visitation. The resolution of this issue necessitates a remand to the district court.

Our review of the record fails to disclose the payroll information necessary to correctly determine Darcy's support obligation. We accordingly vacate John's child support obligation and remand this issue for the district court's determination.

We have also considered John's challenge to the district court's division of the parties' liability to John's father and find it has no merit. We affirm on this issue.

The judgment of the district court is affirmed and this case is remanded for further proceedings consistent with the opinion.

AFFIRMED AS MODIFIED AND REMANDED.