IN THE COURT OF APPEALS OF IOWA

No. 1999-601 (9-862) / 99-875
Filed February 9, 2000

FILED
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CLERK SUPREME COURT

IN RE THE MARRIAGE OF PATRICIA A. WALKER AND KEVIN J. WALKER

Upon the Petition of
PATRICIA A. WALKER,
Petitioner-Appellant/Cross-Appellee,

And Concerning
KEVIN J. WALKER,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

Petitioner and Respondent appeal from their dissolution decree, contending the court erred in awarding divided physical care. **AFFIRMED AS MODIFIED.**

Jeffrey T. Mains, Des Moines, for appellant.

Kent A. Balduchi, Des Moines, for appellee.

Heard by Huitink, P.J., and Streit and Miller, JJ.

STREIT, J.

Kevin and Patricia Walker each appeal their dissolution decree as it pertains to the primary physical care of their daughter, Gretchen. Patricia claims the trial court erred in dividing Gretchen's primary physical care between both parents and in failing to grant her requested attorney fees. She asserts primary physical care should be awarded to her alone. Kevin counters by arguing the trial court properly divided physical care, but in the alternative claims he should receive primary physical care of Gretchen. We find divided physical care was not appropriate, award Patricia primary physical care, set Kevin's visitation schedule, and order appropriate child support. We further find the district court did not abuse its discretion with regard to attorney fees and order Kevin to pay Patricia's appellate attorney fees in the amount of $750.

I. Background Facts & Proceedings.

Kevin and Patricia Walker married in 1982. Patricia had one daughter, Brigette, from a previous marriage, and in 1985 the couple had Gretchen, the subject of this appeal. Brigette is now an adult.

During the course of the marriage, Patricia stayed home, provided for the children's daily needs, and operated a daycare out of the home. Kevin was and remains an auto mechanic. He works a rotating schedule of four ten-hour days. His pay scale allows him to earn pay in excess of his actual hours worked by completing various repair procedures in less time than a standardized schedule. He routinely averages fifty paid hours per week. When the couple separated, Patricia began cleaning homes on a part-time basis. She works approximately sixteen hours per week, cleaning between three and four homes.

In 1993, after eleven years of marriage, Patricia left the marital home with the children and got an apartment. The couple remained separated for six years, with Patricia providing the primary physical care of Gretchen. During this time, Kevin voluntarily paid $250 a month to assist Patricia in raising the children, and later increased the monthly payment to $300. Kevin also retained Gretchen and Patricia on his health insurance, paid for Patricia's car insurance and Gretchen's athletic fees, and routinely supplied both Gretchen and Patricia with clothes, a TV, stereo equipment, and appliances. He also continued to foster an appropriate parental relationship with both children.

In 1998 Patricia filed for dissolution of marriage. The trial court, in granting the dissolution, ordered a divided physical care arrangement where Patricia had Gretchen four days and Kevin had her three days a week. The court further ordered child support by calculating what Kevin would owe per week and then reducing it by three-sevenths, and then taking what Patricia would owe per week and reducing it by four-sevenths. The amounts due one another were offset, leaving Patricia $126.11 in child support. In calculating the parties' respective gross incomes, the court took Kevin's hourly wage and multiplied it by the fifty hours he normally worked. The court further provided that at periodic times throughout the year Kevin was to provide Patricia a copy of all income which exceeded the fifty-hour per week base and then pay Patricia twelve percent of that excess income. He then took Patricia's hourly wage and multiplied it by thirty hours, because she was capable of working such hours but voluntarily limited her work schedule to the sixteen hours she normally worked. The court also awarded Patricia attorney fees in the amount of $1000.

Patricia appeals, claiming the trial court erred in awarding divided physical care. She seeks primary physical care. If this court were not to disturb the award of divided physical care, Patricia claims the trial court erred in: (1) its child support calculation as the 3:4 apportionment operates to her disadvantage; (2) attributing to her an additional fourteen work hours per week for purposes of the child support calculation; and (3) underestimating Kevin's income. She further claims the trial court erred in awarding her only a nominal amount of trial attorney fees, and additionally seeks appellate attorney fees. Kevin cross-appeals, claiming both the court's physical care arrangement and its support calculations were correct, but argues in the event this court disrupts the trial court's custody arrangement he should have primary physical care of Gretchen.

II. Gretchen's Physical Care.

Patricia claims the trial court erred in dividing the primary physical care of Gretchen. She seeks primary physical care. Kevin claims the trial court properly divided primary physical care, but argues in the event this court disrupts the trial court's custody arrangement he should have primary physical care of Gretchen.

A. Standard of Review.

We review child custody determinations de novo. Iowa R. App. P. 4; *see In re Marriage of Miller,* 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings but give them deference because it had an opportunity to view, firsthand, the demeanor of the parties and evaluate them as custodians. *In re Marriage of Daniels*, 568 N.W.2d 51, 53 (Iowa App. 1997).

B. Divided Physical Care.

Although Iowa Code section 598.41(5) (1999) recognizes divided physical care as a viable option if it is in the best interest of the child and would foster a relationship with both parents, it remains disfavored if the parents are unable to cooperate and respect each other's parenting and lifestyles. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). Divided physical care has traditionally been disfavored because: (1) it tends to be destructive of discipline; (2) it places the child in a state of flux where she does not belong to either parent; and (3) it shatters the child's need for stability. *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996).

Joint physical care arrangements can be in the best interests of a child, but their success is wholly dependent upon the mutual cooperation of the parents. If the parents are unable to work amicably towards their child's best interests, joint physical care could actually have the opposite effect and harm the child. *See In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa App. 1998) (ruling equal physical care may be harmful and disruptive if it deprives the child of stability). In the present case, the divided physical care arrangement was not a joint request of the parties but a mandate from the court. The parties have not demonstrated the willingness to cooperate in the manner necessitated by such an arrangement. Kevin questions Patricia's work ethic and her present living arrangement with her boyfriend. Patricia urges Kevin undermines her authority by permitting Gretchen to associate with friends she deems troublemakers. Given these fundamental disagreements coupled with the established six-year

history of Patricia being the primary caregiver, divided physical care is not in Gretchen's best interests.

C. Primary Physical Care.

In child custody cases, the child's best interest is our governing consideration. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa App. 1996). Determining which parent will do better in raising the child is the critical issue. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). The objective is to place the child in the environment most likely to bring her to healthy physical, mental, and social maturity. *In re Marriage of Harris*, 499 N.W.2d 329, 332 (Iowa App. 1993).

There are a number of statutorily and judicially recognized factors designed to assist in determining the primary caregiver. *See* Iowa Code § 598.41 (1997); *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). Those applicable to this case include: (1) The traits of each parent, including stability, character, and mental health; (2) The preference of the child, if the child is of sufficient age and maturity; and (3) The parent with greater primary care experience. *In re Marriage of Winter*, 223 N.W.2d at 166-67; *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa 1995). Each factor, however, does not necessarily impact the decision with equal force. *In re Marriage of Daniels*, 568 N.W.2d at 54. To the contrary, some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *Id.*

Despite Patricia's willingness to permit her boyfriend, a rehabilitated drug user, to live with her and Gretchen's somewhat ambivalent request to live with

her father, Patricia has always been Gretchen's primary care taker and remained so at Kevin's acquiescence for the six years of their separation. Patricia works a flexible work schedule that gives her optimal time not only to supervise Gretchen but also to shuttle her to and from her various extracurricular activities. Patricia is actively involved in Gretchen's life and is acutely aware of her daughter's potential trouble areas. Her relationship with her boyfriend has been ongoing since the separation, and there is no evidence the relationship was deleterious to Gretchen's development. It is Gretchen's best interests that primary physical care be placed with her mother.

D. Visitation. In granting visitation, the best interest of the child predominates. *Id.* In a situation where both parents foster healthy relationships with the child, active involvement with both parents is normally in a child's best interest. *In re Marriage of Toedter*, 473 N.W.2d 233, 234-35 (Iowa App. 1991). Thus to "assure the child the opportunity for the maximum continuing physical and emotion contact with both parents after the" dissolution, a court should grant liberal visitation. Iowa Code § 598.41(1)(a) (1997); *In re Marriage of Kerber*, 433 N.W.2d 53, 54 (Iowa App. 1988). That overarching goal, however, is tempered by the structural necessity of a court's order. A visitation schedule must have well delineated parameters in order to have some binding effect. The difficulty in this case is squaring the liberal visitation Kevin deserves with the unstructured nature of his rotating work schedule. The parties are free to reach a visitation schedule amenable to both parties, and in fact we encourage it. However, in the event this proves only to be a fanciful vision of this court, Kevin shall have a minimum of ten days visitation per month. The application of those ten days are

left to the mutual agreement of the parties, but Kevin may not exercise more than three consecutive days of visitation in any one week.

The parties shall alternate holiday visitation and the child's birthday. Holidays include: New Year's Day, Easter, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Eve, Christmas Day. In odd number years, Kevin shall have visitation on New Year's Day, Memorial Day, Labor Day, Christmas Day, and Gretchen's birthday. In the even number years, he shall have visitation on Easter, July 4th, Thanksgiving, and Christmas Eve. He shall also have visitation on Father's Day, his birthday, and four weeks during Gretchen's summer vacation. Patricia shall have Gretchen on each Mother's Day and Patricia's birthday. This holiday visitation schedule is independent of the normal visitation described above and does not affect the ten days normally granted Kevin.

E. Child Support.

We generally presume the amount of child support that results from application of the guidelines is the correct amount of child support to be awarded. *See* Iowa Code § 598.21(4)(a) (1997). A variation from the guidelines shall not be considered unless the result would be unjust or inappropriate. *See id.*

> The purpose of the child support guidelines is to provide for the best interest of the children by recognizing the duty of both parents to provide adequate support for their children in proportion to their respective incomes. *While the guidelines cannot take into account the specific facts of individual cases*, they will normally provide reasonable support.

Iowa Child Support Guidelines ¶ 2 (1995) (emphasis added); *see In re Marriage of Beecher*, 582 N.W.2d 510, 513 (Iowa 1998).

The trial court, in computing the amount of child support under the previous divided primary care arrangement, appropriately considered Patricia's earning capacity by finding she was capable of working in excess of her normal sixteen hours a week. *See In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa App. 1995). The court attributed to Patricia an additional fourteen hours bringing her total hours worked to thirty hours per week. We concur with the trial court's decision and will likewise attribute to Patricia income based on a thirty-hour workweek, giving her a net monthly income of $1384.

In assessing Kevin's income for purposes of the child support calculation, his average income over the last four years is the most reliable measure. Kevin routinely earns substantial overtime. Given Kevin's fluctuating income, we must operate under the general law of averages to apply the guidelines with consistency. We find a quarterly assessment of Kevin's earnings too burdensome, for substantial variations in income are best addressed in modification proceedings. Therefore, Kevin's net monthly income for purposes of the calculation is $2897. Based on the net monthly incomes of the parties, with the appropriate adjustments for medical insurance and union dues, the guidelines provide a monthly child support payment by Kevin in the amount of $617. Kevin shall pay this amount until Gretchen turns eighteen.

III. Attorney Fees.

Patricia claims the trial court erred in denying her additional attorney fees and further requests appellate attorney fees.

A. Trial Attorney Fees. An award of attorney fees lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa

1994). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay, and the fees must be fair and reasonable. *Id.* Patricia must establish the trial court abused its discretion in awarding her only a portion of her requested attorney fees. *See id.* We find the decision of the trial court was equitable and not an abuse of discretion.

B. Appellate Attorney Fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Id.* Given the relative circumstances of the parties in this action, we find equity warrants the award of appellate attorney fees to Patricia in the amount of $1000. Costs are taxed to Kevin.

AFFIRMED AS MODIFIED.