IN THE COURT OF APPEALS OF IOWA

No. 1-231 / 90-1612

IN RE THE MARRIAGE OF CANDACE RENEE WOOD AND PATRICK ALLEN WOOD

FILED
AUG 27 1991
CLERK SUPREME COURT

Upon the Petition of

CANDACE RENEE WOOD,

Appellee,

And Concerning

PATRICK ALLEN WOOD,

Appellant.

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Appeal from the Iowa District Court for Washington County, James D. Jenkins, Judge.

Respondent appeals from the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Eric Borseth of Borseth Law Office, Pleasant Hill, for appellant.

Daniel M. Voss of Day & Meeker, Washington, for appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ. Schlegel, J., takes no part.

OXBERGER, C.J.

Patrick Wood (respondent) appeals the district court's award of custody, visitation, child support and an income tax deduction to the wife for both children as exemptions. Candace Wood (petitioner) believes that the trial court's decree should be affirmed in all respects, and asks to be awarded attorney fees of $3,986.35 for defending the appeal.

Patrick and Candace Wood were married on August 8, 1987. They are the parents of twin children born on August 9, 1988. The parties' primary disputes center around the trial court's award of custody of the two girls to Candace, the minimal visitation given to Patrick, and the award of child support in excess of the Iowa Uniform Child Support Guidelines.

Prior to their marriage both parties were employed outside the home. After Candy became pregnant, she remained home to care for the their children until November, 1989. Pat continued to work outside the home, which required at times odd hour working schedules and periods up to one week away from home. Pat worked outside the home to provide for the children, while Candy remained home to provided for their daily care. Candy returned to work outside the home in November, 1989.

Throughout the parties' marriage the couple had financial difficulties. On January 1, 1990, they moved in

with Pat's parents. On February 23, 1990, Candy took the girls and moved out. The Petition for Dissolution was filed on March 9, 1990. During the parties' separation, the couple agreed to joint custody of the children, and neither party challenged the issue of joint legal custody at any time prior to or during the trial. A temporary order was entered on March 9, 1990 granting the parties joint legal and physical custody of their minor children. Candy lived with her mother during the times she had temporary custody of the children. During the other times, she lived with her boyfriend. Pat continued to stay with his parents and with their help took care of the girls during the times he exercised custody.

On September 12, 1990, the district court entered its findings of fact, concluding joint legal custody would not be in the children's best interests and primary care, custody, and control of the children should be awarded to Candace. Because of the children's young age, the court set up a sliding scale visitation schedule with Pat receiving only daytime visitation until the twins became age five. Given the short duration of the parties' marriage, the court did not order alimony to either party. The court observed Pat had a net income of $323 per week, and under the child support guidelines he should pay 29.4% of his income as support. Because Pat was living with his parents, the court concluded his living costs were

reduced and consequently could provide more child support. The court distinguished the two children as "twins" and reasoned the child support guideline level was too low and deviated upward from it to require Patrick to pay $520 per month in child support. The court directed Candace shall have the right to claim both children as dependents for income tax purposes. Because Candace did not seek attorney fees, the court directed that the parties shall be responsible for their respective attorney's fees. The court also divided the parties' property and debts, but this division is not challenged on appeal.

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).

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) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983) and 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 Vrban, 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).

I. LEGAL CUSTODY

At the onset, it is important to distinguish between joint legal custody of children and custody which involves the physical care of the child. Iowa Code section 598.1(4) (1989) defines joint legal custody, assigning rights and responsibilities to both parents toward their children and under which neither parent has rights superior to those of the other parent. These rights and responsibilities are distinguished from the responsibility of physical care which may be assigned by the court to one parent only. Id. The law favors granting joint legal custody whenever reasonable and in the child's best interest. In Re Marriage of Ullerich, 367 N.W.2d 297 (Iowa App. 1985). This court recognizes joint custody is preferred because, properly tailored to the parties' circumstances, joint custodial arrangements will often go a long way

toward encouraging both parents to share the rights, responsibilities, and frequent joyful, and meaningful experiences of raising their children. In Re Marriage of Weidner, 338 N.W.2d 351, 358-59 (Iowa 1983).

Iowa Code section 598.41(2) (1989) states:

> The court shall consider granting joint custody in cases where the parties do not agree to joint custody. If the court does not grant joint custody under this subsection, the court shall cite clear and convincing evidence, pursuant to the factors in subsection 3, that joint custody is unnecessary and not in the best interests of the child to the extent that the legal custodial relationship between the child and a parent should be severed."

(emphasis supplied).

The trial court held:

> The Court has considered an award of joint custody. However, in view of the children's present age, and the parties demonstrated inability to adjust during the period of separation the court does not believe joint custody to be a workable appropriate custodial award.

We find the reasons cited by the court do not meet the legislative mandate that the reasons be sufficient to justify severance of the custodial relationship between the child and the parent.

The trial court in awarding sole custody to petitioner reasoned that it was Candace who performed the daily duties in maintaining the children while Patrick worked outside the home to provide for the family; that Patrick had a lack of child care experience and did not actively perform such duties of care until his wife left.

The ability of a parent to perform in the best interests of a child is not however determined solely by the number of hours experience one has previously acquired in the daily routine of maintaining a child but rather a clearly demonstrated love for the child and a willingness to assume such responsibilities. Lack of experience in the daily exercise of such matters as feeding and diaper changes is no indication of a male or female parent's capability or unwillingness to act in the child's best interests. Patrick's constant commitment to provide economic support for the care of his children under difficult employment circumstances of swing shift schedules and his assistance with the care of the children when possible clearly demonstrates his willingness to act in the best interests of the children.

Petitioner assert the facts of this case are likened to those involved in In Re Marriage of Miller, 390 N.W.2d 596 (Iowa 1986), where joint custody was denied. We disagree. We find nothing in the record which indicates problems experienced by the parties that rise to the level of those set forth in Miller.

We modify the decree to provide Patrick and Candace joint legal custody of their twin daughters.

PHYSICAL CARE

Iowa Code section 598.1(5) defines physical care as the right and responsibility to maintain the principle home of

the minor child and provide for the routine care of the child. While parents may share in the joint legal custody of a child, the court may award physical care to one parent only. Id. § 598.1(4). Patrick asserts the court erred in granting the petitioner primary physical care, custody and control of the minor children. We disagree.

Upon our de novo review, we find both parties to be capable, loving, and caring parents. The placement of the children with either parent would be appropriate. Both have some maturing to do but both are desirous to improve. Both are required to work. By necessity, there will be a reliance upon babysitters, friends, and family to aid in the mission of the parents in caring for the children.

The trial court saw the parties and their witnesses. We find no reason to disturb the trial court's award of physical custody of the children to Candace. We affirm the custody award.

VISITATION RIGHTS

Patrick asserts the court erred in limiting his visitation rights to daytime hours. We agree.

This court has said that standing alone the fact that a child is two years of age is insufficient to limit a father's visitation rights to daytime hours. In Re Marriage of Kerber, 433 N.W.2d 53 (Iowa App. 1988). Liberal visitation rights are in the best interests of the child. In re Marriage of Muell, 408 N.W.2d 774,777 (Iowa

App. 1987). This court finds nothing in the record that indicates physical or emotional harm to the children from granting very liberal visitation rights to Patrick. In order to assure the child maximum continuing physical and emotional contact with both parents, this court directs the trial court's decree on visitation be modified to allow Patrick visitation with his daughters Kaila and Karla every other weekend beginning Friday at 6:00 p.m. and ending Sunday at 6:00 p.m., and alternating holidays, including New Years, Easter, Memorial Day, Fourth of July, Labor Day, Thanksgiving, and Christmas. All holidays will be defined as 6:00 p.m. the day before the holiday and ending at 6:00 p.m. the day of the holiday, except Christmas Day, which is defined as the day school vacation begins at 6:00 p.m. to December 25 at 6:00 p.m., and New Years, which is defined as December 25 at 6:00 p.m. to January 1 at 6:00 p.m. The children will be with the Patrick every Father's Day and with the Candace every Mother's day, and with Patrick four weeks during the summer, to be exercised in a maximum of two-week periods. The noncustodial parent will notify the custodial parent of the schedule of summer visitation by May 1 of each year. Visitation is allowed at any other times the parties can agree. Patrick shall pick up and return the children to the residence of Candace and bear the expense of doing so.

CHILD SUPPORT

Patrick asserts the court erred in awarding a child support amount greater than that provided for in the Iowa Uniform Child Support Guidelines, because no special circumstances exist that justify a deviation. We agree.

The trial court in reasoning special circumstances for its deviation from the guidelines said:

> In view of the fact that we are dealing here with twins and respondent is living with his parents presumably without cost for room and board, the Court feels the guideline support level is much too low and should be exceeded.

The percentage payment under the Uniform Child Support Guidelines for two children based upon Patrick and Candace's net income is 26.8%. The fact the children are also twins is not a special circumstance justifying a deviation. Nor is the fact that Patrick is temporarily living with his parents any grounds to deviate the child support, particularly since the absence of expenses in such setting is only presumed by the court to exist. Absent special circumstances, this court modifies the trial court's determination of child support, directing Patrick to pay 26.8% or $87.00 per week.

INCOME TAX EXEMPTION

The trial court awarded Candace, the custodial parent, the income tax exemption for both daughters. Under the circumstances of this case we modify the trial court's award and direct Candace as the custodial parent to release

her right to one of the children's dependency exemption to Patrick, by executing IRS Form 8332. In so doing, each parent will receive one tax exemption each.

Except as modified, the trial court's decree is affirmed.

Each party will pay his or her own attorney's fees. Costs are taxed to the appellant.

AFFIRMED AS MODIFIED.