

IN THE COURT OF APPEALS OF IOWA

No. 7-768 / 97-0428

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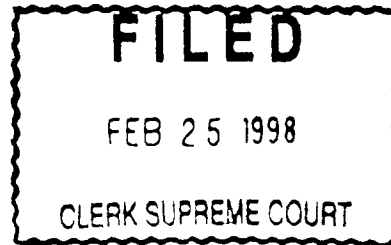
LAURIE A. BENZING,

Petitioner-Appellant,

vs.

MICHAEL R. BERNARD,

Respondent-Appellee.



Appeal from the Iowa District Court for Cerro Gordo County, Gilbert K. Bovard, Judge.

Laurie Benzing appeals the district court's award of primary physical care.

AFFIRMED AS MODIFIED.

Matthew F. Berry, Clear Lake, for appellant.

Kristy B. Arzberger of Arzberger Law Office, Mason City, for appellee.

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

PER CURIAM.

Petitioner Laurie Benzing appeals the decision awarding primary physical care of Katherine Bernard, the parties' child, to respondent Michael Bernard. She alleges the district court incorrectly determined Michael could better provide for Katherine because it failed to consider the relevant facts and circumstances. Laurie also requests child support should we modify the decision of the trial court. We affirm as modified.

Laurie and Michael were never married. Laurie filed a petition for paternity requesting the court grant both parties joint legal custody of Katherine and award her primary physical care. Michael filed an appearance and answer requesting the trial court award him primary physical care. The trial court chose to name Michael the primary physical custodian of Katherine.

Laurie contends Michael: (1) is too harsh in his discipline; (2) has little contact with family; (3) is not as close to Katherine as she is because of his need to work to attend to his financial problems; (4) is too structured, impatient, and intense; (5) fails to discuss important decisions with her; and (6) has a past history of drug use that makes him at risk to use drugs again.

Michael argues the trial court correctly determined he is the better choice and Laurie's allegations are unfounded.

I. STANDARD OF REVIEW. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. We give weight to the fact

findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. PRIMARY PHYSICAL CARE. The critical issue before us is the best interests of the children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This must, of necessity, be the first and controlling consideration in our discussion. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41, *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). The issue in determining the best interests of the children 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). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. *Winter*, 223 N.W.2d at 167. The objective should always be to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). Each custody decision is based on its own particular facts. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

Michael kept a daily log and contends the court should use this as evidence of his treatment and care of Katherine. Michael kept this log at the suggestion of

counsel. While it may be true logs can be helpful in custody cases, we find Michael wrote his log in a very self-serving and obsessive manner. For example:

6-4: Laurie came by and picked up Katie so that I could march in the parade for Habitat [for Humanity]. I spotted Laurie, Katie, Michelle, Steve, Amber, and Laurie's mom. Gave a special wave. (Katie spotted me and wanted to come to me).

.....
6-10: It's a beautiful day. Read my *Parents* magazine. Articles on safety. Katie slept well. Picked up Katie from sitters, went to video store, rented *Cool Running*. Katie and I went food shopping then home. We watched t.v. then read books. Katie went to bed.

We give little weight to this journal.

Although appropriate discipline is a factor in all custody decisions, the dispute here has distracted the able trial court from more important issues – that of who will be the better physical care parent over the years for this child. Michael's obsessive record keeping and his intolerance of Katherine's imperfections does not bode as well for Katherine as does the loving and nurturing environment Katherine has enjoyed with Laurie.

The facts show Laurie has the closer interpersonal relationship with Katherine. The parties have recently shared physical care of Katherine; however, Laurie has historically been the primary care giver. Laurie will also be able to foster close contact with Katherine's extended family. Michael, because of his unfortunate upbringing, will not be able to provide the same environment. This factor is not pivotal, but it is one of the many factors to be considered along with the other facts and circumstances. See *In re Marriage of Guyer*, 238 N.W.2d 794, 796 (Iowa 1976).

Further, Michael's inconsistent answers during discovery regarding his treatment for cocaine addiction are troubling.

For these reasons we find the trial court erred in its determination of who should be awarded primary physical care and we modify the decision to award Laurie primary physical care of Katherine.

III. CHILD SUPPORT. Because we have transferred primary physical care to Laurie, we must also address the issue of child support. The child support guidelines are strictly followed in determining a parent's child support obligation. *State ex rel. Miles v. Minar*, 540 N.W.2d 462, 464 (Iowa App. 1995). "In applying the child support guidelines, the court must determine the parents' current monthly income from most reliable evidence presented." *In re Marriage of Hart*, 547 N.W.2d 612, 615 (Iowa App. 1996). "This often requires the court to carefully consider all of the circumstances relating to parents' income." *Id.* All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligation. *In re Marriage of Russell*, 511 N.W.2d 890, 893 (Iowa App. 1993). Deduction of alimony payments from monthly income for the purposes of computation of child support is within the discretion of the court. *Id.* at 892.

Neither party appears to challenge the income amounts as set by the trial court. Thus, we determine Laurie's net monthly income to be \$1340.04, and Michael's net monthly income to be \$1428.64. Accordingly, we set Michael's child support obligation at \$321.44. We also conclude Michael shall be entitled to claim Katherine

as a dependent for income tax purposes for tax years commencing in 1998, conditioned upon his being current in his child support obligation for the tax year in question. Laurie will execute and deliver appropriate IRS authorizations for this purpose in a timely fashion. This obligation shall be effective upon the filing of this decision.

We order Michael to pay all court costs on appeal.

For the reasons set out above, we affirm as modified and award Laurie primary physical care and child support, and order Michael to pay court costs on appeal.

AFFIRMED AS MODIFIED.