FILED
OCT 23 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

298

IN RE THE MARRIAGE OF LINDA M. FOUDREE AND BRUCE W. FOUDREE

UPON THE PETITION OF)
LINDA M. FOUDREE,
)
Petitioner-Appellant/Cross-Appellee,
)
AND CONCERNING
BRUCE W. FOUDREE,)
Respondent-Appellee/Cross-Appellant.)

Filed October 23, 1984

4-298
83-1541

Appeal from the Iowa District Court for Polk County, Richard A. Strickler, Judge.

The petitioner-wife appeals from a dissolution decree, challenging the trial court's award of child custody to the husband. The husband cross-appeals, challenging the visitation schedule and the division of property. AFFIRMED AS MODIFIED.

Robert H. Laden and Thomas P. Schlapkohl of Hyland, Laden & Pearson, P.C., Des Moines, for petitioner-appellant/cross-appellee.

F. H. Becker of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, Des Moines, for respondent-appellee/cross-appellant.

Heard by Oxberger, C.J., Schlegel, and Hayden, JJ.

This appeal involves the custody of the parties' minor child. The court awarded sole custody to respondent, Bruce Foudree, with visitation for petitioner, Linda, on each weekend. We affirm as modified.

Linda, the petitioner on appeal, is thirty-three years old and is a staff pediatrician at Blank Children's Hospital in Des Moines. Bruce is thirty-five years old, has a law degree from Drake University, L.L.M. from the University of Pennsylvania, and is currently serving as Insurance Commissioner for the State of Iowa. The couple were married for seven years when the marriage was dissolved in June 1983. They have one son, Andrew, born April 9, 1976. He is an emotionally and physically healthy, bright child, who is very active. The record is abundant with information showing that both parties are loving, attentive, supportive, and devoted parents. The court appointed a custody investigator, Dr. Todd Hines, to report to the court on his recommendations. His expertise in this matter was brought out in trial and is substantial. He confirmed that either parent would provide excellent care for the child. Under extensive questioning by the court, he stated that the parents were equal in nearly every consideration regarding parenting abilities. The only difference he noted was to give Linda a slight edge in sensitivity to Andrew's emotional needs. Dr. Hines also pointed out the couple had a problem with communication regarding the child. He noted they are competitive people and that each could be self-centered, demanding, mistrustful, manipulative, and capable of putting their own needs ahead of those of the child. However, he strongly recommended both joint legal and physical custody of the child, saying that they were capable of communicating and needed only a push in that direction. He further pointed out the couple had managed to communicate regarding Andrew to the degree that they maintained what was in effect joint physical custody for eighteen months during the pendancy of the trial.

The trial court found the parents had an equal parenting ability in nearly all respects. It found, however, that the couple could not communicate to the

degree necessary for an award of joint custody. It noted that Dr. Hines said when the couple was "forced" to communicate, they were capable of it and said, "That poses a critical question; who will, for the next decade and a half, force the parties to communicate?" Based on this, the court awarded sole custody to Bruce. In commenting on the custody award, it added that Bruce testified he felt that Andrew had suffered somewhat from the separation and divorce, while Linda said she thought Andrew had adapted well to it. The court said this showed Bruce was more in tune with Andrew's emotional needs.

Bruce says that we should not set aside the court's decision, and that if any change is to be made, Linda should get less visitation. The review of an equity action is de novo, but the court gives deference to the trial court decisions regarding credibility of witnesses. Iowa R. App. P. 14(f)(7). In addition to restating the court's basis for its determination, Bruce points out numerous instances in which the couple could not agree regarding Andrew's welfare. Linda wanted Andrew to go to Hubbell School, near her, while Bruce wanted him to attend Rice, which would be near Bruce's home. Dr. Hines recommended two neutral schools, one of which was not available, the other vetoed by Bruce. Bruce also claims difficulties in settling issues regarding Andrew's schedule and what religion should be offered to the child. These facts, Bruce says, are similar to that found in In re Marriage of Weidner, 338 N.W.2d 351 (Iowa 1983), where the couple was unable to communicate regarding their children's needs, and sole custody instead of joint custody was awarded as a result. Id.

Linda argues that the courts must look to the best interests of the child, and points out Dr. Hines's statement that Andrew needs both of his parents. Since they cannot remain married, Dr. Hines says, joint custody would be in his best interests. Each parent has agreed the other should have maximum possible contact with the child. The residences of each parent are only ten minutes away

from each other. Linda also points out that any communication problems that existed primarily came because of Bruce's lack of cooperation, but that they have still managed to share custody while awaiting the decree.

We first note that the best interest of the child is our primary concern. Iowa R. App. P. 14(f)(15). Joint custody is preferred, and a list of factors relevant to the consideration of legal custody is set forth at section 598.41(3) of the Iowa Code.

Lack of communication is one factor set forth to be considered in awarding joint custody. Iowa Code § 598.41(3)(c)(1983). No doubt our legislature was aware that in a divorce the parties generally are not getting along well. Therefore, we believe a lack of ability to communicate must mean something more than the usual acrimony that accompanies a divorce. This was recognized by the court in In re Marriage of Bolin, 336 N.W.2d 441, 444-45 (Iowa 1983). The court awarded joint legal custody in that case, which involved more disharmony and unpleasant situations than those here. The husband attempted to take the child from the mother, and eventually refused to return the child after visitation had expired. Id. Despite this, the court found the couple had a good attitude regarding their child and that an inability to agree on physical custody does not mean the couple cannot communicate sufficiently for joint custody. Id. at 445.

We also recognize the reality of the adversarial nature of a divorce and custody contest is a factor to be considered regarding the couple's difficulties. Both were in favor of joint custody originally. However, when it became apparent the court might consider awarding sole custody to one parent or the other, each became concerned they might become the noncustodial parent. It was admitted at trial that part of the battle over which school Andrew would attend was a perceived advantage that might be obtained if he were to attend school near one or the other parent's home. Despite this, and the natural competitiveness of two talented and successful people, they managed to communicate for eighteen

months without undue problems regarding Andrew. We agree with Dr. Hines that this is evidence the parties can communicate when it comes to Andrew's needs. They are intelligent people, and we believe the motivating force that will make them communicate is the same force that enabled them to communicate for eighteen months; a concern for Andrew.

In addition, our courts have cautioned that no one factor on the list of those to be considered is to be set out or unduly emphasized. In re Marriage of Weidner, 338 N.W.2d at 358. Instead, the quality of the total family custodial setting must be determinative. Id.

We believe the communication difficulties of the parties falls far short of that necessary to dissuade the court from granting joint legal custody and reverse the trial court on this issue.

In determining physical custody, we look at all the factors we have discussed already and those set out at In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). In his recommendation, Dr. Hines noted the couple have complimentary psychological styles, that Bruce is more cognitive, rational, and intellectualized in his approach, while Linda is more emotional, sensitive, and feeling in her approach. These styles counterbalance each other, and together benefit Andrew, Dr. Hines reports. He comments, "Sole custody for either parent or clear primary custodianship is likely to be destructive to the potential opportunity for this youngster to utilize the unique combination of human characteristics available through equal and shared contact with his parents; sometimes such a situation is unavoidable but in this case it is not." He adds, "This situation represents an ideal set of conditions for joint custody, including joint physical custody." Dr. Hines recognized that joint physical custody is unusual, and rarely warranted, but in this case provides for the best interests of Andrew and will work. This is in part

because Linda works weekends, while Bruce works weekdays. Andrew could be with his mother from Monday through Thursday and then with his father from Friday through Sunday.

Joint physical custody is rarely considered, but in this case we believe it is warranted. Under the situation the trial court has arranged now, Andrew spends the maximum amount of time with babysitters or third parties, and the mimimum amount of time with either parent. He must be with a third person caretaker until 5:00 p.m. each day when his father returns from work. Since his mother works weekends, and is given visitation on weekends, he again must be with third person caretakers until his mother returns from work. The parent awarded sole custody, we have noted, is entitled to be more than a servant to the child, and on that basis we have allowed the one with sole custody an occasional weekend with their child. In re Marriage of Weidner, 338 N.W.2d at 359. This situation arranged by the court means both parents are prevented from being more than servants to the child. It appears ludicrous to pass up a situation where he may spend more time with his parents instead of a babysitter. With joint physical custody, he will be with his mother during the week when she does not work and with his father on weekends when he does not work.

Bruce claims any arrangement of joint physical custody or visitation for Linda on every weekend will be unduly disruptive to Andrew. He compares it to the situation of In re Marriage of Weidner, where the court reversed a decision allowing visitation every weekend. Id. However, that case is factually quite different from this one, and was replete with conflicts and strife which affected the children. There the father repeatedly disrupted the children's life and filled them with stories intended to frighten them. Id. at 357. He was also involved with an open and intimate relationship with another woman, a relationship that concerned a family therapist. Id. The court also ordered ten to twelve months of post decree therapeutic work with the family. Id. Such is far from the situation

here. In that case the court also dealt with the typical arrangement where both parents worked weekdays. Id. at 354, 359.

Bruce also brings up the case of In re Marriage of Guyer, 238 N.W.2d 794 (Iowa 1976). There the court refused visitation every weekend, stating, "the weekly visits are unduly disruptive." Id. at 797. The court did not elaborate on its basis for this decision and there is no way we can compare this case to that case. Justices LeGrand and Mason noted in their dissent that they disagreed with the statement the visitation would be disruptive, commenting, "I think this sweeping statement is both ill-advised and unjustified. Undoubtedly some cases present facts in which weekly visitation should not be ordered. There are not such circumstances here." Id.

This record shows that joint physical custody will work with this couple. Their schedule for the eighteen months prior to the decree shows nearly every week of that time Andrew spent four days with one parent and three days with the other. He appears to remain a healthy child at the end of this time.

We reject any determination that Linda should not be given physical custody because she does not perceive problems with Andrew's adjustment to the divorce. The court in making its determination, with this as a part of its basis, presumes that Bruce is correct when he says Andrew has some adjustment problems. In so doing, it dismisses the observations of Linda, a pediatrician, and Dr. Hines, an impartial third party and a psychologist trained in this area. Any view Linda has in this regard does not adversely reflect upon her parenting abilities.

For these reasons we award joint physical custody to the parties, with Andrew's care placed with Linda Monday through Thursday and placed with Bruce from Friday through Sunday.

Bruce also raises on cross-appeal the claim that he should be awarded an amount for his contributions to Linda's education. Considering all the factors set

out at section 598.21(1) of the Code, we decline to disturb the trial court property settlement.

We remand for entry of an order consistent with this decision.

AFFIRMED AS MODIFIED.