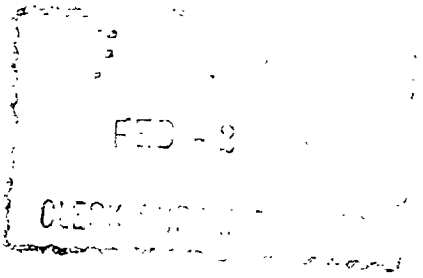
IN THE COURT OF APPEALS OF IOWA



No. 5-627 / 95-0492

IN RE THE MARRIAGE OF PAUL K. ANDERSON AND JARICA R. ANDERSON

Upon the Petition of
PAUL K. ANDERSON,

Appellee,

And Concerning
JARICA R. ANDERSON,

Appellant.

Appeal from the Iowa District Court for Linn County, Larry Conmey, Judge.

Jarica Anderson appeals the decree dissolving her marriage to Paul Anderson, contending the district court erred in awarding primary physical care of their daughter to Paul. **MODIFIED AND REMANDED.**

Deborah J. Hughes of Irvine & Robbins, Cedar Rapids, for appellant.

William F. Olinger and John A. Stitely of William F. Olinger Law Firm, Cedar Rapids, for appellee.

Heard by Habhab, P.J., Cady, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

SCHLEGEL, S.J.

This appeal from a dissolution proceeding involves the issue of the placement of the primary physical care of the parties' daughter. Upon our de novo review, Iowa Rule of Appellate Procedure 4, we direct the child be placed in her mother's physical care. We modify the decree to order the father to pay child support and remand for a determination of a visitation schedule compatible with the parents' present situation.

I. CUSTODY

Jarica and Paul Anderson were married on October 10, 1992. The parties moved from Indiana to Cedar Rapids, Iowa in September 1993. Paul worked as a news anchor in Cedar Rapids and Jarica was employed with a temporary employment agency. She worked until the parties' only child, Kailey, was born in Cedar Rapids on January 8, 1994.

Paul filed a petition for separate maintenance in July 1994, and Jarica filed an answer and counterclaim for dissolution of the marriage in August 1994. Due to financial constraints, the parties continued to reside together throughout the dissolution proceedings. The dissolution trial was held on December 20 and 21 and a decree of dissolution was filed on January 10, 1995. The decree awarded Paul the primary physical care of Kailey. Jarica appeals this award.

Our first and governing consideration in child custody cases is the best interest of the child. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995). The factors to consider in awarding custody are found in our statutes as well as prior cases. *See* Iowa Code § 598.41(3) (1993); *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983). These factors essentially bear on what will be in the long-term best interest of the child. *Wilson*, 532 N.W.2d at 495. The critical issue is which parent will do better in raising the child. *Id.* Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *Weidner*, 338 N.W.2d at 356.

The parent who served as the primary caretaker during the marriage will not necessarily be awarded the physical care of the child by the dissolution court. *Wilson*, 532 N.W.2d at 495. However, the role of primary caretaker is critical in the development of children and careful consideration is given in custody disputes to allowing children to remain with the parent who has been the primary caregiver. *Id.*

Pursuant to the agreement of the parties, Jarica did not work outside the home after Kailey was born and served as her primary caretaker. In response to temporary orders entered by the district court in September 1994, Jarica obtained outside employment. Her job was part-time and her work hours did not conflict with those worked by Paul so Kailey was always in the care of one of her parents and did not need a day care provider.

In awarding Kailey's physical care to Paul, the district court noted he had a much greater earning capacity, a supportive family and seemed more stable and happy with his life than Jarica was with hers. Paul's testimony regarding Jarica had been highly critical of her family, and he had contended Jarica suffered from recurrent bouts of depression. The record reveals Jarica had only limited contact with her family and any depression she suffered appeared to be related to the death of her mother, the dissolution of her marriage or was the normal consequence of pregnancy and postpartum conditions.

The disparity in the parties' earning capacities is attributable in large part to the differences in the parties' ages and levels of education. At the time of trial Paul was thirty-eight, a college graduate and was employed as a news anchor. Jarica was only twenty-four, had one year of college education and was only employed part-time.

Evidence was offered at trial to establish Jarica had few connections to Cedar Rapids and would be returning to her hometown in Texas following the conclusion of the dissolution proceedings. She had made arrangements to live with friends and provide child care in exchange for a place to live. Jarica had also made contacts regarding the possibility of returning to a part-time job she had held when she lived in Texas.

There was evidence to indicate Paul was actively looking for a larger news market in which to work and would not necessarily remain in Cedar Rapids for any

considerable amount of time. Such a move would be consistent with his history of moving from market to market in an attempt to obtain larger audiences and better anchor positions.

Regardless of which parent was awarded custody, arrangements would have to be made to facilitate a long-distance parenting relationship. The record reveals Jarica had made efforts to read and obtain expert advice about this situation in order to prepare the parties for visitation transfers and to foster Kailey's relationship with her noncustodial parent.

This is a difficult case. Both Jarica and Paul are fit parents and could provide adequate care and a loving home for Kailey. Neither Jarica's desire to return to Texas nor the likelihood Paul will move to a larger market makes either less qualified to serve as Kailey's caretaker. *See e.g., In re Marriage of Stickle*, 408 N.W.2d 778, 780-81 (Iowa App. 1987) (appropriate to award mother physical care despite her intent to relocate outside of state).

Based upon our de novo review, we conclude Kailey should be placed in Jarica's care. From the time of her birth Jarica acted as Kailey's primary caretaker. Her role as primary caretaker is not diminished by the fact Paul increased his role as a caretaker after the district court directed Jarica to seek employment. Jarica intended to obtain combined housing and employment in Texas which would allow her to continue to act as Kailey's caretaker and minimize the need for an outside care provider. Her lower level of income and the uncertainty in her future plans do not

automatically negate her ability to provide stability for Kailey. *See e.g., In re Marriage of Riddle*, 500 N.W.2d 718, 719 (Iowa App. 1993).

Of additional significance in this case are Jarica's efforts to obtain knowledge on how to best facilitate long-distance visitation and custody transitions for Kailey. Jarica's testimony was far less critical of Paul than his testimony was of her. Jarica appears more likely than Paul to maximize visitation and a continuing relationship between Kailey and her noncustodial parent. We direct Kailey be placed in her mother's primary physical care.

II. VISITATION

The district court established a visitation schedule based on the presumption Jarica would remain in Cedar Rapids, Iowa, despite her expressed intent to return to Texas. We remand for the entry of a visitation schedule for Paul if the parties are not otherwise able to reach an agreement on visitation.

III. CHILD SUPPORT

Due to the change in physical care, Paul must commence paying child support to Jarica. Paul earns $34,000 a year and has a net monthly income of $2,050. Jarica had a net monthly income of $245. Utilizing the child support guidelines which went into effect on July 1, 1995, Paul's monthly child support obligation is $487.90.

IV. ATTORNEY FEES AND COSTS

Jarica requests an award of appellate attorney fees and costs. Paul also requests an award of appellate attorney fees. An award of attorney fees rests within the court's discretion. Jarica is the prevailing party in this action. Given the outcome of this appeal and the disparity in the parties' incomes, we find it equitable to order Paul to pay $1,000 of Jarica's appellate attorney fees. We direct Paul to pay the costs of this action.

MODIFIED AND REMANDED.

Cady, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm the trial court. I agree with the majority this is a difficult case and both Jarica and Paul are fit parents to care for and provide a loving home for Kailey. This is the very reason why I would affirm the trial court. The trial judge had the witnesses before him and the opportunity to observe first-hand their conduct and demeanor. I would affirm.