IN THE COURT OF APPEALS OF IOWA

No. 0-672 / 00-494
Filed November 20, 2000

IN RE THE MARRIAGE OF AIMEE NICOLE DUBENDORF AND DAVID EUGENE DUBENDORF

Upon the Petition of
AIMEE NICOLE DUBENDORF,
Petitioner-Appellee,

And Concerning
DAVID EUGENE DUBENDORF,
Respondent-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Story County, Carl D. Baker, Judge.

David Dubendorf appeals the child custody, visitation, and support provisions of the parties' dissolution decree. **AFFIRMED.**

William T. Talbot of the Parker Law Firm, Nevada, for appellant.

Stephen M. Terrill of Terrill & Martens Law Offices, Ames, for appellee.

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

HUITINK, P.J.

I. Background Facts and Proceedings.

Aimee and David Dubendorf's marriage was dissolved on February 10, 2000. They were awarded joint legal custody of their three-year-old daughter, Lauren. The district court granted Aimee primary physical care of Lauren, subject to David's right to visitation.

At the time of trial, Aimee was working part time as a hostess in a restaurant. She had just earned her bachelor's degree in elementary education and was seeking employment as an elementary teacher. The district court determined Aimee's net monthly income was $804.54. David was employed as a journeyman electrician. The court found his net monthly income was $2183.32.

On appeal David contends the district court erred in awarding physical care to Aimee and in failing to impute Aimee's future teaching salary to her for purposes of child support calculations. Alternatively, David asks for increased visitation, arguing that the court failed to grant liberal visitation. Aimee requests an award of appellate attorney fees.

II. Standard of Review.

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).

III. Physical Care.

In child custody cases, our first and governing consideration is the best interests of the children. The critical issue is not which parent possesses the greater right to the child; rather the controlling consideration must be the best interests of the child. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the child. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). The objective should always be to place the child in the environment most likely to bring that child to healthy physical, mental, and social maturity. *See In re Marriage of Rebouche*, 587 N.W.2d 795, 797 (Iowa App. 1998). The court should also consider the characteristics and needs of the child, including the child's age, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the child, the relationship of the child with each parent, the nature of each proposed environment and the effect of continuing or changing an existing custodial status. *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).

There is no presumption in favor of the mother or the father. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). Greater primary care experience is one of many factors the court considers but it does not ensure an award of physical care. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995). Insofar as is reasonable and in the best interests of the child, the

court should make an award of custody which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents and which will encourage the parents to share the rights and responsibilities of raising the child. *See* Iowa Code § 598.41(1) (1999); *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979).

David contends the evidence indicates he is the preferred physical care provider for Lauren. He cites testimony from friends and family concerning his primary care experience and ability to provide a wholesome environment for Lauren. This evidence weighs heavily in his favor. We also note the record is devoid of evidence that would disqualify or otherwise cast doubt on his ability to provide for Lauren's physical care. We expressly reject any suggestion that David is motivated by ill will toward Aimee or that his physical care demands are intended to punish her.

In its decree the district court said:

> Aimee has more child-raising experience, and this practical experience obtained during her life is enhanced by her college education and her effort to advance her knowledge concerning the parent-child relationship and child development. In addition, Aimee has been the parent who has been primarily responsible for Lauren's daily care. This is not a criticism of David, who has been primarily responsible or the financial resources of the family. However, Aimee has provided Lauren with excellent care, and after Lauren was born Aimee left Iowa State University to care for her daughter for approximately eighteen months.
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> This Court agrees with Kenneth Riedel [the child custody evaluator], who concluded that Aimee and David would both be good parents for Lauren. This is one of those cases where the decision concerning custody will not disadvantage Lauren either way; however, this Court believes that on balance the scale is tipped in favor of Aimee.

After reviewing the record, we reach the same conclusion and adopt these findings as our own. We accordingly affirm on this issue.

In reaching this conclusion we do not intend to minimize David's past or future parental role. As a joint custodian, David enjoys considerable parental rights and duties. *See* Iowa Code § 598.41. We trust that any initial disappointment with our decision will not discourage David in the exercise of those rights or discharge of his parental duties. His continued commitment to parenting Lauren is essential to her immediate and long-term best interests.

Lastly, we acknowledge counsel's zealous advocacy and devotion to the equity of David's cause. We are, however, dismayed by counsel's assertion that the district court's decision was influenced by notions of gender preference or bias. Our review of the record reveals no more than an honest disagreement on the relative merits of the parties' physical care demands. We urge counsel to reconsider any contrary opinion or at least be more circumspect in its future expression.

IV. Child Support.

David also argues that the trial court incorrectly determined Aimee's income for child support purposes. He argues Aimee's income should be based on her earning capacity as a schoolteacher.

It is appropriate to consider earning capacity rather than actual earnings in applying the uniform guidelines. *In re Marriage of Bonnette*, 492 N.W.2d 717, 722 (Iowa App. 1992). Each parent has a duty to provide support according to his or her ability to pay. *Iowa Dep't of Human Servs. ex rel. Gonzales v. Gable*,

474 N.W.2d 581, 583 (Iowa App. 1991). However, before using earning capacity rather than actual earnings, a finding must be made by the court that the use of actual earnings would create a substantial injustice or that adjustments would be necessary to provide for the needs of the children and to do justice between the parties. *Bonnette*, 492 N.W.2d at 722. The relevant factors to consider in assessing earning capacity include employment history, present earnings, and reasons for failing to work a regular workweek. *See Gable*, 474 N.W.2d at 583.

We find that the court properly considered Aimee's actual earnings when applying the guidelines at least until she secures a teaching position. We accordingly affirm on this issue.

V. Visitation Rights.

David also contends that the trial court failed to grant liberal visitation. The district court's decree provided as follows:

> The visitation to be exercised by David with Lauren will be as follows:
>
> A. Every-other weekend from 6:00 p.m. on Friday until 6:00 p.m. the following Sunday. . . .
>
> B. One (1) weekday evening each week from the time David gets off work until 8:00 p.m.
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> C. The parties shall alternate visitation on major holidays . . . . If the major holiday falls on a weekend visitation for David, he shall be entitled to keep Lauren Sunday night through the conclusion of the holiday visitation on Monday until 7:00 p.m. David shall also be entitled to visitation with Lauren on her birthday at times to be arranged by the parties.
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> D. David shall be entitled to visitation with Lauren on Father's Day from 9:00 a.m. until 7:00 p.m. . . . In addition, David shall be entitled to a visitation with Lauren on his birthday at a time to be arranged by the parties.
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> E. David shall be entitled to visitation with Lauren for one-half (1/2) of the Christmas school break each year, and this shall include Christmas Day every-other year commencing with the year 2000.

F. David shall be entitled to visitation each year with Lauren for one-half (1/2) of the school spring break period.

G. David shall be entitled to three (3) weeks of visitation with Lauren in the summer months of June, July and August. This summer visitation shall conclude at least one (1) week prior to the commencement of the school year.

Aimee shall be entitled to have Lauren in her physical care every Mother's Day and on Aimee's birthday. Aimee shall also be entitled to have Lauren on Christmas Day every-other year commencing with the year 2001.

Liberal visitation rights are in the best interest of the child. *In re Marriage of Muell,* 408 N.W.2d 774, 777 (Iowa App. 1987). The court shall order liberal visitation rights, where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents. Iowa Code § 598.41(1) (1999). Although liberal visitation is the benchmark, our governing consideration in defining visitation rights is the best interests of the children, not those of the parent seeking visitation. *See In re Marriage of Stepp,* 485 N.W.2d 846, 849 (Iowa App. 1992). It is important not to impose a shared-type of physical care arrangement under the disguise of expansive visitation because it deprives children of the needed stability in their lives. *In re Marriage of Roberts,* 545 N.W.2d 340, 343 (Iowa App. 1996).

Applying these principles, we find that the goal of stability gives rise to a conclusion that the visitation awarded is in Lauren's best interest. We accordingly affirm on this issue.

VI. Attorney Fees.

Aimee requests an award of 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 circumstances of the parties in this action, we do not find equity warrants an award of appellate attorney fees to Aimee.

AFFIRMED.