IN THE COURT OF APPEALS OF IOWA

No. 7-625 / 97-0164

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IN RE THE MARRIAGE OF JAMES G. GATROST AND TEDI L. GATROST

Upon the Petition of
JAMES G. GATROST,

Petitioner-Appellant,

And Concerning
TEDI L. GATROST,

Respondent-Appellee.

FILED
JAN 28 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Harrison County, Gordon C. Abel, Judge.

Petitioner appeals from entry of the dissolution decree. **AFFIRMED AS TO THE ISSUE OF PRIMARY PHYSICAL CARE; AFFIRMED BY OPERATION OF LAW AS TO THE ISSUE OF CHILD SUPPORT.**

G. Elizabeth Otte, Council Bluffs, until withdrawal, and then Kellie Rae Taylor, Council Bluffs, for appellant.

Richard B. Maher, Glenwood, for appellee.

Heard by Huitink, P.J., and Vogel and Mahan, JJ, but decided en banc.

MAHAN, J.

Petitioner appeals from the entry of the dissolution decree. He argues the trial court erred in awarding respondent primary physical care of the parties' minor children. He also contends the trial court improperly included his overtime pay in calculating child support. We affirm on the issue of primary physical care, and affirm by operation of law on the issue of child support.

James and Tedi Gatrost were married on January 6, 1990. They have two children, Jessica, born June 28, 1990, and Gregory, born August 12, 1991. James also has a daughter, Jennifer, from a previous marriage who lived with the family.

James filed for dissolution of the marriage on April 19, 1996, but the parties worked out an agreement whereby they would both live in the marital home pending the filing of the decree. James was thirty-five years of age and Tedi was twenty-five at the time of trial. James was employed as a machinist for Omaha Standard. The trial court found his net monthly disposable income to be $1530. The court noted he worked seasonal overtime and included this income in determining his child support obligation. Tedi was employed as assistant manager at Hardee's with a net monthly disposable income of $1038.

Evidence was presented at trial of James's past alcohol dependence and use of controlled substances. He had an alcohol-related accident in 1992 and was convicted of OWI in 1993. James admitted using marijuana over the years and to using it in the

home when the children were in another room. He also admitted using marijuana while on probation for the OWI charge and admitted to experimenting with crank. Tedi alleged James sold marijuana in the past, but James admitted only to delivering it.

Evidence was also presented of Tedi's past use of alcohol and marijuana, and her use of crank for a period of two months. The crank had been provided to her by James.

Bonnie Galloway, a licensed mental health counselor, conducted a home study and testified at trial. She testified both parents were qualified to have primary physical care of the children, but she recommended it be awarded to James.

The trial court found Tedi to have been the primary care giver of the children. He found her to be a more credible witness than James. The court also found the recent care giving efforts by James "do not reflect his usual level of care and attention given these children since birth." The trial court also found James was not completely honest with Bonnie Galloway concerning his own shortcomings and in overstating his perceptions with regard to Tedi's shortcomings. Finally, the trial court found Tedi would be more likely to promote continued contact between the children and James. The court cited James's actions in unilaterally changing the children's doctor and cutting Jessica's hair short without consulting Tedi. He also cited an incident where James moved Tedi out of the couple's bedroom and gave the room to his daughter,

Jennifer. James then instructed Jennifer to have nothing to do with Tedi. The court summarized by stating, "the conduct by James Gatrost during the pendency of this action in controlling the children without any input from Tedi is consistent with the characterization of his personality type in Galloway's report as a controlling and demanding individual."

The court awarded primary physical care to Tedi and set James's child support obligation at $459 per month for two children, reduced to $334 per month when only one child needs the support.

I. SCOPE 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 and in *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 children; gender is irrelevant and neither parent should have a greater

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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 2d 394, 397 (Iowa 1992).

The trial court heard the evidence in this case and was able to observe the demeanor of the witnesses firsthand. We have reviewed the evidence in this case and affirm the award of primary physical care to Tedi.

III. CHILD SUPPORT. The trial court included overtime earnings in setting James's support level at $459 per month for two children, reduced to $334 per month for one child. We affirm on this issue by operation of law. *See* Iowa Code § 602.5106(1) (1997).

IV. ATTORNEY FEES. Both parties have requested appellate attorney fees. In determining whether to award attorney fees on appeal, our decision is guided by the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Geil*, 509 N.W.2d at 743. We determine neither James nor Tedi should be awarded appellate attorney fees.

AFFIRMED AS TO THE ISSUE OF PRIMARY PHYSICAL CARE; AFFIRMED BY OPERATION OF LAW AS TO THE ISSUE OF CHILD SUPPORT.

For affirmance: Cady, C.J., and Streit and Vogel, JJ.

For modification: Sackett, Huitink and Mahan, JJ.