IN THE COURT OF APPEALS OF IOWA

No. 7-113 / 06-1552
Filed June 13, 2007

**IN RE THE MARRIAGE OF JULIE E. PALEK
AND SHAWN G. PALEK**

**Upon the Petition of
JULIE E. PALEK,**
Petitioner-Appellant,

**And Concerning
SHAWN G. PALEK,**
Respondent-Appellee.

Appeal from the Iowa District Court for Story County, William J. Pattinson, Judge.

Julie Palek appeals from the child custody provisions of the decree dissolving her marriage to Shawn Palek. **AFFIRMED.**

Matthew Boles of Parrish, Kruidenier, Moss, Dunn, Boles, Gibble & Cook, L.L.P., Des Moines, for appellant.

Linda Murphy of Murphy & Parks, P.L.C., Des Moines, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

Julie and Shawn Palek married in 1994 and had two children: Sydney, born in 1997, and Sawyer, born in 2002. When the parents divorced twelve years later, the district court granted Shawn physical care of the children. On appeal, Julie takes issue with this portion of the dissolution decree.

I. Physical Care

The "first and governing consideration" in child custody cases is the long-term best interests of the child. *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984). Julie contends the children's best interests would have been better served had the district court placed the children with her. She cites the following factors: (A) she is more financially stable than Shawn; (B) a child-custody evaluator recommended her as the physical caretaker; (C) Sydney expressed a preference to have her serve as the physical caretaker; and (D) she is the better caretaker. Our review is de novo. Iowa R. App. P. 6.4.

A. Financial Stability

Julie maintains her "'employment history' demonstrates that she, rather than Shawn, is more likely to make career decisions necessary to provide for the children." We disagree.

Julie, like Shawn, obtained an AA degree in Commercial Art. Until 2003, she worked for a company that paid her approximately $44,000 annually. In 2003, Julie transferred to a lower-paying job. About one month before trial, Julie accepted a job near Chicago. Although her gross income was to increase to $3626 per month and she was eligible for bonuses estimated at two percent of her salary, her expenses were also slated to increase significantly. In particular,

her monthly rent payment almost doubled and her child care expenses were to rise from zero to $360 per month, assuming she was granted physical care. These figures support the district court's finding that "the increase in Julie's living expenses in Illinois makes this move economically non-feasible."

We recognize that Julie was the primary wage earner during the marriage. We also recognize that Julie reluctantly opted to assume this role to accommodate Shawn's dream of becoming a custom airbrush painter. Her decision to seek a job that provided a regular income stream and family health insurance was laudable. However, the record provides no cogent explanation for why she left a job that afforded her both for an out-of-state position that did not measurably improve her financial circumstances. We concur with the district court that this decision was inimical to the children's well-being.

Julie's decision is particularly surprising in light of the significant daily interaction each parent had with the children. When Sydney was four years old, Shawn was working as a freelance artist out of the parties' home in Slater. Given his flexible hours, it was decided that he would begin caring for Sydney during the day rather than continue to send her to an outside day care provider.[1] When Sawyer was born in 2002, Julie stayed at home with him for approximately six weeks. After she returned to work, Shawn became both children's primary caretaker.

In 2003, Shawn opened a custom paint shop in Des Moines. He equipped the shop with a kids' room containing the amenities of a day care center as well

[1] This decision was precipitated by the closure of the day care center that Sydney had been attending.

as video cameras to monitor the children from other parts of the shop. He cared for the children every weekday from before 8:00 a.m. until 5:30 or 6:00 p.m. While Julie faults Shawn for keeping the children "locked up" in the kids' room, the record reveals that the children were at home until 11:00 a.m. or noon, as Shawn generally worked from noon to 8:00 p.m. When Sydney began school in Slater, Shawn dropped her off in the mornings, stayed home with Sawyer till 11:00, went to the shop by noon, drove from Des Moines to Slater to pick Sydney up after school, and returned to his business with her for a couple of hours. This arrangement essentially continued after the parents separated.[2]

It is clear from this summary that both parents were actively involved in the children's lives on a daily basis. It is also clear that Shawn chose a career path that allowed him to serve as the children's primary caretaker. His business partner testified as much, stating Shawn's kids "always came first." Shawn's lower earnings relative to Julie's reflect this choice.

In sum, we agree with the district court that Julie's higher earnings and steady income stream do not render her the more financially stable parent. In particular, her decision to accept a financially tenuous position in another state foreclosed the joint physical care arrangement the parents had successfully implemented.

B. Child Custody Evaluation

A child custody evaluator presented the district court with an assessment of the Palek family and a physical care recommendation. She commended both

[2] During the school year, the parents alternated week night care every two nights and alternated weekends. In the summer, Julie took care of the children in the evenings on all but one night per week.

parents for their "strong parenting" of the children and found "no concerns about the strength or stability of the parent/child relationships." In light of this assessment, she opined that "[i]f Julie stayed in her current position and remained living in Huxley there would be no question that joint physical care would be recommended and supported as the best option for these children." Turning to Julie's move, she continued, "[t]he reality that Julie is making a career (and perhaps personal) move significantly complicates every aspect of the children's and adults' lives." She acknowledged that

> [u]nder these circumstances, Julie's decision to move to Chicago would suggest that she be the one to adapt to and cope with the implications and conditions imposed by such a move while the children continue to experience the familiarity and stability of their current life.

Nevertheless, she concluded that the children's relative youth and Sydney's expressed desire to be with her mother gave Julie a "slight edge" over Shawn in the physical care calculus.

Julie maintains the district court "diminished the value of" this recommendation. To the contrary, the court accurately summarized the custody evaluator's recommendation for placement with Julie "as the second-best option necessitated by the functional realities occasioned by Julie's move to Illinois." There is no question that the children benefited from daily contact with Julie and that they would continue to benefit from that level of contact. However, the same can be said of the children's contact with Shawn. Under these circumstances, we conclude the district court acted equitably in opting to grant physical care to the parent whose work and home environment was established versus the parent

who chose to reconfigure both for questionable financial reasons shortly before the divorce was finalized.

C. Sydney's Preference.

Julie and the custody evaluator testified that Sydney expressed a preference to live with her mother. The district court acknowledged this stated preference but found that Sydney was not "sufficiently mature to make the custody decision on her own." We agree.

It is established that a child's preference is not controlling. *In re Marriage of Thielges*, 623 N.W.2d 232, 239 (Iowa Ct. App. 2000). Indeed, our court has declined to honor the preferences of children far older than Sydney. *Id.* (declining to defer to the preference of the fourteen-year-old child).

There is no question that Sydney was a mature child; a teacher testified she displayed leadership qualities, and others characterized her as bright, articulate, and social. Despite these qualities, she was years away from adulthood and still appropriately focused on childhood concerns such as riding bikes with friends and enjoying a walk-in closet in her mother's new apartment. While she expressed closeness to her mother, her first preference was to maintain daily contact with both parents. Under these circumstances, the district court acted equitably in declining to honor her preference.

D. The Better Caretaker

Julie suggests that she was the qualitatively better caretaker. First, she points to the childcare conditions at Shawn's workplace. She maintains that she advocated for years to have Sawyer placed in a structured day care environment. Her trial testimony supports this contention. Additionally, the custody evaluator

opined that Sawyer could benefit from interaction with other children in a structured day care setting.

Shawn testified he was looking into sending Sawyer to a day care center beginning in January 2007. The district court judge "strongly recommend[ed]" that Shawn pursue this option and stated he would "look askance on Shawn's continued incorporation of a child care facility in his business premises, should the issue of physical care be revisited for some reason in the future." We believe this was an equitable resolution of the situation.

Julie next points to the "significant emotional bond" she shares with the children. As noted, we agree this bond exists, but also find evidence of a similar bond with Shawn. Those witnesses who testified to the contrary had a familial relationship with Julie. For example, a former office manager at Shawn's business who provided damaging testimony concerning Shawn's interaction with the children, turned out to be Julie's sister. In contrast, Sydney's kindergarten teacher testified that the kids "definitely responded" to Shawn during parent-teacher conferences. Another teacher who also had Sydney in her class stated Shawn was "very enthusiastic from what I saw, supportive, very approachable and easy to talk with." The teachers' perceptions of Shawn's relationship with his children was corroborated by the custody evaluator who, as noted, found a strong emotional bond with both parents.

Julie also suggests that Shawn was more focused on his work than on his supervision of the children. Again, much of the damaging testimony came from Julie's sister, who stated Shawn spent little time with them in the kids' room. This testimony was contradicted by Shawn's business partner and by the business

partner's ex-wife who stated she wished her ex-husband parented their children as well as Shawn parented his.

Finally, our de novo review of the record reveals that both parties used marijuana during the marriage. Julie suggested at trial that Shawn's usage was greater than hers and should be a factor in the custody evaluation. Although she appears to have abandoned this argument on appeal, we note that drug use may be a factor in a physical care determination, *see In re Marriage of Harris*, 499 N.W.2d 329, 331 (Iowa Ct. App. 1993) (considering the mother's alcohol abuse in deciding to grant the father physical care), and, indeed, may result in a determination that children should be removed from the custody of their parents. *In re A.A.G.*, 708 N.W.2d 85, 92 (Iowa Ct. App. 2005) (finding the mother's substance abuse sufficient to justify continued placement of the children outside her care). In this case, both parents testified they stopped consuming the drug before trial and the custody evaluator opined that there did not appear to be "substantial difficulties with drug or alcohol abuse." Based on this evidence, we agree with the district court that the parents' prior drug use was not a factor in the custody determination, at the time of trial. We emphasize, however, that renewed drug use may be a factor in a modification action. *In re Marriage of Malloy*, 687 N.W.2d 110, 113-14 (Iowa Ct. App. 2004) (finding a substantial change in circumstances warranting modification of child custody where the mother moved in with a man with a history of drug and alcohol abuse).

Based on the record created at trial, we conclude the district court acted equitably in granting Shawn physical care of the children.

II. Disposition

We affirm the district court's physical care ruling.

AFFIRMED.