IN THE COURT OF APPEALS OF IOWA

No. 7-154 / 06-1525
Filed July 12, 2007

IN RE THE MARRIAGE OF DEON LYNN GREDER AND JOHN ARTHUR GREDER

Upon the Petition of
DEON LYNN GREDER,
Petitioner-Appellee,

And Concerning
JOHN ARTHUR GREDER,
Respondent-Appellant.

Appeal from the Iowa District Court for Crawford County, James D. Scott, Judge.

Respondent-appellant appeals from the custody and support provisions of the decree dissolving his marriage to petitioner-appellee. **AFFIRMED AS MODIFIED.**

Kara L. Minnihan of Minnihan Law Firm, Onawa, for appellant.

Joseph J. Heidenreich of Dresselhuis & Heidenreich, Odebolt, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

John Greder appeals, challenging the custody provisions and support provisions of the decree dissolving his marriage to Deon Greder. We affirm as modified.

BACKGROUND

John and Deon were married in 1995, and their only child, a daughter, was born in that same year. The child has an excellent relationship with both parents, and the district court found both John and Deon to be capable parents. In the fourteen months between their separation and the dissolution hearing John and Deon shared primary physical care of the child, who spent alternate weeks with each parent.

The district court determined that Deon should be awarded the primary physical care of the child, and John should pay child support of $200 a month. The district court ordered that to satisfy that obligation John should assign to Deon the $324 a month disability payment he receives for the child as a result of his disability.

John contends (1) he should have shared primary care and (2) if the district court is affirmed, he should only be required to pay $200 of the child's disability payment to Deon. Deon contends the district court should be affirmed.

The district court found Deon had been the primary care parent for the two children of her first marriage, and they were doing well as adults. After hearing the evidence and observing Deon's demeanor, the court determined she was a more firm disciplinarian than John, had a stronger work ethic, and had been more actively involved with the child's school and her extracurricular activities. The

court noted that John too has two adult children, and he provided the primary care for a son who is serving in the military and is a fine young man.

The district court further found the parents have different parenting styles, and John is much more lenient than Deon. The court believed John's leniency went too far. The court noted while in John's care the child missed school thirteen times and while in Deon's care only three. The court was concerned that John provided the child with a cell phone, allowed her to keep her computer in her own room, that she returns from her father's care without her homework done, and is more likely to miss extracurricular activities while under John's care. The court also had concern about John's use of marijuana. While recognizing John recently tested negative for drug use and his counselor's belief he has stopped using them, the court was of the opinion he was yet in a trial period of proving abstinence from marijuana.

We conduct a de novo review of physical care awards. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*). The focal question is, whether there is a basis for the district court to reject shared primary physical care. We base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). The interests of the child are the primary consideration. *See In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984). We focus on the child and whether shared care is in her interest.

Iowa Code section 598.41(5) provides in relevant part:

> If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent. If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child.

This section "constitutes neither a ringing endorsement of joint physical care, nor a mandate for courts to grant joint physical care." *See In re Marriage of Ellis*, 705 N.W.2d 96, 102 (Iowa Ct. App. 2005). The legislature has sought to assure a child the opportunity for the maximum continuing physical and emotional contact with both parents and encourage his parents to share the rights and responsibilities of raising him. *See id.* However, there are a number of factors we consider in assessing the issue. *See In re Marriage of Hansen*, ____ N.W.2d ____, ____ (Iowa 2007).

The district court found both parties, while sharing different parenting styles, are capable parents who had raised other children successfully. Both parents have education beyond high school. In the fourteen months prior to trial the parties successfully shared care of their daughter. They have been somewhat flexible when the need arises. For example, when John's son left for service in the military, Deon allowed John to take their daughter to the send-off even though it was during Deon's custody week. And when Deon's father was critically ill John kept their daughter overnight, and the next morning both parents together told her that her maternal grandfather had died. This indicates that despite different parenting styles the parties have been able to work together for their daughter's benefit.

The child is intelligent, mature for her age, loves both of her parents, does not want to be caught in the middle, and wants the current shared care

arrangement to continue. Both parents live relatively close to each other at this time. As we earlier noted, the court also believed that either parent was capable, and John was given liberal visitation.

Certain complaints of Deon's about John are not surprising in the context of dissolution of marriage. Deon is concerned that John gave their daughter a cell phone. He testified it was to allow the child to keep in contact with him. He pays the bills and monitors the use. Deon complains the child uses a computer in her room when at John's, while Deon limits her computer use to the family room. John testified the computer Internet connection in his home is dial-up, and the child lets him know when she uses it. He testified he has her password, she knows he has it, and he checks her computer on a regular basis. Deon also disagreed with John's decision to take their daughter on a vacation trip to South Dakota rather than leaving her home to play summer softball.

None of Deon's above criticisms of John are reasons to reject shared care as they show no more than minor disagreements between parents. Both parents are concerned about the child's safety. We have concerns about John's past use of illegal substances as we do about Deon's past use. Their drug of choice was marijuana, and the evidence shows they smoked it together socially and tried to keep their use away from their children. Though Deon contends she never used marijuana, the testimony of John and his son would indicate she has.

John was determined to be disabled after a load of lumber fell on him. He testified he smoked marijuana to relieve the pain and he has not used marijuana since August 2005, after he completed a pain management clinic at the University of Nebraska Hospital in Omaha. John's licensed mental health

counselor who works for Lutheran Family Services and has been a certified alcohol and drug counselor, met with John twenty-six times. She also did some joint counseling with John and his daughter. She testified she had not seen any signs of a relapse. John also attends Narcotics Anonymous regularly.[1]

The child's thirteen absences from school while in John's care are of concern. He testified two days were the result of his taking her to a send-off for her brother, who was going to Iraq. He contends the other days were when she vomited, had a fever, or headache.

While John is more aggressive than Deon and at one time put an inappropriate sign on the couple's house criticizing the city, there is no evidence he has ever been physically abusive. The principal at his daughter's school in comparing John to Deon said that he is "more vocal in defense of his children."

While Deon testified John does not always see that their daughter's homework is finished, there was no evidence the child was not doing well in school.

Neither parent has been financially responsible, and both have relied on their parents for financial assistance. Their net worth showed a negative balance except for approximately $200,000[2] Deon will receive as a result of a recent inheritance.

There is testimony both parties have on occasion put their child in the middle. It would appear Deon is less flexible than John.

Is an award of joint physical care not in the child's best interest? The district court found it was not, specifically finding "John is too lenient, allows too

[1] The case was tried on August 3, 2006.
[2] The entire inheritance was set aside to Deon.

much absenteeism from school, and does not give careful attention to the child's homework. Further, the degree of hostility John exhibits through the signs he displays on his home is harmful." Giving the required deference to the district court we affirm on this issue.

John's last contention is that he should not have been required to pay the $324 a month he receives from the social security administration to Deon when his child support obligation under the guidelines is only $200.

The social security benefit for a dependent of a disabled worker is not a payment for or to the worker, rather it is a benefit for the dependent and is payable according to federal regulations[3] for the purpose provided by the regulations. The benefits a disabled worker and his dependents receive have been earned, in part, through the employee's payment of social security taxes and their purpose is to replace income lost because of the employee's disability. *In re Marriage of O'Brien*, 565 N.W.2d 619, 621 (Iowa 1997). Under these circumstances, it is equitable to treat dependency benefits as a substitute for child support for the period during which such benefits are paid. *Id*.

Deon contends in applying the child support guidelines the district court failed to attribute sufficient income to John. The district court set his net monthly income at $900 but failed to include the $324 social security disability benefit he

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[3] 20 C.F.R. § 404.2021(c)(1) (2005) provides:

> As a guide in selecting a representative payee, categories of preferred payees have been established. These preferences are flexible. Our primary concern is to select the payee who will best serve the beneficiary's interest. The preferences are:
>
> (c) For beneficiaries under age 18, our preference is -
>
> (1) A natural or adoptive parent who has custody of the beneficiary, or a guardian.

currently receives as payee for their child. Deon contends the benefit should be included in John's income.

In *In re Marriage of Hilmo*, 623 N.W.2d 809, 814 (Iowa 2001), the Iowa Supreme Court agreed with the rationale of other courts and concluded that dependent benefits should be included as income of the disabled parent for purposes of computing child support and that a disabled parent is allowed a credit against his child support obligation for dependent social security disability payments. *Poots v. Poots*, 240 N.W.2d 680, 681 (Iowa 1976). Under this formula John's child support would be set at $275 a month which is forty-nine dollars a month less than the benefit paid to the child.

Following *Hilmo*, 623 N.W.2d at 814, we fix John's child support at $275 a month. Should Deon apply for and become payee of the child's benefit, then John's obligation for child support shall cease. We modify the dissolution decree accordingly. In all other respects we affirm.

We award no appellate attorney fees. Deon has the ability to pay her own attorney fees as she has substantially more assets and income than John.

Costs on appeal are taxed to John.

AFFIRMED AS MODIFIED.