IN THE COURT OF APPEALS OF IOWA

No. 7-288 / 06-1477
Filed August 8, 2007

IN RE THE MARRIAGE OF MATTHEW L. AMENELL AND EVY JUNIATI-AMENELL

Upon the Petition of
MATTHEW L. AMENELL,
Petitioner-Appellee,

And Concerning
EVY JUNIATI-AMENELL,
Respondent-Appellant.

Appeal from the Iowa District Court for Des Moines County, Mary Ann Brown, Judge.

Evy Juniati-Amenell appeals from the trial court's decree dissolving her marriage to Matthew L. Amenell. **AFFIRMED AS MODIFIED AND REMANDED.**

Andrew Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellant.

Steven Hahn of Schulte, Hahn, Swanson, Engler & Gordon, Burlington, for appellee.

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

HUITINK, P.J.

Evy Juniati-Amenell appeals from the trial court's decree dissolving her marriage to Matthew L. Amenell. She contends the trial court erred by awarding physical care of their child to Matthew.

I. Background Facts and Proceedings.

Matthew and Evy were married in April 1998. They have one child, William (Will), age eight, whose welfare is implicated in these proceedings.

Evy is thirty-seven years of age. She is an Indonesian citizen with permanent resident status in the United States. Evy has a master's degree in industrial engineering, as well as credits earned towards a master's degree in business administration. Although Evy has employment opportunities in Indonesia, she has been unable to obtain suitable employment in the United States. As of the time this case was tried in June 2006, Evy remained unemployed. She was then living in Bettendorf with Will while pursuing her M.B.A.

There was no dispute concerning Evy's dominant role as Will's primary care provider. There was also no dispute concerning Evy's intention to return with Will to Indonesia where she can find suitable employment, as well as the support of her extended family.

Matthew is thirty-five years of age. He has a bachelor's degree in industrial engineering. Although he has a substantial employment history as an engineer, Matthew was last employed as a laborer by a temporary services agency. Matthew was living with his parents in Montrose at the time this case was tried.

Matthew has an undisputed history of alcohol abuse, including drunk driving convictions in 2003 and 2004. He also has a documented history of domestic violence, including a deferred judgment for domestic abuse assault in 2000. Additionally, Matthew was named in a "New Jersey Domestic Violence Civil Complaint and Restraining Order" filed by Evy in November 2004. As a result of his criminal conduct, Matthew has received in-patient and aftercare treatment for alcohol abuse. As a condition of his 2000 deferred judgment for domestic abuse assault, Matthew completed a twenty-six-week batterer's education course.

Matthew and Evy's marriage relationship was strained from the beginning. Three weeks after their marriage, Evy told Matthew she wanted a divorce. They have lived separately for extended periods of time. From January 2001 through May 2001, Evy and Will lived in Iowa City while Matthew lived and worked in Ankeny. From May 2001 to September 2002, Evy and Will resided in Indonesia. In September 2002 Evy and Will returned to the United States and lived in New Jersey with Matthew until January 2005. From January 2005 through August 2005, Evy and Will lived in Indonesia. In August 2005 Evy and Will returned to the United States and, as noted earlier, were residing in Bettendorf as of the time this case was tried in June 2006.

The record is unclear concerning the parties' financial and visitation arrangements while they lived separately in 2001 and 2002. Prior to their separation in January 2005, Evy and Matthew attempted to mediate financial and custodial issues in anticipation of a divorce. The resulting "Memorandum of Understanding" included the following language concerning custody of Will:

> Evy Juniati-Amenell will have sole legal and physical custody of their child, William A. Amenell. The parents acknowledge and agree that Evy will relocate to Indonesia (presumably Jarkarta or Bandung) prior to the end of 2004. Each parent acknowledges there will be a great distance between Matthew and William. Matthew has, however, agreed to the relocation of Evy with their son to Indonesia. Despite their differences, both parties agree that they value the parenting role of the other. They accept the difficulties that the distance will create, but nonetheless will foster the relationship between William and Matthew to the best of their abilities.
>
> . . . .
>
> The trip from the United States to Indonesia is approximately 24 to 36 hours. Both parties have agreed that until William is older, he cannot travel that length of time by himself. The cost of airfare is approximately from $600.00 to $1,200.00 per trip depending on the airline and the time of year. It will be more difficult for Evy to obtain a visa to return to the United States than it would be for Matthew to visit Indonesia. The parties anticipate that Matthew will attempt to see William when he can take a vacation and when he can afford the cost. He has approximately three weeks of vacation per year. The parties have addressed the additional costs that Matthew will bear by an adjustment to the child support calculated under the Child Support Guidelines.

The record is unclear concerning the final resolution of the parties' mediation efforts.

Matthew testified that his only contacts with Evy and Will from January 2005 through August 2005 were telephone calls and e-mails. After Evy and Will returned to Iowa in the fall of 2005, the parties established a visitation schedule. After Matthew filed for divorce in December 2005, Evy refused to allow weekend visits and restricted Matthew's visits to two hours on weekdays and seven hours on Saturday. She also insisted that all visitation occur in Davenport or Bettendorf. Beginning in March 2006 Evy insisted that Matthew's visits be supervised by his parents.

Matthew claimed Evy's unilateral changes in their visitation arrangements were arbitrary and in retaliation for filing for divorce. Evy's version is that she was concerned for Will's safety because Matthew did not have a driver's license and she was advised to insist on supervised visits by a "Children in the Middle" counselor based on Matthew's history of alcohol abuse and domestic violence.

Matthew's failure to provide significant and consistent financial support for Will and Evy during their separations was the source of considerable tension between the parties. The record includes a series of e-mails in which Evy threatens to disrupt if not entirely end Matthew's relationship with Will unless Matthew acquiesced to her custodial and financial demands. Matthew's version is that he sent Evy money when he could afford to do so and that he discontinued all support payments only after his unemployment benefits expired in January 2006. Neither party sought court intervention or requested temporary custody or support orders prior to trial. The only temporary order issued enjoined Evy from leaving the United States with Will.

The fighting issues at trial included Will's custody and physical care. The trial court's ruling on August 11, 2005, states:

> The court in this case is left with a terrible choice for poor Will. Evy has been the parent who has primarily reared and raised Will. Evy acknowledges that she is moving to another country. Moving the child to this other country will make visitation of any kind virtually impossible between Will and his father. In addition, Evy has demonstrated a complete disregard of her responsibility if she is the custodial parent to insure an ongoing relationship and contact between Will and his father. Instead, Evy has set up roadblocks to the relationship being maintained between Will and his father. There is absolutely nothing in the record to indicate that Evy will do anything to encourage and foster a relationship between Will and his father, regardless of where she lives.

> On the other hand, the other parent, Matthew, has done virtually nothing to help raise Will. Matthew has not provided consistent financial support for Will since he and Evy have been separated this past year and a half. Matthew has an acknowledged drinking problem and has a history of domestic abuse assaults against Evy.
>
> . . . .
>
> In this case the court concludes that Will maintaining his contact with the United States and some type of relationship with his father is more important than Will continuing to live with the person who has been his primary custodial parent during his life. It is more likely that Matthew will make an effort for Will to have contact with Evy, if Will is in his physical care, than Evy would if Will was in her physical care. By placing Will with his father, the court will insure that both parents have an ongoing relationship with the child. By placing Will with his mother, the court would, in essence, be insuring that Will will have contact with only one of his parents.

The trial court accordingly awarded the parties joint legal custody of Will. Matthew was awarded physical care, subject to Evy's right to visit Will as specified in the decree. On appeal Evy claims the trial court erred by failing to award her physical care of Will. Evy does not contest the court's award of joint legal custody. She also requests appellate attorney fees.

II. Standard of Review.

Our review in this equity action is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues presented for review. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). "We accord the trial court considerable latitude in resolving disputed claims and will disturb a ruling 'only when there has been a failure to do equity.'" *Id.* We give weight to the trial court's findings of fact, especially when considering the credibility of the witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(*g*). Prior cases have little precedential value, and we must base our decision on the

particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. The Merits.

> When a district court dissolves a marriage involving a minor child, the court must determine who is to have legal custody of the child and who is to have physical care of the child. "Legal custody" carries with it certain rights and responsibilities, including, but not limited to, "decision making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction." Iowa Code § 598.1(3), (5). When parties are awarded "joint legal custody," "both parents have legal custodial rights and responsibilities toward the child" and "neither parent has legal custodial rights superior to those of the other parent." *Id.* § 598.1(3).
>
> . . . .
>
> "'Physical care' means the right and responsibility to maintain a home for the minor child and provide for the routine care of the child." *Id.* § 598.1(7).

In re Marriage of Hynick, 727 N.W.2d 575, 578-79 (Iowa 2007). "The noncaretaker parent is relegated to the role of hosting the child for visits on a schedule determined by the court to be in the best interest of the child." *Id.* at 579.

"The controlling consideration in child custody cases is always the best interests of the children." *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000).

> "Best interest of the child" includes, but is not limited to, the opportunity for maximum continuous physical and emotional contact possible with both parents, unless direct physical or significant emotional harm to the child may result from this contact. Refusal by one parent to provide this opportunity without just cause shall be considered harmful to the best interest of the child.

Iowa Code § 598.1(1) (2005). The court's objective is to place the child in the environment most likely to bring him or her to a healthy physical, mental, and

social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996).

We identify numerous factors to help determine which parent should serve as the primary caretaker of the children in a divorce. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997) (citation omitted); *see* Iowa Code § 598.41 (2005). Some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *See Daniels*, 568 N.W.2d at 54. Evidence of untreated domestic battering is given considerable weight in determining which parent should be awarded physical care. *Id.* at 55. The fact that a parent was the primary caretaker of the child prior to separation does not assure an award of physical care. *In re Marriage of Toedter*, 473 N.W.2d 233, 234 (Iowa Ct. App. 1991). However, consideration is given in any custody dispute to allowing the child to remain with a parent who has been the primary caretaker. *In re Marriage of Hansen*, ____ N.W.2d _____ (Iowa 2007) ("stability and continuity of caregiving are important factors that must be considered in custody and care decisions"); *id.* ("[T]he successful caregiving by one spouse in the past is a strong predictor that future care of the children will be of the same quality."); *id.* (awarding mother physical care after considering several facts including her role as primary caretaker). The court in *Hansen* also indicated this concept encompasses an "approximation

rule." *Id.* This rule provides "that the caregiving of parents in the post-divorce world should be in rough proportion to that which predated the dissolution." *Id.*

Based on our de novo review of the record, we find the foregoing factors weigh heavily in favor of awarding Will's physical care to Evy. Awarding physical care to Evy will allow Will to remain with the parent who has been his primary care provider since birth. Moreover, the record indicates Evy has successfully parented Will and provided for his primary care needs despite the disadvantages resulting from Matthew's failure to provide her with adequate and consistent financial support. In contrast, the record indicates Matthew has no significant primary care experience and his interest in providing primary care for Will is recently acquired. In addition, Matthew's past lack of interest in parenting Will and history of domestic and alcohol abuse weigh heavily against awarding him physical care.

As noted earlier, the trial court's decision to award physical care to Matthew was premised on Evy's stated intention to return to Indonesia, as well as the court's negative impression of Evy's regard for Matthew's relationship with Will. In our view, neither circumstance justifies denying Evy's request for physical care.

The fact that Evy and Will will live abroad is not controlling. We expressly reject any notion that the issues implicated by Evy's return to Indonesia justify subordination of Will's welfare or best interest to Matthew's visitation rights. Although visitation arrangements may prove to be more complicated and expensive than the parties would prefer, the resulting difficulties are an unavoidable consequence of the dissolution of an international marriage.

Matthew also claims the political instability in Indonesia presents an unacceptable safety risk for Will. We disagree. The record indicates that Evy has secured substantial employment in Indonesia and has made adequate residential, educational, and day-care arrangements for Will. Based on her testimony concerning these matters, we find Evy can provide a safe and stable living environment for Will in Indonesia. Moreover, Evy's past parenting experience indicates that she has the requisite initiative and adaptability to provide for Will's primary care and personal security under difficult circumstances. We are confident in her continued ability to do so.

Lastly, we are unable to reconcile the trial court's findings concerning Evy's regard for Matthew's relationship with Will with the evidence concerning the parties' visitation experience. Although there were disagreements concerning the details, there is no evidence indicating Matthew was denied all contact or visitation with Will. Moreover, we are not inclined to fault Evy for visitation-related tensions, particularly in view of Matthew's history of domestic and alcohol abuse. We, for similar reasons, are not inclined to assign significant weight to Evy's e-mails to Matthew concerning the implications of Matthew's failure to provide adequate financial support for Will. Matthew's failure to provide financial support was clearly the source of Evy's discontent. We will not give Matthew the benefit of negative inferences drawn from circumstances of his own making. In any event, when viewed in context, Evy's assertions are more fairly described as desperate statements made in the heat of the moment rather than reliable indicators of her sentiments concerning Matthew's relationship with Will or her willingness to comply with court-ordered visitation. For all of the foregoing

reasons, we conclude that Evy is and will be the parent better suited to provide for Will's physical care. We accordingly modify the trial court's decree by awarding physical care of Will to Evy. Because we have modified the trial court's physical care award, we remand for consideration of visitation and child support issues in light of this opinion. On remand the court shall, at a minimum, order visitation as described in the mediator's proposed memorandum of agreement quoted earlier in this opinion.

Evy requests an award of appellate attorney fees. In determining whether to award appellate attorney fees, we consider the needs of the party making the request and the ability of the other party to pay. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa Ct. App. 1987). After considering these factors, we award Evy $2500 in appellate attorney fees. Costs of this appeal are assessed to Matthew.

AFFIRMED AS MODIFIED AND REMANDED.