IN THE COURT OF APPEALS OF IOWA

No. 9-505 / 09-0281
Filed October 7, 2009

IN RE THE MARRIAGE OF EVA MARIE RUDINGER AND MANFRED RUDINGER

Upon the Petition of
EVA MARIE RUDINGER,
Petitioner-Appellant,

And Concerning
MANFRED RUDINGER,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

Eva Rudinger appeals from the decree dissolving her marriage to Manfred Rudinger. **AFFIRMED.**

Bradford Kollars and Michelle M. Lewon of Kollars & Lewon, P.L.C., Sioux City, for appellant.

Eva Rudinger, Sioux City, pro se.

Dennis R. Ringgenberg and Marci L. Iseminger of Crary, Huff, Inkster, Sheehan, Ringgenberg, Hartnett & Storm, P.C., Sioux City, for appellee.

Heard by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

Eva Rudinger appeals from the decree dissolving her marriage to Manfred Rudinger. She contends that (1) she, not Manfred, should have been awarded primary physical care of the parties' son born in December of 2001; (2) she should not have been required to pay all the costs of transportation associated with her visits with her son; (3) the district court did not correctly allocate her son's tax exemption for state and federal income tax purposes; (4) she should not have been required to post a $2500 bond to ensure her compliance with the decree; and (5) that she should have been awarded attorney fees for her trial counsel. She also contends she should have appellate attorney fees. We affirm.

SCOPE OF REVIEW. The case was tried in equity. Our review is therefore de novo. Iowa R. App. P. 6.907 (2009). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995). 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. 6.904(3)(*g*); *In re Marriage of Beecher*, 582 N.W.2d 510, 513 (Iowa 1998); *In re Marriage of Gaer*, 476 N.W.2d 324, 326 (Iowa 1991).

BACKGROUND AND PROCEEDINGS. The parties were married in May of 1990. They have one child, a son born in December of 2001. At the time of trial the child had just begun first grade at a Sioux City, Iowa, school. Eva, born in the United States in 1962, received a degree from Morningside College in 1984. Following graduation she worked for Mid-Step Services in Sioux City for

six months, then with Siouxland Mental Health, where she voluntarily terminated her employment in 1993. Since that time she has worked for Gateway, Grand Jewelers, Bomgaars, and Edge Teleservices, which job she left in August of 2008. She was unemployed at the time of trial. She has family in the Sioux City area.

Manfred was born in West Germany in 1959. He holds a bachelor's degree in mechanical engineering from Rothenburg, Germany. He subsequently obtained a master's degree in engineering in Germany. He came to the United States when his then employer, Schaeff, transferred him to their U.S. subsidiary plant located between Lawton and Sioux City, Iowa. At the time of trial he worked at FIMCO in North Sioux City, South Dakota. Manfred testified that he intended to return Dombuehl, Germany, where he has an aging mother and several brothers.

Both parents have always been involved in the child's life. Neither parent had outside employment following the child's birth, and both were involved with his early care. Manfred returned to the workforce when the child was about two months old. Eva was not employed outside the home until February 2008. The relationship between Manfred and his son strengthened in the year prior to trial.

The district court, after hearing the evidence, found that each party was interested in providing the best for the child. The court determined the focal issue was which parent can best provide for him in the ten years when he is between eight and eighteen years of age. The court further found the child to be in good mental and physical health and to have a meaningful relationship with

both parents, but found the child had minor disciplinary struggles with his mother. The court noted both parties were about the same age and both demonstrated strength of character and were physically healthy. The court found both parties were interested in providing the best for the child and that each had the capacity and ability to provide a stable and wholesome environment for the child, though the nature of their proposed environments would be different. The court then considered each parent's attitude towards child-raising and also considered what it termed the cultural problems, the distance problems, and the jurisdictional problem. The court found the cultural problems would be addressed with Manfred's proposed transition period. Finally, the court determined that the parties should have joint custody of their son and his physical care was placed with Manfred.

The court noted that the distance between the United States and Germany would only allow for visits in the summer and during the Christmas holiday. The court then fixed Eva's visitation to begin ten days after school has concluded in the spring to run until ten days prior to the beginning of the next school year. In addition she received eight days visitation during the Christmas-New Year holiday break, which may include December 24 each year. The court ordered each party to acquire a computer with internet access and equipped to provide for video and audio transmissions so that Eva could have face-to-face contact with the child while he was in Germany and Manfred with the child while he was in the United States. The court determined the contact could occur as long as the contact did not interfere with school or bed times. The court provided that in

the event Eva travels to Dombuehl, Germany, she should have reasonable visitation including overnight visits so as not to interfere with the child's schooling. Each party was directed to deposit $2500 with the Woodbury County clerk of court and, in the event either failed to comply with the order, that after a hearing the court could order the deposits be contributed toward attorney fees or travel expenses.[1]

PHYSICAL CARE. Eva contends she was historically the child's primary caregiver and to allow the child to remain with her will support stability and continuity of care. She correctly argues that our courts have held successful care giving by one parent in the past is a strong predictor that the future care by that parent will be of the same quality. *See In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007). However, the fact that a parent was the primary caretaker of a child previously does not assure that he or she will be awarded primary physical care. *In re Marriage of Kunkel*, 546 N.W.2d 634, 635 (Iowa Ct. App. 1996) (recognizing the mother was the primary care giver of the children in the marriage, but also recognizing the father, though employed outside the home, had substantial influence in their upbringing and awarding him care). The fact a parent was the primary caretaker prior to separation does not assure he or she will be the custodial parent. *Id.*; *see also In re Marriage of Toedter*, 473 N.W.2d 233, 234 (Iowa Ct. App. 1991) (affirming physical care with father despite mother's role as primary caretaker); *Neubauer v. Newcomb*, 423 N.W.2d 26, 27-28 (Iowa Ct. App. 1988) (awarding custody of a child who had been in the

[1] The court ordered if the money was not used it could be ordered to be used as a post-secondary education subsidy or returned to the party who posted it.

mother's primary care for most of the child's life to the father). While the primary caretaker is frequently named the primary custodian, it is the interest of the child that is the first and governing consideration and we look to all the factors the court is directed to consider in awarding custody that are enumerated in Iowa Code section 598.41(3) (2007), in *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983), and in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term interests of the child. *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa Ct. App. 1985). Gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. *In re Marriage of Riddle*, 500 N.W.2d 718, 719 (Iowa Ct. App. 1993). With all these factors in mind we address Eva's contentions.

Eva believes she is the better parent. The district court did not agree and, giving the required deference to the district court's factual findings, neither do we. Eva also has concerns about the child's adjustment in Germany, where she contends the culture and language may curtail his learning. She also contends that the education he receives in Germany may not allow him to return to the United States in a job he would have been able to take if he were educated in the United States.

We recognize that the child will have initial difficulties in Germany, primarily with the language. We recognize there are differences between United States and German schools, yet there is no evidence comparing the schools and we do not attempt to do so. However, we find no reason to find German schools inferior, nor do we believe an education in Germany will preclude the child from finding employment in the United States in accord with his work ethic and ability if he desires, as an adult, to work here

Eva contends also that the law does not support moving her son to Germany, that Manfred has failed to show he can care for his son there, that he has no plan, and that it is not in the child's best interest. The district court found that the United States and Germany are parties to the Hague Convention on the Civil Aspects of International Child Abduction, an international treaty the purpose of which is to discourage international parental child abduction and to ensure children who are abducted or wrongfully retained in a party's country are returned to their country of habitual residence. Eva does not challenge this finding. She argues instead that there is no guarantee Germany would enforce this decree. The district court did not have serious concerns that Manfred would not return the child for visitation when ordered to do so. There is nothing in the record to cause us to decide otherwise. In fact, Germany may be quicker on returning a child following a hearing than the United States.[2]

[2] Some countries, though not always the United States, provide for the execution of an order for the return of a child during the pendency of a Hague Convention appeal. *See Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, Held 18-21 January 1993*, 33 I.L.M. 225, 232 (1994) (noting that an order may be enforced pending

Our hope for justice for our citizens in foreign courts can best be forwarded by our efforts to offer fair and equitable treatment to foreign nationals in our jurisdiction. We cannot assume Manfred will not honor our decree. *In re Marriage of Hatzievgenakis*, 434 N.W.2d 914 (Iowa Ct. App. 1988). The focal question is not where the child lives, it is which parent is the stronger parent and which parent will better serve him as custodial parent in the next decade. We affirm the custody award.

TRAVEL EXPENSES. Eva contends Manfred should pay all transportation costs. The district court did not order Eva to pay any child support but held her responsible for the travel expenses for the child to go between Germany and the United States twice a year. We find no reason to reverse on this issue.

TAX EXEMPTIONS. The district court allowed the parties to claim the child as a dependent on their federal and state income tax return in alternate years. Eva claims she should be able to claim him every year contending there is no benefit for Manfred to claim him in Germany. With no obligation to pay child support and the child residing with her only three months a year, we find no reason to reverse on this issue.

BOND. Eva contends that the court should not have required her to post a $2500 bond. We do not find the district court abused its discretion on this issue. *See id.* at 918 (reducing a bond for a noncustodial parent's agreement to return a child from Greece following visitation from $20,000 to $10,000).

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an appeal in Austria, France, Germany, Luxembourg, and the Netherlands). *Walsh v. Walsh*, 221 F.3d 204, 213 (1st Cir. 2000).

ATTORNEY FEES. Eva contends the district court erred in not awarding her trial attorney fees and she should have attorney fees on appeal. We review the claim for trial attorney fees for an abuse of discretion. *See In re Marriage of Russell*, 473 N.W.2d 244, 247-48 (Iowa Ct. App. 1991). We award no attorney fees to either party on appeal and find the district court did not abuse its discretion in not awarding trial attorney fees.

AFFIRMED.