IN THE COURT OF APPEALS OF IOWA

No. 7-920 / 07-1070
Filed January 30, 2008

IN RE THE MARRIAGE OF HEATHER WOODWARD AND NATHAN MOHR

Upon the Petition of
HEATHER RAE WOODWARD,
Petitioner-Appellant,

And Concerning
NATHAN LEE MOHR,
Respondent-Appellee.

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

Heather Rae Woodward challenges the custodial provision of the decree dissolving her marriage to Nathan Lee Mohr. **AFFIRMED IN PART AND REVERSED IN PART.**

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

Joseph J. Heidenreich of Dresselhuis and Heidenreich Law Firm, Odebolt, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

SACKETT, C.J.

Heather Rae Woodward challenges the custodial provision of the decree dissolving her marriage to Nathan Lee Mohr. She contends she, not Nathan, should have been granted primary physical care of the parties' son born in October of 2003. She also contends if she is not awarded primary physical care she should be granted extraordinary visitation. She also argues the district court erred in making her responsible for the first $250 of her son's medical expenses each year. We affirm the custody and visitation provisions. We reverse on the medical expense issue.

Scope of Review. Our standard of review in dissolution-of-marriage proceedings is de novo. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). In a de novo review we examine the entire record and adjudicate anew the issues properly presented on appeal. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1982). 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. 6.14(6)(*g*); *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 852 (Iowa Ct. App. 1998). We approach this issue from a gender-neutral position avoiding sexual stereotypes. *In re Marriage of Pratt*, 489 N.W.2d 56, 58 (Iowa Ct. App. 1992); *see also In re Marriage of Bethke*, 484 N.W.2d 604, 608 (Iowa Ct. App. 1992).

Background and Proceedings. The parties married in September of 2004 and separated in March of 2005. Heather filed the petition for dissolution that led to this appeal in May of 2006. In July of 2006 the parties stipulated that a temporary custody order could be entered wherein they would share physical

care of their son on a week-to-week basis. Heather and Nathan conceded they had difficulty in communicating while sharing care, however they both cooperated and the shared physical care they stipulated to continue for ten months until the case came to trial in May of 2007. Prior to trial the parties had stipulated to the division of their assets and debts and agreed that the issues for trial be narrowed to child custody, visitation, child support, attorney fees, and court costs.

The district court heard testimony from a number of witnesses who were acquainted with the couple and their child. On May 8, 2007 the district court entered a decree of dissolution determining both parties were good parents but that Nathan should be primary custodian and Heather should have visitation. Heather was ordered to pay child support of $134 a month. Nathan was required to provide medical insurance for Taylor. Heather was to pay the first $250 of uncovered medical expenses and the balance of the expenses were to be allocated thirty percent to Heather and seventy percent to Nathan. Nathan was required to pay $1000 towards Heather's attorney fees. Court costs were assessed one half to each party.

In reaching its custodial award the district court found the child was developmentally delayed and would require special assistance if he is to attain normal levels of development. The court further found that Nathan was the first parent to recognize the child's needs, whereas Heather did not initially recognize them and she rejected an education specialist's advice. The court found Nathan slightly more mature, stable, and responsible than Heather and found he was more likely to bring their child to mental and social maturity and properly provide for his physical health.

The child was born with a congenital heart defect and he had two surgeries in his first ten days of life and was kept in the hospital for a month following his birth. He had hearing problems that appear to have been resolved through medical intervention. He is developmentally delayed in a number of areas. At thirty-seven months old he was tested and his level of communication was at twenty-two months, his cognitive ability at nineteen months, and his social level was at twenty-seven months. He also appeared to have low oral motor skill in his lips and lower jaw and when speaking he has significant stuttering including multiple part and whole word repetitions. Educational experts opined the child will need pre-academic skill building as well as speech and language services and that he should attend pre-school special education all day every weekday.

Primary Physical Care. Heather contends that she has been the child's primary caretaker his entire life. We conduct a de novo review of physical care awards. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). The trial court found and we agree that the record shows that Heather was the primary caregiver during the first two years of the child's life. In assessing who should be a child's physical caretaker, we consider whether one parent has historically been the primary caregiver, although this factor is not controlling. *In re Marriage of Decker*, 666 N.W.2d 175, 178 (Iowa Ct. App. 2003). This consideration is given due weight; however, the court must consider all relevant factors in determining which parent is better able to provide for the long-term best interests of the child. *See In re Marriage of Kunkel*, 546 N.W.2d 634, 636 (Iowa Ct. App. 1996).

Granting a parent who has been the primary caregiver primary physical care provides continuity and stability and is generally the least disruptive alternative and the one most likely to promote the child's long-term interests. *See In re Marriage of Hansen*, 733 N.W.2d 683, 700 (Iowa 2007). The district court here reasoned and we agree that because the parties have shared the child's physical care for nearly a year, placement with Nathan would be no more disruptive than placement with Heather. Furthermore, the child was less than three years old when the joint care arrangement was made; thus, his memory of the time he was in Heather's primary care is less than it would be had he been older. We therefore proceed to consider other factors.

We recognize both parties have strengths and weaknesses. Their son was born when they both were of a young age. Following their separation they both took up residence with members of the opposite sex who also have a relationship with their child. Heather testified she had immediate plans to marry when the dissolution was completed, while Nathan indicated he may take more time before doing so. It appears from the record that Heather's boyfriend cares about the child and treats him with respect as does Nathan's girlfriend.

Both parties had a number of witnesses testify that they were the better parent. Nathan recognized the child had problems. Heather did not recognize the problems until the time of trial. Heather's witnesses testified they found the child to be perfectly normal. Evidence from professional educators, some of whom opined that Nathan should have custody, found the child to be seriously developmentally delayed. Heather's inability to recognize the child's delayed

development appeared to be the turning point for the district court in the custody dispute.

Our review of the record causes us to agree with the district court reasoning that Nathan should be named primary custodian.

Visitation. Heather was given visitation every other weekend from five o'clock in the afternoon on Friday until five o'clock in the afternoon on Sunday, and in addition, every Wednesday evening from five to eight o'clock. She was also given alternating holidays and three weeks in the summer. She contends she should have substantially more visitation. It was recommended by the educational experts that the child needed structure and consistency in care. We find nothing that supports granting Heather additional visitation.

Uncovered Medical Expenses. Heather contends the district court erred in requiring her to pay the first $250 of uncovered medical expenses. Heather contends that under rule 9.12 of the child support guidelines, the district court was bound to order that Nathan pay for the first $250 of uncovered medical expenses. Rule 9.12 provides:

> In addition, the court shall enter an order for medical support as required by statute.
>
> "Uncovered medical expenses" means all medical expenses for the child not paid by insurance. *The custodial parent shall pay the first $250 per year per child of uncovered medical expenses* up to a maximum of $500 per year for all children. Uncovered medical expenses in excess of $250 per child or a maximum of $500 per year for all children shall be paid by the parents in proportion to their respective net incomes. "Medical expenses" shall include, but not be limited to, costs for reasonably necessary medical, orthodontia, dental treatment, physical therapy, eye care, including eye glasses or contact lenses, mental health treatment, substance abuse treatment, prescription drugs, and any other uncovered medical expense. Uncovered medical expenses are not to be deducted in arriving at net income.

(Emphasis supplied).

Nathan disagrees with Heather's position. He contends that the issue must be addressed under Iowa Code Chapters 598 and 252E (2005), and rule 9.12 does not apply.

Iowa Code section 598.21B(3) provides:

> Medical support. The court shall order as child medical support a health benefit plan as defined in chapter 252E if available to either parent at a reasonable cost. A health benefit plan is considered reasonable in cost if it is employment-related or other group health insurance, regardless of the service delivery mechanism. The premium cost of the health benefit plan may be considered by the court as a reason for varying from the child support guidelines. *If a health benefit plan is not available at a reasonable cost, the court may order any other provisions for medical support as defined in chapter 252E.*

(Emphasis supplied).

Nathan argues that neither he nor Heather have health insurance coverage at their places of employment, consequently 598.21B(3) authorizes the district court to order medical support as it sees appropriate as long as it is for medical support as defined in chapter 252E.

Iowa Code section 252E.1(9) provides:

> 9. "Medical support" means either the provision of a health benefit plan, including a group or employment-related or an individual health benefit plan, or a health benefit plan provided pursuant to chapter 514E, to meet the medical needs of a dependent and the cost of any premium required by a health benefit plan, *or the payment to the obligee*[1] *of a monetary amount in lieu of a health benefit plan*, either of which is an obligation separate from any monetary amount of child support ordered to be paid. Medical support is not alimony.

[1] Iowa Code section 252E.1(11) defines obligee: 11. "Obligee" means a parent or another natural person legally entitled to receive a support payment on behalf of a child.

Heather is paying a modest child support. Consequently we do not disagree with the district court that requiring her to pay the first $250 in uncovered expenses is equitable. However, rule 9.12 provides the custodial parent "shall pay" which language is mandatory. *See* Iowa Code § 4.1(30)(a). The word "shall" does not mean "may." *State v. Luckett*, 387 N.W.2d 298, 301 (Iowa 1986). We also reject Nathan's argument that we should address the issue under Iowa Code chapters 598 and 252E. There is no claim that the district court was asked to apply these chapters in allocating the child's medical expenses between the parties. Nathan has been ordered to obtain medical insurance for the child and that provision has not been challenged on appeal.

The district court erred in ordering Heather to pay the first $250 in unreimbursed medical expenses.

Attorney Fees.

Both parties request appellate attorney fees. Such an award rests within our discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We do not award attorney fees. Costs on appeal are taxed seventy-five percent to Heather and twenty-five percent to Nathan.

AFFIRMED IN PART AND REVERSED IN PART.