

IN THE COURT OF APPEALS OF IOWA

No. 6-278 / 05-0976
Filed May 10, 2006

NEIL CHRISTOPHER BERGER,
Petitioner-Appellant,

vs.

VICTORIA MARIE RIOS,
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Marsha M. Beckelman, Judge.

Petitioner appeals a district court ruling awarding primary physical care of the parties' child to respondent. **AFFIRMED.**

Patricia C. Kamath of Kamath Law Office, Iowa City, for appellant.

Victoria Rios, North Liberty, pro se.

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

HUITINK, J.

Neil Christopher Berger (Chris) appeals a district court's ruling awarding primary physical care of the parties' child to respondent, Victoria Marie Rios (Vicki). Vicki has not filed an appellee's brief. That failure does not entitle Chris to a reversal as a matter of right, but does provide a basis for sanctions. *State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 209 (Iowa 1982). We limit our discussion to the issue raised in Chris's brief. *Id.*

I. Background Facts and Proceedings

Chris and Vicki met at a bar in 1993 and were "drinking buddies" for a short period of time. As a result of their short-lived relationship, Vicki gave birth to the parties' child, Dalton, in August 1994. The parties never married. Chris began paying child support after a court order establishing paternity and setting child support was filed in 1996. Chris had some contact with Dalton during the first years of his life, but did not try to establish visitation or custodial rights to Dalton until filing a petition for custody in 2003.

Following a two-day trial, the district court filed its ruling in April 2005. The court made extensive findings of fact and awarded Chris and Vicki joint legal custody of Dalton, with primary physical care to Vicki, subject to reasonable, liberal visitation by Chris. Chris appeals, arguing that he can better raise Dalton to healthy physical, mental, and social maturity. He requests sole legal custody, with visitation to Vicki under protective conditions.

II. Standard of Review

Our scope of review in this equitable action is *de novo*. Iowa R. App. P. 6.4. Because the district court has a firsthand opportunity to hear the

evidence and view the witnesses, we give weight to its findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

III. Discussion

We use the same legal analysis in determining custody of children born to unmarried parents as that utilized if the children's parents were married and divorced. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988). Neither parent bears a higher burden of proving parental fitness under these circumstances. *Id.*

The primary consideration in any physical care determination is the best interests of the child. Iowa R. App. P. 6.14(6)(o); *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). In considering which physical care arrangement is in the child's best interests, we consider the factors set forth in Iowa Code section 598.41(3) (2003), as well as the factors identified in *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983), and *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue 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). In determining which parent serves the child's best interests, the objective is to place the child in the environment most likely to bring him to healthy, physical, mental, and social maturity. *Id.* at 38; *Murphy*, 592 N.W.2d at 683.

We find it unnecessary to repeat here the extensive and detailed findings of fact made by the district court. Suffice it to say that both parents have had

their problems with the law in the past. It is clear from the record, however, that both parents have made better choices more recently. The district court found that “Vicki has ended her relationships with various ‘bad people,’ [and] has been supportive of Dalton having a good relationship with Chris since Chris began visitations with Dalton in August 2003, after Chris became serious about having consistent involvement in Dalton’s life.” Based on the testimony presented at trial, the district court concluded, “Dalton is a well-behaved, polite, gentle, sweet child, with no behavior problems who is actively involved in a wide variety of extracurricular activities.”

The district court found “lacking” Chris’s explanation for his failure to establish visitation or custodial rights to Dalton until filing the petition for custody in 2003:

Chris could have pursued, at a minimum, visitation rights with Dalton, but failed to take action until 2003. This is in spite of the fact that Chris has long accused Vicki of extremely serious problems as a parent, including physical abuse, verbal abuse with profanity, spending late nights out and away from Dalton, exposing Dalton to drugs and alcohol, exposing Dalton to unsavory people, and having sex with men in earshot of Dalton. The court notes that Chris, according to his testimony, at no time called DHS to report Vicki for neglect or child abuse.

The district court also addressed the credibility of witnesses:

Several witnesses testified about Vicki’s bad temper, violent behavior, drug use, and drinking problems. Most of the witnesses who testified for Chris were not credible, however, in the view of the court, particularly because the witnesses’ testimony sounded rehearsed and exaggerated. Much of the testimony was remarkably similar. Some of the witnesses appeared to have personal axes to grind against Vicki and did not present themselves as neutral, factual witnesses. Much of the information presented by the witnesses against Vicki was several years old.

We give particular weight to the district court's credibility assessment. It is apparent that the district court carefully reviewed the evidence before it in making its custody, physical care, and visitation determinations. Upon de novo review, we find the district court's findings are supported by the record. We affirm the district court's decision.

AFFIRMED.