

IN THE COURT OF APPEALS OF IOWA

No. 6-967 / 06-0630
Filed January 31, 2007

**IN RE THE MARRIAGE OF DUSTIN PAUL BENGSTON
AND BOBBIE JO BENGSTON**

**Upon the Petition of
DUSTIN PAUL BENGSTON,**
Petitioner-Appellee,

**And Concerning
BOBBIE JO BENGSTON,**
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

Bobbie Bengston appeals from the child custody provisions of the decree dissolving her marriage to Dustin Bengston. **AFFIRMED.**

Michael O. Treinen of Dunakey & Klatt, P.C., Waterloo, for appellant.

Michael J. Miller of Redfern, Mason, Dieter, Larsen & Moore, P.L.C., Cedar Falls, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

BAKER, J.

Bobbie Bengston appeals from the child custody provisions of the decree dissolving her marriage to Dustin Bengston. We affirm.

Background Facts and Proceedings.

Bobbie and Dustin are the parents of one child, Samantha, who was born in June of 2002, and they were subsequently married on April 5, 2003. Bobbie brought into the marriage a three-year-old son, Clint, from a previous relationship. During their relationship, Dustin came to think of Clint as “my own child.”

Since Samantha’s birth, Dustin has worked at Bertch Cabinets and at the time of trial was earning \$12.00 per hour. While his typical shift is from 6:00 a.m. until 2:00 p.m., he occasionally works until 4:00 p.m. Shortly after Samantha’s birth, Bobbie began attending Hawkeye Community College. For the next two-and-one-half years, she maintained a class schedule from 8:00 a.m. until 3:00 p.m., followed by working at McDonalds from 4:00 p.m. until midnight five days per week. While Bobbie was at work, Dustin cared for both children.

In May of 2005, the parties separated. At that time, Bobbie took Samantha on a trip to Arkansas reportedly to visit an aunt. While there, Dustin became concerned that perhaps Bobbie was having an affair with her son Clint’s father, who lived in Arkansas, and he filed a petition seeking to dissolve their marriage on May 27, 2005.

On May 31, Bobbie returned from Arkansas to find that Dustin had moved out of their residence. Initially upon her return, Bobbie had placement of Samantha during the week and Dustin would see her on the weekends. In mid-

June, the parties entered into a shared care agreement whereby they split placement of both children on alternating weeks. This arrangement apparently worked well for both the parties and the children. However, after July 10, this arrangement came to an end and Dustin did not see Samantha again until October 13, 2005. Sometime around July 10, Bobbie informed Dustin she was moving to Arkansas with Samantha. According to Dustin, from that date until approximately September 1, he did not know where Bobbie and Samantha were living. Bobbie admitted she did not inform Dustin where she was living in Arkansas.

On October 13, a temporary placement hearing was held. Following that hearing, the court entered an order granting the parties joint legal custody of Samantha and granting physical care to Dustin. Pursuant to this arrangement, the court ordered that Dustin maintain physical care of Samantha for six-week periods, while Bobbie would then exercise visitation for a two-week period. In so ordering, the court found Dustin to be the more credible witness, that Bobbie moved to Arkansas without prior notice to Dustin, that she had refused to foster or support Samantha's relationship with Dustin, and that she had acted against the best interests of Samantha in moving out of the State.

On February 14, 2006, Dustin's petition for dissolution came on for trial. The court subsequently entered a decree dissolving the marriage and, among other things, named Dustin as Samantha's physical caretaker. Bobbie appeals from this decree claiming the court erred in awarding Dustin physical care of Samantha.

Scope of Review.

In this equity action, our review is de novo. Iowa R. App. P. 6.4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 453 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. *In re Marriage of Williams*, 589 N.W.2d 759, 760 (Iowa Ct. App. 1998).

Physical Care.

In naming Dustin as Samantha's physical caretaker, the court first noted that both parents "have demonstrated their ability to be the primary caretaker of Samantha" and that each "can provide a proper home environment [and] can provide for her financial needs." The court further found that because Dustin had most recently provided the bulk of Samantha's care and because Bobbie's move to Arkansas with Samantha was not in her best interests, Dustin should provide Samantha's physical care. On appeal, Bobbie maintains these findings were erroneous and that Samantha's physical placement should be with her.

In assessing an issue of child custody, the controlling consideration is the best interest of the children. *In re Petition of Purscell*, 544 N.W.2d 466, 468 (Iowa Ct. App. 1995). The objective should always be to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. See *In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974). The court should also consider the characteristics and needs of the children, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the children, the relationship of the children with each parent, the

nature of each proposed environment, and the effect of continuing or changing an existing custodial status. *In re Marriage of Kunkel*, 550 N.W.2d 250, 253 (Iowa Ct. App. 1996).

Greater primary care experience is one of many factors the court considers, but it does not ensure an award of physical care. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa 1995). In so far as is reasonable and in the best interest of the child, the court should make an award of custody which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents and which will encourage the parents to share the rights and responsibilities of raising the child. See Iowa Code § 598.41(1)(a) (2005). To effectuate that policy, the court must consider the willingness of each party to allow the child access to the other party. *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979).

Upon our careful de novo review of the record, we concur in the trial court's determination that Samantha's interests are best served by awarding her physical care to Dustin. First, we find support in the record for the court's finding that the parties were "jointly responsible for the day-to-day care of Samantha prior to the separation." After Bobbie started taking classes and working nearly full-time shortly after Samantha's birth, Dustin assumed a significant portion of Samantha's daily care. Until she finished school in December of 2004, Dustin cared for Samantha in the evenings. After Bobbie finished school the parties resumed a more even allocation of the childcare responsibilities. Accordingly, we reject Bobbie's position that she "was virtually the only parent to provide care for Samantha"

At the time of trial, Samantha had been in Dustin's physical care for over five months pursuant to the temporary order. During that time frame, Samantha adjusted very well and thrived in Dustin's care. Samantha's daycare provider testified that Samantha interacts "very well" with other children and is "one of the best ones there." Dustin has involved Samantha in church activities and has otherwise provided for her everyday needs. Dustin's mother and extended family, as well as Samantha's family, play an important role in Samantha's life, most of whom live in the Black Hawk County area.

It is clear the trial court was most strongly influenced in its custody determination by Bobbie's move to Arkansas with Samantha. We likewise find this is a significant factor that weighs heavily in favor of placing Samantha in Dustin's care. When Bobbie moved, she did so without providing to Dustin any notice of her intention to move. Her only explanation for the move was a desire to be closer to friends. Equally significant is the fact that did not she provide him an address at which they could be located in Arkansas.

Geography is not typically a major factor in determining custody. *See In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App. 1998). In this case, however, the move to Arkansas had an adverse effect upon the child beyond mere geography. Samantha's selfish move to Arkansas had the effect of denying virtually any access to Samantha by Dustin, who until that time had played a substantial role in her life. It prevented Dustin from having any meaningful contact with Samantha until the hearing at which the court granted him temporary physical care. Her move also essentially unilaterally terminated the shared physical care arrangement under which the parties had been

operating and which had apparently worked well. Bobbie's actions were clearly opposed to Samantha's best interests.

We believe Dustin has and will continue to foster a relationship between Samantha and Bobbie's family and will allow Samantha the maximum possible amount of contact with her mother. *See Burham*, 283 N.W.2d at 276. Dustin testified that while in his care, Samantha speaks to Bobbie every day on the telephone. Such openness apparently is not reciprocated when Samantha is in Bobbie's care.

Conclusion.

We reject Bobbie's request that we modify the dissolution decree to provide that she be awarded Samantha's physical care. Dustin, who remains in the State of Iowa around the bulk of Samantha's family, her friends, and her familiar environment, has proven himself to be a capable and loving father. He has and will continue to foster a relationship between Samantha, her mother, and her extended family. We agree Samantha's interests are best served by this arrangement ordered by the district court and therefore affirm. Costs are assessed to Bobbie.

AFFIRMED.