

FILED
MAY 31 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JENIFER LEE SUTHERLAND AND DAVID DaSAI SUTHERLAND

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UPON THE PETITION OF
JENIFER LEE SUTHERLAND,

)

Filed May 31, 1983

)

Petitioner-Appellee,

)

AND CONCERNING
DAVID DaSAI SUTHERLAND,

)

3-62
3-69154

Respondent-Appellant.

)

Appeal from Black Hawk District Court, L. D. Lybbert, Judge.

Respondent-husband appeals from the decree dissolving the parties' marriage, asserting that the best interests of the parties' two sons require that he be given custody. AFFIRMED.

Ray Sullins, Des Moines, for respondent-appellant.

L. Don Snow of Mershon, Snow & Knock, Cedar Falls, for petitioner-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ.

Hayden, J., takes no part.

PER CURIAM

Petitioner Jenifer Lee Sutherland and respondent David DaSai Sutherland were married in April 1974. They have two children: Todd, born in October 1975, and Troy, born in August 1978. During the marriage, Jenifer was primarily responsible for the care of the two boys.

When the parties separated, David moved out of the parties' house. However, he returned about two weeks later and *allegedly forcibly evicted Jenifer* from the house, keeping the boys with him. The trial court later granted David temporary custody of the boys.

There was conflicting testimony at trial concerning the parties' parenting abilities. The trial court awarded Jenifer custody, stating as reasons (1) that the attorney for the boys had recommended that Jenifer have custody; (2) that Jenifer had been primarily responsible for the care of the boys during the marriage; and (3) that David had become obsessed with getting custody of the boys away from Jenifer, to the point of letting his business deteriorate and hiring a string of *different attorneys in a relatively short period of time*. David appeals, contending that the custody award was improper.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We review the facts as well as the law and determine anew those rights properly presented and preserved. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). We give weight to the findings of the trial court, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. app. P. 14(f)(7).

On our de novo review we conclude that the children's interests would be best served by placing custody in their mother. See Iowa R. App. P. 14(f)(15). Our resolution of this issue is guided by the factors listed in Iowa Code section 598.41(3):

- a. Whether each parent would be a suitable custodian for the child.
- b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.
- c. Whether the parents can communicate with each other regarding the child's needs.
- d. Whether both parents have actively cared for the child before and since the separation.
- e. Whether each parent can support the other parent's relationship with the child.
- f. Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.
- g. Whether one or both the parents agree or are opposed to joint custody.
- h. The geographic proximity of the parents.

See also In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

We find the first five factors to be particularly relevant in this case. First, the trial court found that Jenifer seemed to be more genuinely interested in the children and much more stable "emotionally and otherwise" than David. See Iowa Code § 598.41(3)(a). The court recounted, in particular, the following chain of events which occurred subsequent to the parties' separation:

[R]espondent initially moved out of the parties' home with the understanding that petitioner and the two boys would reside there during the pendency of the action. However, on the night of February 10 and early morning of February 11, 1981, respondent appeared with several members of his family who then proceeded to force their way into the home and removed her bodily from the premises. Respondent apparently held petitioner in the snow while his family removed the children, who were aware of what was taking place. Some of the petitioner's belongings were also thrown out of the house and petitioner eventually went to her parents' home. Two days later petitioner went to respondent's mother's home where the boys had been staying and sleeping overnight and attempted to take the boys with her. Respondent's mother and his sister then held onto the boys and subdued her. On February 12 petitioner filed an application for an injunction and application for custody setting out the foregoing and that the respondent and his family had taken the children by force and threatened petitioner. The application for

custody was set for hearing which did not take place until March 19, 1981. Following a lengthy hearing, the Court left the temporary custody of the children with respondent in the family home that he was occupying and had been the children's home and granted petitioner extensive visitation rights, including every Wednesday, every other weekend, and every Sunday that petitioner did not have the children for the weekend. After that, petitioner and her mother went to the parties' home to get her clothing and other items with the consent of the respondent. While there, a quarrel arose which resulted in respondent grabbing petitioner's mother. One of the children went out to the car where petitioner's father awaited and reported that respondent was "hurting grandma" and petitioner's father then went into the home, fought respondent, and extricated petitioner and his wife. Following this, there were numerous instances when respondent did not make the children available to petitioner for her court ordered visitations.... Petitioner was to have had the children from October 18 to October 25, but respondent entered her premises on October 21 and forcibly removed the children after assaulting petitioner. He returned them that evening, but continued to harass the petitioner for the rest of that period. Prior to that time respondent had harassed petitioner by waiting for her in the parking lot of her apartment and for this reason petitioner was afraid to stay at her apartment...

While conflicting testimony was presented at trial regarding these incidents, the trial court's findings are given substantial weight when the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7). The court noted that respondent's testimony was "rambling, nonresponsive, and obviously intended to bring anything into the trial that would cast an unfavorable impression upon the petitioner."

Second, the trial court found that Jenifer had been primarily responsible for the care of the boys during the marriage. See Iowa Code § 598.41(3)(d). While we again note the conflicting evidence, our independent review of the record generally substantiates this finding.

Finally, we note that David has made it difficult for Jenifer to exercise her visitation rights and that the same type of behavior might ensue in the future if custody were awarded to him, hence causing the "psychological and emotional

needs and development of the child [to] suffer due to lack of active contact with and attention from both parents." Iowa Code § 598.41(3)(b); see §§ 598.41(3)(c), (e). The trial court found that David and his mother had become obsessed with removing custody of the children from Jenifer, to the extent that his business had deteriorated and that he had to hire several attorneys in a relatively short period of time.

While neither David nor Jenifer has been a paradigm of virtue in relation to the parenting of the two children, we conclude, as did the trial court, that Jenifer would be the more suitable custodian and would best serve the children's interests, and accordingly affirm the custody decision.

AFFIRMED.