IN THE COURT OF APPEALS OF IOWA

No. 5-633 / 95-686

IN RE THE MARRIAGE OF TIMOTHY SCOTT PROBASCO AND TAMMY JO PROBASCO

Upon the Petition of

TIMOTHY SCOTT PROBASCO,

Petitioner-Appellee,

And Concerning

TAMMY JO PROBASCO,

Respondent-Appellant.

FILED
FEB 28 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Appanoose County, Richard J. Vogel, Judge.

Tammy Jo Probasco appeals from the custody provisions of the parties' dissolution decree. **AFFIRMED.**

R. T. Starken of Alexander & Starken, Ottumwa, for appellant.

Gregory G. Milani of Osborn, Bauerle & Milani, Ottumwa, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

HABHAB, P.J.

Timothy and Tammy Probasco were married on September 27, 1987. They have one child, Scott Winchester Probasco, who was born on October 22, 1989.

At the time of the dissolution hearing, Timothy was thirty years old. He is employed at a tire shop in Unionville, Missouri. He lives with his parents, Larry and Nancy Probasco, in a house near Unionville. Timothy has had some problems with alcohol in the past. In 1990, he pled guilty to a charge of public intoxication, and in 1992, he pled guilty to a charge of operating while intoxicated, first offense. In 1994, he pled guilty to theft in the fifth degree.

Tammy was twenty-four years old at the time of the dissolution hearing. She is employed as a certified nurse's aide at a nursing home. She is planning to go to classes to become a licensed practical nurse. Tammy lives in a rented house in Melcher with her fiancé, Kelly Wilson. Kelly's mother, Judy Wilson, also lives with them. Kelly is married to another woman, but testified he planned to get a divorce and then marry Tammy.

On May 9, 1994, Timothy received temporary physical care of Scott. Tammy was ordered to pay child support of $129 per month. The district court ordered a home study of both homes to be conducted by the Department of Human Services.

The dissolution hearing was held on March 14, 1995. Jeff Laston, a social worker, had conducted the home study. He found both homes were clean and adequate to raise a child. He testified Scott had done very well in Timothy's care and

recommended Timothy have physical care of the child. He stated Tammy's situation seemed less stable due to the possibility of changes in her job and residence. Jon Wager, who had assisted in conducting the home study, also recommended that Scott be placed in Timothy's physical care.

The district court awarded the parties joint legal custody of Scott, with Timothy having primary physical care. The court stated it was concerned about Timothy's problems with alcohol, but found no evidence he was currently abusing alcohol. The court found Scott was doing very well in Timothy's care. As to Tammy, the court expressed doubts about her living arrangements. The court also noted she had not paid any child support under the temporary order. Based on these factors, the court determined it was in Scott's best interests to live with Timothy.

Tammy has appealed the custody provision of the dissolution decree. She believes she should have primary physical care of Scott. She states she was Scott's primary caretaker during the marriage. She claims Timothy's alcohol problems are more serious than found by the district court. She also claims Timothy threatened her at the time the parties separated.

Our scope of review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

The best interests of the child dominates our consideration in child custody cases. *In re Marriage of Brainard*, 523 N.W.2d 611, 614 (Iowa App. 1994). Numerous factors exist to supplement the best interests standard, which are enumerated in Iowa Code section 598.41(3). *Id.* The critical issue in determining the best interests of the child is which parent will do better in raising the child into a healthy, content, well-adjusted young adult. *Id.*

We find both Timothy and Tammy could do a good job in raising Scott. The evidence showed Timothy appears to have put his problems behind him and has taken up the role of custodial parent whole-heartedly. Timothy has enrolled Scott in day care in Unionville. The day care provider testified Scott did very well and did not have any problems. Timothy has taken Scott to swimming lessons and T-ball. Further, both social workers involved in the home study recommended Scott be placed in Timothy's physical care.

Like the district court, we are concerned about Tammy's housing arrangements because they are dependent on her relationship with Kelly. Because Kelly is actually married to another woman, the stability of this relationship is somewhat in doubt. Moreover, Tammy's failure to pay child support while this case was pending is a factor to be taken into consideration.

We agree with the trial court it is in Scott's best interests he be placed in Timothy's physical care. We affirm the custodial provision of the parties' dissolution decree.

Both parties seek attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions *In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa App. 1991). We determine each party should pay his or her own attorney fees for this appeal.

We affirm the decision of the district court. Costs of this appeal are assessed to Tammy.

AFFIRMED.