IN THE COURT OF APPEALS OF IOWA

No. 1-205 / 00-1240
Filed April 27, 2001

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CLERK SUPREME

JOHN P. THOMPSON,
Petitioner-Appellee,

vs.

ALICIA R. SMITH,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

Alicia R. Smith appeals from an order establishing paternity and awarding John P. Thompson physical care of their minor child. Alicia contends (1) she should have been awarded physical care of their minor child; and (2) her actual earnings should have been used in calculating her child support obligation. **AFFIRMED.**

Stephen B. Jackson and Stephen B. Jackson, Jr. of Jackson Law Office, Cedar Rapids, for appellant.

Frank J. Nidey of Nidey Peterson Goldberg, P.L.C., Cedar Rapids, for appellee.

Heard by Sackett, C.J., Huitink and Streit, JJ.

SACKETT, C.J.

We are asked to review the district court's resolution of a custody dispute in a paternity action. The child, MeShell Rae Thompson, was born March 1, 1997. Her parents are John, born in 1972, and Alicia, born in 1975. They were in a relationship before and after MeShell's birth but separated six to twelve months later. In April of 1999 John filed a petition asking the court (1) to establish his paternity, (2) name him and Alicia custodians; (3) grant him primary care; and (3) order Alicia to pay child support. After a trial the district court granted the parties joint custody and awarded John primary physical care. Alicia was granted liberal visitation and ordered to pay child support. Alicia now appeals contending (1) she, not John, should have been granted primary care, and (2) the district court should have used her actual earnings in fixing her child support obligation. We affirm.

We review de novo. Iowa R. App. P. 4; *In re Marriage of Riggert*, 537 N.W.2d 789, 791 (Iowa Ct. App.1995); *In re Marriage of Harris*, 499 N.W.2d 329, 330 (Iowa Ct. App. 1993). The criteria governing custody decisions is the same regardless of whether the parties are dissolving their marriage or are unwed. *Lambert v. Everist,* 418 N.W.2d 40, 42 (Iowa 1988); *Petition of Purscell*, 544 N.W.2d 466, 468 (Iowa Ct. App. 1995).

The question is always which parent will do the better job of raising the child. *In re Marriage of Rodgers*, 470 N.W.2d 43, 44 (Iowa Ct. App.1991). We look to the factors set forth in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). Yet, we

are not bound by these determinations. *Id.* We base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). The interests of MeShell are the primary consideration. See *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984); *Neubauer v. Newcomb*, 423 N.W.2d 26, 27 (Iowa Ct. App.1988). We give consideration to each parent's role in child raising prior to a separation in fixing primary physical care. *See In re Marriage of Love*, 511 N.W.2d 648, 650 (Iowa Ct. App. 1993); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992). Though we do not award custody based on hours of service for past care, we attempt to determine which parent will in the future provide an environment where the child is most likely to thrive. *In re Marriage of Crotty*, 584 N.W.2d 714, 717 (Iowa Ct. App. 1998); *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993). There is no inference favoring one party as opposed to the other in deciding which one should have custody. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). The critical issue is determining which parent will do a better job raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in an original custody proceeding. *See In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa Ct. App. 1985).

In awarding custody the district court found:

> John is the more stable parent of the two and John has been MeShell's primary caretaker for most of her life, at least since 1998. John has not only provided the majority of day-to-day care for MeShell but he has provided the necessary services as well as shelter, food and clothing. John has, under some difficult circumstances, done what he could to foster and continue the relationship between MeShell and Alicia especially during the year Alicia had no permanent residence. Alicia has been present in

MeShell's life but only began providing consistent care for MeShell after John filed a petition for custody of MeShell.

Alicia argues these findings are flawed, and the district court did not consider evidence that would show MeShell's interests would be best served in her primary physical care. Alicia contends she is presently more able to meet the child's needs. Alicia also contends the district court did not properly consider evidence that John was physically and emotionally abusive toward her and failed to consider that the custodian award will separate MeShell from her half sister. Alicia also contends the district court failed to give adequate weight to John's past history and did not properly assess his credibility.

John refutes Alicia's arguments contending the evidence shows he is the more stable parent and the one more suitable to provide MeShell's primary care. He contends the district court gave the proper weight to his past and to the past conflicts between him and Alicia. John contends little weight should be given to keeping MeShell with her infant half sister because the girls are over three years apart in age, and they have established no relationship.

John and Alicia both have rocky pasts. At the time they first lived together they both were heavy drug users and at times have been involved in drug trafficking. There have been a series of conflicts between the couple.

We agree with the district court that John has shown more stability than Alicia since MeShell's birth. After John and Alicia separated John always provided a home for MeShell. John has had a stable job working for Amana, and he provided financial support and medical care for his daughter. Alicia moved in and out of his apartment. For a time John helped Alicia pay for an apartment. During that period the parties shared the care of MeShell. For a year Alicia was

basically homeless and sleeping in her car. These are factors in John's favor in assessing the custodial award.

Alicia testified that John was abusive to her during their relationship. She contends the district court did not give this evidence the proper weight. Iowa Code section 598.41 directs that evidence of domestic abuse creates a rebuttable presumption against joint custody. See Iowa Code § 598.41(1)(b), (2)(c). We consider the evidence of domestic abuse in determining if the presumption is rebutted and how much weight should be give to that one factor. *See In re Marriage of Ford*, 563 N.W.2d 629, 632 (Iowa 1997).

The evidence of abuse is disputed. Alicia testified John physically and emotionally abused her during the time they were together and that that was the reason she left his home. Alicia's grandfather testified John slammed Alicia's foot in a door. John testified he never abused Alicia or any other woman. He contended there were times that Alicia was aggressive and he restrained her. He points to evidence she was involved in a physical altercation with another woman in a bar. He contends if he choked her he did it in defending himself against her.

Three times the police were called to the home that John and Alicia occupied. They did not make arrests apparently because each complained to the officers that the other had been the abuser. Two friends of John testified Alicia was the aggressor in physical confrontations, that she kicked John in the head and he responded only in self-defense. At a friend's suggestion John attended classes to educate himself on self-control in cases of confrontation with Alicia.

Abusive behavior negates against a parent receiving custody. Our de novo review convinces us that both John and Alicia have engaged in behaviors not conducive to good parenting, including using alcohol and drugs and being abusive to each other. Believable testimony regarding negative behavior of each of the parties is in the record. We find they have both matured since the time they first established a relationship. Each is now in another relationship. Neither has married. John points out that Alicia's current partner has had problems with alcohol abuse, was convicted of physically abusing his wife, and paid nearly five thousand dollars in medical bills as restitution. We also note he recently completed substance abuse treatment. Nothing is gained by examining all of the negative comments and accusations John and Alicia have made against each other. Our focus is not on which parent is worse, but instead on which parent can better serve MeShell's needs.

Fortunately we are also able to find substantial and believable testimony that both John and Alicia love MeShell and do a good job of taking care of her.

Alicia claims the district court did not properly consider the need to keep MeShell together with her then seven-month-old half sister. There is a presumption that siblings should not be separated. *In re Marriage of Smiley*, 518 N.W.2d 376, 380 (Iowa 1994). Generally we oppose split physical care because it deprives children of the benefit of constant association with one another. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). The rule is not ironclad, however, and circumstances may arise which demonstrate that separation may better promote the long-range best interests of children. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996). Good and compelling reasons must

exist for a departure. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993). The factors favoring the presumption of leaving siblings together is not strong in this case. MeShell has not established a relationship with her sister. At the time of trial MeShell was four years old and her half sister only seven months. In the past several years MeShell has been in the primary care of John. Alica was awarded substantial visitation and the children will have an opportunity to be together.

After carefully weighing all factors and giving the required deference to the factual finding of the district court we affirm the custodial award.

Alicia was ordered to pay child support of $235 a month until MeShell finishes high school or reaches nineteen years of age. Alicia contends the trial court should have based its child support award on her actual income. The question is did the district court abuse its discretion in fixing Alicia's net income for the purpose of applying the Child Support Guidelines. *In re Marriage of Gehl*, 486 N.W.2d 284, 287 (Iowa 1992); *In re Marriage of Thede*, 598 N.W.2d 59, 62 (Iowa Ct. App. 1997). The income used represented evidence of what Alicia claimed she could earn. The district court did not abuse its discretion in fixing Alicia's income for the purpose of fixing child support. We affirm on this issue. We award no appellate attorney fees.

AFFIRMED.