



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LOREN FRANK BEASLEY AND ROCHELLE KAY BEASLEY

**UPON THE PETITION OF
LOREN FRANK BEASLEY,**

)

Filed November 30, 1983

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Petitioner/Appellant/Cross-Appellee,

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3-363

AND CONCERNING

83-601

ROCHELLE KAY BEASLEY,

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Respondent/Appellee/Cross-Appellant.

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Appeal from Dubuque District Court, Thomas H. Nelson, Judge.

Petitioner-husband appeals and respondent-wife cross-appeals from the decree dissolving the parties' marriage. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

Wayne A. Norman, Jr., Dubuque, for petitioner-appellant.

Thomas J. O'Flaherty and Kevin G. Magee, Des Moines, for respondent-appellee.

Heard by Oxberger, C.J., and Snell and Sackett, JJ.

OXBERGER, C.J.

Petitioner-husband appeals and respondent-wife cross-appeals from the decree dissolving the parties' marriage. On appeal, petitioner-husband asserts: (1) the trial court abused its discretion in denying petitioner-husband's application for mental examination of respondent-wife; (2) in determining the custody issue, the trial court failed to give adequate weight to the testimony of petitioner-husband's witnesses and to the evidence regarding the relative conduct of the parties; and (3) the trial court should not have split custody of the parties' two children between petitioner-husband and respondent-wife, and should have instead awarded petitioner-husband custody of both children.

On cross-appeal, respondent-wife asserts: (1) the trial court should not have split custody of the parties' two children and should instead have awarded her custody of both children; and (2) one of petitioner-husband's witnesses was an expert, and the trial court should not have allowed him to testify because petitioner-husband did not give respondent-wife notice that an expert would be called.

Both parties also assert that even if split custody was appropriate, the trial court should have provided for visitation by each party with the child placed in the other party's custody. We affirm in part and reverse in part.

I. Scope of Review

In equity matters such as this, where our review is de novo, it is our responsibility to review the facts as well as the law and determine from the credible evidence rights anew. In re Marriage of Winegard, 257 N.W.2d 609, 613 (Iowa 1977). We give weight to, but are not bound by, the findings of the trial court. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981).

II. Mental Examination

The evidence presented to the trial court at the December 21, 1982, hearing in support of Loren's application for mental examination of Rochelle were two affidavits from a social worker and a special education teacher. Both affidavits state that after Donald visits his mother, he has behavioral problems at school. There was also evidence that Rochelle had been diagnosed schizophrenic and epileptic approximately eight years ago.

The general rule is that an order for mental examination under rule 132 is discretionary with the trial court and it will not be overturned unless an abuse of discretion is shown. McQuillen v. City of Sioux City, 306 N.W.2d 789, 790 (Iowa 1981). Two elements must be established to warrant an order for examination: (1) the mental condition of the party must be in controversy; and (2) when the condition is in controversy, good cause must be shown for the examination. Id. at 790-91. We do not believe general allegations of cause and effect of Rochelle's visits with Donald and an eight-year-old psychiatric diagnosis is sufficient basis to order a mental examination. Without more, we cannot agree that the trial court abused its discretion. Therefore, we affirm the denial of the application.

III. Weight of Testimony

In equity cases such as this, especially when considering the credibility of witnesses, we give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7). Loren alleges that, when viewing the entire record, the trial court erred in failing to give adequate weight to his witnesses. We assume his argument is based upon the trial court's custody award of the second child, Moya, to Rochelle. However, the bulk of the testimony of Loren's independent witnesses was concerned not with Moya, but with Donald and his situation and his interaction with Loren. Those independent witnesses had virtually no personal knowledge regarding Moya. Therefore, we find no merit in this contention.

IV. Conduct of Parties

The general rule is to the extent the conduct of the parties, good or bad, bears upon and reflects the character and fitness of the respective parties for custody of the children, it is admissible and is properly considered on the issue of child custody. In re Marriage of Peterson, 227 N.W.2d 139, 141 (Iowa 1975). The ultimate goal in all child custody decisions is to determine under the whole record which parent can better serve the long-range best interests of the children. Id. at 141. The findings of fact filed by the trial court on March 28, 1983, indicated that at that point in time the trial court was well aware of Rochelle's past mental illness, her outbursts of physical violence, and her occasional unusual behavior. The parties separated prior to Moya's birth. Moya has known no other parent, for all practical purposes, except Rochelle. There is no substantial evidence that the care Rochelle has provided for Moya is inadequate. We find that the trial court did give sufficient weight to the conduct of the parties and properly considered that conduct on the issue of child custody.

V. Split Custody

The rule is that no court should separate siblings absent good and compelling reasons. In re Marriage of Burham, 283 N.W.2d 269, 276 (Iowa 1979). We believe such reasons have been shown. Donald has been in the custody of Loren since November 25, 1981. Since that time Donald has materially improved in his behavior and in his schooling. Donald has adjusted to his father's strict discipline and appears to be doing well within his environment. On the other hand Moya was born on November 25, 1981. For all practical purposes, she has had little contact with her father or her brother. She has lived exclusively with Rochelle since her birth. We are cognizant of the fact that split custody will deprive children of the benefit of constant association with each other. In re Marriage of Wahl, 246 N.W.2d 268, 270 (Iowa 1976). However, we see no evidence that either child has suffered at this point from being separated from its sibling. We do not believe it would be in Donald's best interests to disrupt the stable relationship he now enjoys

and award his custody to Rochelle. Likewise, we will not usurp the life-style that Moya has become accustomed to since birth for the sole reason of assuring the benefit of constant association with Donald. Therefore, we affirm the split custody award.

VI. Visitation Rights

The trial court terminated the visitation rights of Loren with Moya and of Rochelle with Donald. The court indicated that visitation at this point in time would be harmful to the children as violent confrontations between the parents ensue when in each other's presence. Visitation, like custody, is determined by the best interests of the children. In re Marriage of Hubbard, 315 N.W.2d 75, 82 (Iowa 1982). It is ordinarily in the best interests of the children to have continued association with the noncustodial parent through visitation. Id. at 82. Both parents have requested that visitation not be denied. Furthermore, visitation would allow Donald and Moya to develop and maintain a beneficial association with each other. See Wahl at 271. Termination of visitation is not the only option. We believe a less onerous alternative is available. For example, a neutral third party or relative could deliver each child to the other parent's home or visitation could occur at a third party's residence. Therefore, we reverse that portion of the trial court's ruling terminating all visitation rights. We remand this case to the trial court with directions to allow visitation on such terms and for such periods of time that the trial court within its discretion deems reasonable.

We strongly reprimand the parents of these children however for their uncooperative attitudes and conduct toward each other. The evidence indicates that this behavior has already had an adverse effect on the children and if not remedied the effects will most likely continue. Each parent has professed a desire to keep close contact with the children. We caution Loren and Rochelle to let their animosity for each other give way in order to promote a healthful parent-child relationship. If cooperation is not forthcoming, further adjudication of the

rights of these parties may be necessary.

VII. Surprise Testimony

Our de novo review convinces us that the testimony of Peter Templeman did not materially affect Rochelle's substantial rights so as to warrant a new trial. See Iowa R. Civ. P. 244(c). Therefore, we need not reach the merits of that issue.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.