FILED
DEC 29 1982
SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF TERRY LEE RESCHLY AND SHIRLEY SUE RESCHLY

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UPON THE PETITION OF **TERRY LEE RESCHLY,**	)	
Petitioner-Appellant,	)	Filed December 29, 1982
AND CONCERNING **SHIRLEY SUE RESCHLY,**	)	**2-300** / **3-67438**
Respondent-Appellee.	)	

Appeal from Washington District Court, Robert Bates, Judge.

Petitioner-father appeals from custody provision of dissolution decree, which awarded custody of the two children to their maternal grandparents. AFFIRMED.

Emmit J. George of Johnston & George, Iowa City, for the petitioner-appellant.

John Wehr, Des Moines, for respondent-appellee.

Thomas M. Walter of Johnson, Bauerle, Hester & Walter, Ottumwa, for intervenors-appellees.

Heard en banc.

Petitioner Terry Reschly and respondent Shirley Reschly were married in 1975 and had two children, Shawna, born in 1975, and Shannon, born in 1977. In 1979 Terry filed a petition for dissolution and requested custody of the two children. Shirley's parents, Roger and Delores Cavin, intervened in the dissolution proceedings, requesting that the children be placed in their custody. Concluding that the presumption in favor of awarding custody to a natural parent had been rebutted by evidence of Terry's criminal behavior, drug abuse, and employment instability, the trial court awarded custody to the Cavins. On appeal Terry challenges only that provision of the decree regarding custody. Shirley joins in the brief of the intervenors requesting that the trial court's decision be affirmed.

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).

The paramount consideration in any custody dispute is the best interests of the child. Iowa R. App. P. 14(f)(15). The Iowa courts have recognized a presumption, or "inference," that the child's natural parents generally will fulfill those interests. In re Marriage of Smith, 269 N.W.2d 406, 407 (Iowa 1978); Halstead v. Halstead, 259 Iowa 526, 534, 144 N.W.2d 861, 865-66 (1966); see Iowa Code §§ 633.559, 633.571 (1981). This presumption is rebuttable, however, and custody may be awarded to third parties if the child's best interests would thereby best be fulfilled. Halstead, 259 Iowa at 534, 144 N.W.2d at 866. The supreme court has cautioned that children may not be removed from the custody of their natural parents simply because another home "offers more advantages," In re Burney, 259 N.W.2d 322, 324 (Iowa 1977); rather, it must be demonstrated that the parent is not a "suitable custodian." In re Mann, 293 N.W.2d 185, 190 (Iowa 1980).

Terry Reschly was twenty-five years old at the time of trial, having attended high school at Washington, Iowa. He had been convicted of breaking and entering in 1974 and was placed on probation for twenty-eight months. He successfully completed his probationary time but only because it was not known that he was illegally selling drugs during this period. Sometime between 1975 and 1977, he broke into several residences in Washington, Iowa, and removed property and money. Prior to 1978, he also twice entered a locked implement dealership but said he could not remember if he took any money. He did, however, remember taking money from a Ford dealership that he entered when it was not open for business.

In addition to selling illegal drugs, Terry engaged in the heavy use of those drugs, including LSD, marijuana, amphetamines, hashish, cocaine, and barbituates. He and his friends consumed marijuana and hashish in the presence of his two children. He claims he subsequently quit smoking and using drugs.

Terry's employment record does not help his cause. While working at Perfex, he was smoking eight to ten joints per day at work to keep him going. He was fired from that employment. At the Hy-Vee Food Store, he was fired for physically restraining a female employee from returning to her station. He lost his job with the City of Washington for allegedly stealing flowers. His employment at the Firestone Store lasted nine months. He quit to go into the Air Force, decided after fifteen days that he had made a mistake, and successfully obtained a discharge. His ex-wife testified that he told her he got out by faking drug withdrawal symptoms.

At the time of trial, Terry was receiving ADC payments and had a job as a sales representative for Central Petroleum Company selling in the north half of Henry County. For two weeks work he earned $86.60 before deducting his expenses. He married his present wife Vicki shortly before trial and was living

with her and her son. Vicki was expecting a child by Terry in a month. Vicki has a ninth-grade education, has worked as a waitress, and has been receiving ADC payments since age sixteen.

The homestyle situation allowed by Terry has been harmful to the children. There have been incidents of drug abuse, alcohol abuse, physical fights, and an attempted suicide, all when the children were present. Neglect by babysitters and lack of proper care by Terry of the nutrition and health needs of the children are among their experiences.

On appeal Terry concedes that his past behavior has not been exemplary and that he has not always been competent to care for the children, but contends that he has reformed and that he is now able to minister to their needs. Apparently certain changes Terry exhibited were sufficient to lead the trial court to state, in its conclusions of law, that "the Court does not find him unfit at this time." (Emphasis in original). The trial court was overly generous in its conclusion even as limited in time. Although certain changes in Terry's behavior may have occurred, we are not convinced that they rise to the level of change which prompted the court to temporarily place the children with their father in In re Freund, 216 N.W.2d 366, 368-69 (Iowa 1974). Neither are we convinced that these "changes" are permanent in nature rather than temporary, or are motivated internally rather than merely by a desire to obtain custody. A finding of fitness at this time does not bar consideration of past behavior in evaluating what custodial determination is in the children's best interests for the future. While we are encouraged by the progress made by Terry to become a fit parent and are hopeful that it will continue, we are convinced that, in light of all the evidence, he is not yet a suitable custodian.

In contrast, the Cavins have provided a secure, healthy, nurturing environment for Shawna and Shannon. Roger Cavin and Delores Cavin are relatively young grandparents. Roger has stable employment with John Deere in

Ottumwa; he earned approximately $26,000 last year. He also has part-time employment as the night martial for the town of Ollie, Iowa, earning approximately $1,200 per year, and has had six years law enforcement experience. Delores has been employed during her lifetime on a fairly regular basis, but quit work in June of 1979 to stay home and care for Shawna and Shannon while they were left with her for some two to three months. Both of the intervenors have indicated in their testimony a capacity and a strong interest to care for the minor children. Both have developed plans for the emotional, social and educational needs of the children. The Cavins feel that the children emotionally require stability, love, and affection. They maintain a very stable home and demonstrate love and affection to the children, both verbally and physically. The Cavins feel the children need to be with other children their own age, learning how to get along. To that end, Shannon has been enrolled in preschool. There are children, including relatives of their own age, in the Ollie area, as well as activities they can participate in. In addition, the Cavins have attempted to meet this social need during visitation periods when the children have been taken to Ottumwa to see the clowns, to Adventureland, and on various family gatherings. The educational needs of the children will be amply met by Shawna's attendance at a new school in the Pekin Community School District and by Shannon's enrollment and attendance in preschool. While the Cavins themselves do not attend church on a regular basis, they feel that it is important for the children to be exposed to religious beliefs and have, during visitations, taken the opportunity to expose the children to Sunday School and church services.

The children have a strong attachment for the Cavins and for the home. This is not a situation in which the children have never resided with the grandparents except for brief periods of visitation. They have, in fact, spent time

there during the summer of 1979 and visitation has occurred on a regular basis. The Cavins, by their testimony, demonstrate a strong attachment for the children and a desire to see that the children receive the best possible upbringing. At trial a psychiatric social worker testified that it would be in the best interests of the children if their custody were placed with the Cavins. Custody has been awarded to third parties in cases with similar factual circumstances. See, e.g., In re Marriage of Smith, 269 N.W.2d 406, 408-09 (Iowa 1978)(custody of minor child awarded to his uncle where mother was unstable and sometimes suicidal, and placement of child with father would render visitation by mother very difficult); Finken v. Porter, 246 Iowa 1345, 1352, 72 N.W.2d 445, 449 (1955)(best interests of child mandated that he be placed in custody of grandmother and her husband, who had provided much care for him, rather than with his natural father). We therefore conclude that the presumption of parental preference in custody matters has been rebutted in this case. See Halstead v. Halstead, 259 Iowa 526, 534, 144 N.W.2d 861, 865-66 (1966).

We hold the evidence establishes that the best interests of these children lie with custody in Roger and Delores Cavin. The trial court's decision is affirmed.

AFFIRMED.

All judges concur except Oxberger, C.J., and Johnson, J., who dissent.

OXBERGER, C.J. , (dissenting.)

I respectfully dissent. I agree with the trial court's finding that the father is not now an unfit parent. I also agree with Dr. Richard L. Jenkins' finding: "In view of the strong bond of affection with the resultant emotional security which Shawna and Shannon have with Terry and Vickie Reschly, it is my opinion that it would be very detrimental to their welfare to remove them from the Reschly home. Dr. Jenkins, a psychiatrist with the psychiatric hospital in Iowa City, was ordered by the trial court to interview the family and report his findings to the court. The children have been with the father since 1979, subject to periodic reviews by the Department of Social Services.

I would continue the natural parent-child relationship and not award custody of the children to the maternal grandparents.

Johnson, J., joins this dissent.