



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KELLY SUE PHILLIPS AND KEITH ALLEN PHILLIPS

Upon the Petition of	)	275
KELLY SUE PHILLIPS,	)	
Petitioner-Appellant,	)	Filed March 31, 1987
And Concerning	)	
KEITH ALLEN PHILLIPS,	)	<u>6-511</u>
Respondent-Appellee.	)	86-792

Appeal from the Iowa District Court for Black Hawk County (No. 34052 Equity) - James L. Beeghly, Judge.

Petitioner wife appeals from the decree dissolving the parties' marriage.

AFFIRMED.

James F. Whalen of Dunbar, Dunbar & Whalen, Waterloo, for appellant.

David L. Riley of Lindeman & Yagla, Waterloo, for appellee.

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

DONIELSON, J.

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The petitioner, Kelly Sue Phillips, appeals from the decree dissolving the parties' marriage. Kelly asserts (1) that the trial court should have awarded her rather than her husband, Keith, physical care of the parties' child in the joint custody arrangement; and (2) that the trial court unduly restricted her visitation rights. We affirm.

Kelly Sue Phillips and respondent Keith Allen Phillips were married on May 1, 1982. The parties have one child, Brittney Jo, born January 22, 1984. Kelly and Keith separated on October 1, 1985, and Brittney has resided with Kelly since that time. Keith works as a dry cleaner and has steadily worked for the owner of the dry cleaning business for the past seven years. Kelly has worked for short periods of time at a variety of jobs, but was unemployed at the time of trial. Brittney Jo, though relatively in good health, has suffered from several minor health problems and has had hernia surgery.

The main issue at trial is the custody of Brittney. In its dissolution decree, the trial court stated it had "serious concerns about a wide range of personal traits" displayed by Kelly. The court was particularly concerned about Kelly's apparent lack of regard for telling the truth. The court noted that it observed Kelly to be impatient, impulsive, immature, and, on occasion, spiteful. The trial court additionally noted that Kelly appeared somewhat unstable in her employment and family relationships. The court did note, however, that these traits seem to have been exacerbated following the parties' separation. The trial court concluded that Keith appeared to be more stable and responsible and had the backing of a more supportive family. The trial court's subsequent order provided for joint custody with physical custody of Brittney granted to Keith. The trial court's order also provided that Kelly was to have visitation on alternate weekends from 5:00 p.m. Friday to 5:00 p.m. Sunday and visitation

in even-numbered years on Memorial Day, Labor Day, and Christmas, and in odd-numbered years on Easter, Fourth of July, and Thanksgiving. Kelly was also awarded six consecutive weeks of visitation each summer.

Because dissolution proceedings are equitable in nature, our scope of review is de novo. Iowa R. App. P. 4. While we give weight to the fact findings of the trial court, especially considering the credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

There are no hard and fast rules governing the issue of custody. In re Marriage of Vrbanc, 359 N.W.2d 420, 423 (Iowa 1984). Precedent is of little value and our decision must ultimately depend on the particular facts relevant to each issue. Id. The basic tenet which overrides all else in determining which parent is entitled to custody is the best interest of the child. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). The general principles applicable to the issue of custody are set forth at length in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974) and Iowa Code section 598.41(3) (1985) and need not be repeated here. Among the most important factors to be considered in making a child custody determination are the capacity and interest of each parent to provide for the needs of the child and the stability and wholesomeness of each proposed environment. In re Marriage of Grandinetti, 342 N.W.2d 876, 879 (Iowa Ct. App. 1983). The ultimate question is therefore which parent could minister most effectively to the long-range best interests of the child. In re Marriage of Sparks, 323 N.W.2d 264, 266 (Iowa Ct. App. 1982).

In the present case, we agree with the trial court's conclusion that Keith would be the parent more capable of ministering effectively to the long-range interests of Brittney. The record reveals that Keith has been gainfully employed in the dry cleaning business for seven years. Keith's employer testified that Keith was a valued employee and was extremely punctual and responsible.

Keith testified at trial that if he were granted custody he would like to move to another residence where Brittney would have a larger yard in which to play. Keith was consistently punctual in exercising his visitation. Keith testified that because of his work schedule, Brittney's eating and sleeping schedule would be more consistent than as they presently exist under Kelly's supervision. During Keith's period of visitation, Brittney was always observed to be clean, neatly dressed, and well-fed. Keith's apartment has been observed as being neat and clean. Keith has also bought Brittney new clothes, shoes, a new bed, and toys with which to play.

Concerning Kelly, the record reveals, and Keith admits, that prior to the parties' separation, Kelly was a good parent and was the primary caretaker of Brittney. The record reveals that during the period before separation, Kelly constantly made sure that Brittney was clean and well-groomed and generally was the one who bathed Brittney every day. Kelly additionally exhibited a great deal of concern for Brittney's health and saw to it that Brittney received proper medical attention. After the parties' separation, however, Kelly's care for Brittney seriously declined. Testimony from numerous witnesses who testified at trial reveals that Brittney often appeared to be unkempt and dirty, often wearing the same outfit several times in a row without being cleaned. Keith testified that Kelly often refused to give him an extra set of clean clothes during Keith's visitation in case Brittney became dirty. Kelly admitted that Brittney wore her old baby shoes, which Kelly admitted were too large for Brittney. There was sufficient evidence in the record to show that Brittney was often observed covered with dog hair and that on one occasion a sandwich which Brittney was eating was covered with dog hair.

The record additionally reveals that Brittney's eating and napping schedule was not consistent but was dictated by Kelly's schedule. There was evidence

offered at trial tending to show that Kelly was not attentive to Brittney's nutritional needs. Keith testified that on several occasions he observed Brittney eating candy or other sweets though apparently she had not otherwise been fed breakfast or lunch. In addition, Kelly has been employed in a variety of jobs, but failed to keep most of those jobs for longer than a short period of time. Kelly further testified that she was not looking for work because she was too concerned with keeping custody of Brittney.

We also find disturbing Kelly's apparent lack of regard for truthfulness. Contrary to Kelly's contention that the trial court could cite to no specific instances of untruthfulness, we find in the record numerous examples of dishonesty, though not all need be mentioned here. On one occasion, Kelly attempted to have Brittney's physician confirm to Keith that she and Brittney had indeed visited the clinic the previous day, when in fact no appointment had ever been made. There are numerous instances where Kelly informed Keith that he could not exercise visitation on account of a doctor's appointment, yet would give only vague reasons for having such appointments. Kelly failed to inform Keith about Brittney's accident running into Kelly's cigarette. Instead, Kelly told Keith that Brittney had gotten something in her eye and that it had become swollen. Kelly then told Keith that the doctor had ordered that Brittney not be allowed to leave the home for several days, though Keith learned from the doctor several days later that this was not true. In yet another example, Kelly told Keith that she was going to a party at a co-worker's home, when in fact there was no such party.

Kelly also denied having an affair with Dondi Hickey. In a letter dated December 1985 to Kelly's sister, Rosemary, Kelly stated that Dondi was nothing more than a friend and that while she thought she was at one time interested in Dondi, she was never going to see him again. Yet Kelly admitted that by

the end of January 1986 she was having an affair with Dondi while Brittney was in the home. While moral misconduct may not in and of itself bar a parent from being awarded custody, such misconduct is a factor to be accorded weight, and it will be weighed most heavily where such conduct has occurred in the presence of the children. In re Marriage of Grandinetti, 342 N.W.2d 876, 879 (Iowa Ct. App. 1983). Though there is no direct evidence that Brittney has actually witnessed her mother's sexual relationship with Dondi, we do believe that such a relationship may be detrimental to Brittney's emotional welfare.

Based on these facts, we agree with the trial court that Brittney's long-range interests would best be served by awarding custody to Keith. We agree with the trial court's finding that Kelly's care of Brittney has seriously deteriorated, so much so that in November of 1985 both her sister, Rosemary, and her mother, Mrs. Bahlman, at one time considered seeking custody of Brittney. Keith has proved himself to be more responsible and mature, and though Keith is not totally proficient in the methods of child care, we find that his supportive family will be able to provide Keith with whatever guidance is needed. We therefore conclude that Keith should be granted physical care of Brittney.

Kelly additionally contends that the trial court unduly restricted her visitation. Kelly requests that if Keith is awarded physical custody of Brittney, that she be granted midweek visitation while Keith is at work. We find the trial court's award of visitation in the present case similar to that approved by this court in In re Marriage of Fish, 350 N.W.2d 226, 230-31 (Iowa Ct. App. 1984). As in the present case, the respondent in Fish was awarded visitation on alternate weekends and alternate holidays. 350 N.W.2d at 230. The respondent argued that in addition he should have been allowed midweek visitation. Id. We declined to disturb the trial court's award on the issue of midweek visitation on the grounds that such visitation would involve excessive shifting of the child between parents

and could impair the child's sense of stability. Id. at 231. For these same reasons, we decline to modify the visitation award in the present case.

AFFIRMED.