

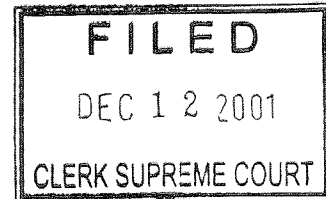
IN THE COURT OF APPEALS OF IOWA

No. 1-840 / 01-0177
Filed December 12, 2001

DARREL WHITE,
Petitioner-Appellee,

vs.

KATHI D. JARRETT,
Respondent-Appellant.



Appeal from the Iowa District Court for Des Moines County, Cynthia Danielson, Judge.

Respondent challenges the district court's decision to award primary physical care of her daughter to petitioner, the child's father. **AFFIRMED.**

James Ottesen, Davenport, for appellant.

Darrel White, West Burlington, Pro Se, for appellee.

Considered by Sackett, C.J., and Mahan and Hecht, JJ.

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SACKETT, C.J.

Respondent-appellant Kathi J. Jarrett and petitioner-appellee Darrell White are the parents of a daughter, Tristin, born November 29, 1992. The parties never married. In 1999 Darrell filed a petition seeking to be granted custody of Tristin. This petition represented the first time Tristin's custody was before a court. The district court provided that Kathi and Darrell should be named joint custodians and Darrell should be granted primary physical care. Kathi appeals, contending (1) the district court should have appointed an attorney for Tristin, and (2) she should be the primary care parent. We affirm.

There was no request at the trial court level for an attorney to be appointed for Tristin. Kathi recognizes that she is raising the issue for the first time on appeal. She contends, however, that because it is in the child's interest it should be addressed. We will address the issue without deciding if it was preserved for appellate review.

The court's authority to appoint an attorney for a child whose interests are at issue in a dissolution comes from Iowa Code section 598.12(1) (1999), which provides:

The court may appoint an attorney to represent the interests of the minor child or children of the parties. The attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify before the court on matters pertinent to the interests of the children.

Further direction on the statute came from the supreme court in *In re Marriage of Joens*, 284 N.W.2d 326, 329 (Iowa 1979), where the court discussed the position of an attorney for children:

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Significantly the attorney is to investigate and to secure the testimony of witnesses helpful to the cause of the children. There is no provision that he 'report' or that he make recommendations. His findings are not made admissible as evidence in the case. It appears that the legislature recognized that in the rancor and bitterness of a custody fight parents might well be insensitive to the best interests of their children. It provided that the children have representation separate and apart from either parent.

The attorney appointed, then, like the attorney for any client, is to see that the interests of those he represents get a full and fair airing at the trial by the presentation of competent and relevant evidence. What the attorney discovers is frequently hearsay, sometimes only rank rumor or gossip. Therefore those who know the facts should testify in order to provide a reliable basis for the trial court's ultimate decision.

This does not conflict with *In re Marriage of Winter*, [223 N.W.2d 165, 167 (Iowa 1974)], where we listed as one of the factors to be used in deciding who should have custody 'The report and recommendation of the attorney for the child.' We intended this to mean only that such matters should be considered by agreement or stipulation, The statute does not provide nor did we say in *Winter* that the trial court accepted untested hearsay in lieu of sworn testimony for deciding an issue as important as child custody. *Id.*

See also *In re Marriage of Gravatt*, 365 N.W.2d 48, 49 (Iowa Ct. App. 1985).

We agree with Kathi that the statute allows the court to appoint an attorney for a child without a request. The statute provides the court "may" appoint. Therefore, the court's decision to appoint or not to appoint is discretionary, not mandatory.

Our review of the record convinces us that the child's interests were adequately represented and protected and the district court did not abuse its discretion in not appointing an attorney for the child.

Kathi next contends that she should be the primary custodian. The controlling consideration in determining custody is the interest of the child. Iowa

R. App. P. 14(f)(15). In deciding this question, we review the record de novo. Iowa R. App. P. 4. We give weight to the findings of the trial court, but are not bound by them. See *In re Marriage of Novak*, 220 N.W.2d 592, 597 (Iowa 1974). 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). We determine each case on its own facts to decide which parent can minister more effectively to the long-range interest of the child. *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). The critical issue is determining which parent will do a better job in 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). 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); *In re Petition of Purscell*, 544 N.W.2d 466, 468 (Iowa Ct. App. 1995).

The district court made careful and detailed findings with which we agree on our de novo review. No useful purpose would be served by setting those findings forth in this opinion and we elect not to do so.

The decision made by the district court is clearly the decision that is in Tristin's interest. Tristin was in her father's care for over a year before the custody hearing and during that time she found stability. She has done well in school and has bonded with her father and his extended family. We have sympathy for Kathi's plight in trying to escape a husband who was abusive. We recognize that Kathi has had some bad breaks in life, but Kathi has been unable

to provide the stability Tristin needs, and it is Tristin's interests that are at issue here. We affirm the district court in all respects.

AFFIRMED.