IN THE COURT OF APPEALS OF IOWA

No. 5-336 / 94-907

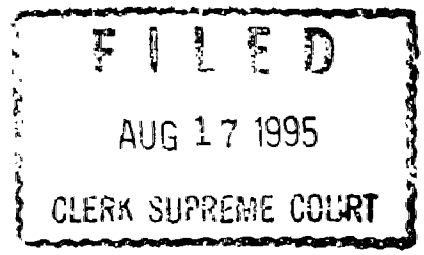
JEFFREY W. MERFELD,

Petitioner-Appellee,

vs.

JUDITH ROLING,

Respondent-Appellant.



Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Chief Judge.

Mother appeals the district court's order granting father joint legal custody and visitation rights to the parties' minor child. **AFFIRMED.**

Mark S. Beckman of Fitzsimmons, Beckman & Gilloon, Dubuque, for appellant.

William J. Jacobs of Legal Services Corporation of Iowa, Dubuque, for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

HABHAB, J.

Judith Roling and Jeffrey Merfeld are the parents of Ashley, born March 8, 1987. The parties never married; however, Jeffrey has had contact with Ashley approximately once or twice a month since she was born.

In April 1993, Jeffrey filed a petition requesting joint legal custody and visitation of Ashley. In addition, Jeffrey filed an application for temporary visitation rights. Judith resisted the petition and filed a counterclaim requesting the court to order Jeffrey to pay child support. Jeffrey was granted temporary visitation and was ordered to pay temporary child support in the amount of $50 per month.

In March 1994, while in Jeffrey's care, Ashley was seriously injured when she was accidentally struck in the head by a baseball bat. Judith initiated a Department of Human Services (DHS) investigation into the accident. The investigation concluded there was no neglect or improper supervision.[1]

After the April 1994 hearing on Jeffrey's petition, the court concluded Jeffrey should be awarded joint legal custody and visitation of Ashley. The court noted two mental health professionals and a clinical social worker agreed that Ashley had been experiencing stress and anxiety due to visitations with Jeffrey. However, the mental health professionals attributed these symptoms to Judith's conduct in resisting visitation rather than to Jeffrey's conduct during visitation.

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[1] Judith also initiated an investigation of sexual abuse based upon a separate incident. This allegation was determined to be unfounded.

Judith appeals.

This case was tried in equity. Thus, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

The sole issue Judith raises on appeal is whether the district court erred in granting Jeffrey joint custody of their child Ashley. Judith contends sole custody of the child should be placed with her. We disagree.

In awarding custody of minor children, the district court is to be reasonable and act in the best interests of the child. Iowa Code § 598.41(1) (1993). The district court is to:

> order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated . . . unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result . . . and which will encourage parents to share the rights and responsibilities of raising the child.

Id. If joint custody is not ordered, the district court is required to cite clear and convincing evidence that joint custody is unreasonable and not in the best interests of the child. Iowa Code § 598.41(2) (1993). We do not believe such evidence has been presented.

In determining whether joint custody is in the best interests of the child in situations where one of the parents does not agree to joint custody, the district court is to consider nine factors. Iowa Code § 598.41(4) (1993). They are:

a. Whether each parent would be a suitable custodian for the child.
b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.
c. Whether the parents can communicate with each other regarding the child's needs.
d. Whether both parents have actively cared for the child before and since the separation.
e. Whether each parent can support the other parent's relationship with the child.
f. Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.
g. Whether one or both [of] the parents agree or are opposed to joint custody.
h. The geographic proximity of the parents.
i. Whether the safety of the child, other children, or the other parent will be jeopardized by the awarding of joint custody or by unsupervised or unrestricted visitation.

Iowa Code § 598.41(3) (1993). This statute has been interpreted to express a preference for joint custody. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); *In re Marriage of Fish*, 350 N.W.2d 226, 229 (Iowa App. 1984). The overriding concern is the best interests of the child. Iowa R. App. P. 14(f)(15).

Judith contends the parties' inability to effectively communicate should be a factor in determining sole custody is appropriate. While Judith testified Jeffrey sometimes loses his temper when they talk. Judith testified the parties have not disagreed regarding any of the decisions Judith had made in the past in raising

Ashley. Further, she stated she believed the parties could, in fact, cooperate in a joint custody arrangement. This testimony strongly conflicts with the position Judith takes on appeal. We cannot find for Judith on this factor given her own testimony to the contrary.

Judith also contends the baseball bat incident raises questions as to whether Jeffrey can properly supervise Ashley. The child abuse investigator found the allegation of neglect in connection with this incident to be unfounded. In so finding, the investigator stated the supervision provided at the time of the accident was reasonable and prudent. Clearly, Judith's claim regarding the baseball bat accident is without merit.

Judith also contends visitation with Jeffrey led to "bizarre behavior" on the part of Ashley. The investigator for DHS stated Ashley's behavior was more likely caused by Judith's conduct in resisting visitation rather than visitation itself. A mental health counselor also found Judith's behavior toward Ashley's visitation caused Ashley's anxiety.

Upon consideration of all issues presented to this court, we find there is not clear and convincing evidence that joint custody would be unreasonable. In so finding, we affirm the district court's decision to follow the statutory preference for joint custody since there is a lack of evidence to support a contrary result.

AFFIRMED.