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IN THE COURT OF APPEALS OF IOWA

ROBIN RENE THIEL,)
Petitioner-Appellant,)
vs.)
BRIAN KEITH THIEL,)
Respondent-Appellee.)

Filed October 7, 1977

246
3-60188

Appeal from Emmet District Court - Richard W. Cooper, Judge.

Petitioner appeals the trial court award of permanent custody to paternal grandparents in an original dissolution decree. Reversed and remanded with instructions.

Harold W. White, of Fitzgibbons Brothers, of Estherville, for Respondent-Appellee.

William J. Sanderson, of Sanderson, Sanderson & Ridout, of Estherville, for Petitioner-Appellant.

James D. Hart, of Anderson, Pelzer & Hart, of Estherville, for Minor Child.

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

OXBERGER, J.

Petitioner Robin Rene Thiel appeals the trial court award of permanent custody of her daughter Camy Marie to respondent Brian Keith Thiel's parents, Kenneth and Marie Thiel. We reverse.

During the pendency of this original dissolution action, Robin and Brian successfully shared the care and custody of Camy by alternating weeks. The possibility of this arrangement ended when Camy reached kindergarten age. Thereafter, the custody dispute developed. Bryan has not cross-appealed the award of custody to his parents. This appeal involves only the claim by Robin that she should have been awarded custody of Camy.

We agree with Robin that custody of children in an original dissolution action is first to be decided between natural parents. "Where the right of custody has not been adjudicated it will be presumed, in the absence of evidence to the contrary, that a child's welfare will best be served by committing it to the custody of a parent." Alingh v. Alingh, 259 Iowa 219, 226, 144 N.W.2d 134, 139 (1966). Further, we are, as in all custody matters, required to consider the question of Camy's custody in the light of her long range best interest. In re Marriage of Winter, 223 N.W.2d 165, 166 (Iowa 1974).

We note the supreme court has quite recently unequivocally refused to dilute the preference for parental custody:

> Our cases have emphasized that parents should be encouraged in time of need to look for help in caring for their children without risking loss of custody. The presumption preferring parental custody is not overcome by a mere showing that such assistance was obtained. Nor is it overcome by showing that those who provided the assistance love the children and would provide them a good home. These circumstances are not alone sufficient to overcome the preference for parental custody. In re Guardianship of Sams, 256 N.W.2d 570, 573 (Iowa 1977).

The supreme court subsequently held in In re Matter of Burney, #3-60543, filed September 21, 1977 at 5:

> Economic and cultural advantages in the Haines home do not tip the balance in their favor. Courts are not free to take children from parents simply by deciding another home offers more advantages. See In re Bennet v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277 (1976). Moreover, although we do not condone the fact Robin lived with Mark Tingwald almost two years before marrying him, we do not believe this should defeat her custody claim. Nor do we think she should be penalized for lack of parental experience. . . ." [emphasis added).

We can but conclude that absent very compelling circumstances constituting neglect, Ball v. Ball, 250 Iowa 753, 767, 96 N.W.2d 317, 325 (1959); abuse, Alingh v. Alingh, 259 Iowa 219, 220, 144 N.W.2d 134, 135 (1966); or incapacity and unfitness to parent, Smith v. Holt, 225 N.W.2d 906, 909 (Iowa 1975) the trial court is not empowered to award custody of children to grandparents in an original dissolution action. It is, absent such exigent circumstances, in the long range best interest of the children to remain in a parent's custody.

Resolution of this case requires some measure of the judicious attitude the supreme court has observed custody disputes require. Garvin v. Garvin, 260 Iowa 1082, 1089, 152 N.W.2d 206, 211 (1967). Against the circumstances urged by the Thiels, and accepted by the trial court to support a withholding of custody from Robin, we must weigh Robin's accomplishments as a young mother.

In the first year of marriage along with the birth of Camy, Robin finished her course work for her high school diploma. She later became employed to help in the support of the marriage and family. After the marriage collapsed, she completed a junior college secretarial program and is now working fulltime for an employer who testified her work performance was excellent. She has arranged for Camy's care at a nursery school. This child care facility delivers and picks up the children from their kindergarten classes. Robin included in her arrangements for day care an understanding with the staff that the Thiels could choose to assist in Camy's care so that the day care would not have to be routine necessity.

Robin's accomplishments directly contradict the trial court's findings that she does not have the necessary maturity to act responsibly as a parent of Camy. In returning children to their mother, McKay v. McKay, 253 Iowa 1047, 115 N.W.2d 151 (1962) reversed a trial court award of custody to the father which in practical result had been custody awarded to the paternal grandmother and paternal aunt. The court in McKay noted the reversal restored the children to a normal relationship with their mother and accorded them a normal relationship with their grandmother and aunt as well.

The record supports no finding of either abuse, neglect or parenting incapacity on the part of Robin. The trial court erred in denying her petition for

custody. Neither do we find support in the record for the contention that the Thiel grandparents have been the de facto custodial parents for Camy to such a degree as to require allowing such custody to remain undisturbed. See **In re Matter of Burney,** supra at 5; **Alingh,** 259 Iowa at 226, 144 N.W.2d at 139.

We remand to the trial court for entry of a decree placing permanent care and custody of Camy with her mother Robin. The trial court is instructed to set visitation rights and support duties of Bryan.

Reversed and remanded with instructions.

Allbee, C.J. and Carter, J. concur; Donielson and Snell, JJ. dissent.

DONIELSON, J. (dissenting)

Although I am aware that In re Matter of Burney, _____ N.W.2d _____ (Iowa, filed September 21, 1977) appears to establish a presumption that child custody is ordinarily to be awarded to one of the parents, I am convinced upon a review of the record that whatever presumption may exist has been clearly overcome in this case. Consequently, I would affirm the judgment of the trial court.

Snell, J., joins in this dissent.