

IN THE COURT OF APPEALS OF IOWA

FILED

DEC 26 1984

CLERK SUPREME COURT
L. UHLENHOPP

IN RE THE MARRIAGE OF NANCY UHLENHOPP AND CLINT L. UHLENHOPP

UPON THE PETITION OF
NANCY UHLENHOPP,

)

613

Filed December 26, 1984

Petitioner-Appellee,

)

AND CONCERNING
CLINT L. UHLENHOPP,

)

4-454
84-720

Respondent-Appellant.

)

Appeal from the Iowa District Court for Butler County-Gilbert K. Bovard,
Judge.

Respondent husband appeals from the decree dissolving the parties' marriage
and challenges the custody provisions made by the trial court. AFFIRMED AS
MODIFIED.

Barry S. Kaplan, of Fairall, Fairall & Kaplan, Marshalltown, for respondent-
appellant.

L. Don Snow, of Mershon, Snow & Knock, Cedar Falls, for petitioner-
appellee.

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

SACKETT, J.

Respondent husband, Clint Uhlenhopp, appeals challenging the custody provisions made by the trial court in his dissolution decree.

Facts

Petitioner Nancy Uhlenhopp and Respondent Clint L. Uhlenhopp were married in 1978. They have two sons: Justin, born in 1978, and Brandon, born in 1981. Nancy has two part time jobs; one with the U.S. Postal Service and the second at a local cafe. Clint is a self-employed carpenter.

During the marriage both parties did some drinking. Since the parties' separation Clint has abstained from the use of alcohol and become more religious. There is evidence that since the separation Nancy has late parties in the home where the children are living. Nancy has assumed the primary care of the children during the marriage.

Nancy's parents were recently divorced. That divorce generated considerable bitterness in Nancy's family. Nancy sided with her father. Nancy's mother and two sisters are very supportive of Clint in his quest to obtain custody of the children. The trial court discounted their testimony because it felt it was generated by bitterness that came as a result of Nancy's parents' divorce.

L. Scope of Review

Our review is de novo. Iowa R. of App. P. 4 (1983).

II. Joint Custody

Clint contends the trial court should have awarded the parties joint custody rather than awarding Nancy sole custody. In addressing the joint custody issue the trial court found that either parent would be a suitable custodian for the children, and that the psychological and emotional needs and development of the children would not suffer by virtue of denial of joint custody because of the established pattern of liberal visitation and the existing geographic proximity of the parents

that allows frequent contacts among them. The trial court also determined that the parents appear to be able to communicate one with the other insofar as the exercise of visitation is concerned.

The trial court refused to grant joint custody because it determined that a strong potential of discord would exist in the event of joint custody with regard to matters involving the children's religious training as well as personal strife involving the grandmother and sisters who have allied themselves with Clint in opposition to Nancy.

The provisions of Senate File 2163, 70th General Assembly, 1984 Regular Session, amended section 598.1 of the Code by adding a new subsection which provides in part:

6. "Best interest of the child" includes, but is not limited to, the opportunity for maximum continuous physical and emotional contact possible with both parents, unless direct physical or significant emotional harm to the child may result from this contact. . .

This subsection was not applicable at the time this matter was heard. However, the Iowa Supreme Court in Leyda v. Leyda, No. 83-1244, slip op. at 9 (filed September 9, 1984), ___, N.W.2d ___, ___ (1984) said of 598.1, "[I]t codifies our decisions that emphasize the importance of the child's physical and emotional contacts with both parents."

In Re Marriage of Fish, 350 N.W.2d 226, 229-230 (Iowa Ct.App. 1984) we pointed out that to award joint custody does not require that the parties be in accord all the time, but only that they be able to communicate with each other regarding the child's needs and support each other's relationship with the child. We stated that our legislature and supreme court have decided it is in the best interest of the child to have two parents actively involved in major decision-making if those parents are able to rationally discuss the issues and support each other's relationship with the child.

The record here supports an award of joint custody. The trial court found either party would be a suitable parent. The parties are able to work with each other on visitation, and, other than several minor instances early in their separation, they both have been honest about and supportive of each other's relationship with the children. Nancy's rejection of joint custody appears to be predicated, at least in part, by her lack of understanding of joint custody.

Parents involved in custody disputes are well advised to be aware of the strong position of the Iowa legislature and courts favoring joint custody and the importance of a child's physical and emotional contacts with both parents. They should also be advised that refusal to provide the opportunity for such contacts without just cause shall be considered harmful to the best interest of the child. See Senate File 2163, 70th General Assembly, 1984 Regular Session amending section 598.1 The Code; see also Leyda v. Leyda, No. 83-1244 (filed September 9, 1984), ___ N.W.2d ___, ___ (Iowa 1984).

We do not agree with the trial court that a potential for discord exists, particularly in view of the cooperation the parties have exhibited to date. We must not set unrealistic standards for agreement of joint custodial parents. It is unrealistic to assume that they are going to agree on every issue regarding their child's well-being any more than parents who remain married will agree on all issues regarding their children's well-being. Denial of joint custody requires more than a difference of opinion on some issues between parents.

The record supports a finding that these parties can function effectively as joint custodians. We modify the trial court decree and award joint custody.

III. Physical Care

Clint contends that physical care of the children should be awarded to him. The trial court determined that Clint acknowledged his own early failures in marriage and the fact that Nancy provided most of the parenting duties, but it

also found in the past year he has quit drinking and matured greatly. He has a good rapport with the children and has a sincere interest in being their custodian.

There is testimony in the record that Nancy has had occasional parties in her home and may give her social life a higher priority than Clint gives his. We have carefully considered this evidence. It is undisputed that Nancy has assumed the major responsibility for these two children since their birth. The children are healthy and well-adjusted. We agree with the trial court that Nancy's past care of the children indicates she can care for them in the future. The fact that a parent was the primary caretaker during marriage is given considerable weight in determining custody. In *Re Marriage of McFarland*, 239 N.W.2d 175, 178 (Iowa 1976). Courts generally have no way of judging parents' future conduct but by the past. *Harwell v. Harwell*, 253 Iowa 413, 420, 112 N.W.2d 868, 873 (1962).

We determine that Nancy should have physical care of the children.

The decree of the trial court is modified to provide that the parties have joint custody of the children with Nancy having physical care.

AFFIRMED AS MODIFIED.