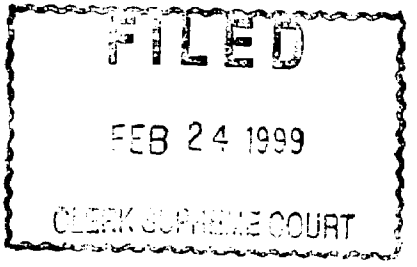
IN THE COURT OF APPEALS OF IOWA

No. 9-044 / 98-1373
Filed February 24, 1999



IN THE MATTER OF D.D.S., Minor Child,

Upon the Petition of
SCOTT DEAN SLEEP,
Appellant,

And Concerning
TAMMY JO HOLUB n/k/a TAMMY JO KIRSCH,
Appellee.

Appeal from the Iowa District Court for Taylor County, Darrell J. Goodhue, Judge.

Scott Sleep appeals the trial court's award of primary physical care of his son to the child's mother, Tammy Jo Kirsch, and the court's child support order. **AFFIRMED.**

Richard O. McConville of Coppola, Sandre & McConville, P.C., Des Moines, and Jeffrey B. Milhollin of Milhollin Law Firm, Corning, for appellant.

Verd R. Bailey of Bailey & Davidson, P.C., Clarinda, for appellee.

Heard by Sackett, C.J., and Streit and Mahan, JJ.

STREIT, J.

Scott Sleep appeals the trial court's award of primary physical care of his son to the child's mother, Tammy Jo Kirsch. Because we find it in the child's best interests to have primary physical care with his mother, we affirm.

I. Background Facts & Proceedings.

Scott Sleep and Tammy Jo Kirsch are the parents of Dustin, born in October 1993. The parties never married, but resided together until 1997, when Kirsch and Dustin moved to an apartment in Clarinda, Iowa.

After their separation, Sleep and Kirsch agreed upon a custody arrangement which allowed Kirsch to attend school in the day and work the evening shift as a registered nurse at the Clarinda hospital. In the fall of 1997, Kirsch married Michael Kirsch, a paramedic at the Clarinda hospital. Shortly thereafter, Kirsch attempted to reunite with Sleep. However, when she discovered she was pregnant with Michael's child, she returned to him.

Sleep petitioned for primary physical care of Dustin in February 1997. Following trial, the court established Sleep's paternity and granted the parties joint legal custody with primary physical care to Kirsch. Sleep was granted liberal visitation and ordered to pay Kirsch child support. He appeals.

II. Primary Physical Care of Dustin.

We review child custody determinations de novo. Iowa R. App. P. 4. *See In re Marriage of Miller,* 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact, but do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.; In re Marriage of Brown,* 487 N.W.2d 331, 332 (Iowa 1992). The controlling consideration in child custody cases is always what is in the best interests of the children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). Although Sleep and Kirsch never wed, the criteria for determining custody is the same as if the parties were married. *Heyer v. Peterson,* 307 N.W.2d 1, 7 (Iowa 1981).

The parent who can administer most effectively to the long-term best interests of the child and place them in an environment that will foster healthy physical and emotional lives is chosen as primary physical care giver. *In re Marriage of Daniels*, 568 N.W.2d 51, 53 (Iowa App. 1997). We are not bound by the district court's findings but give them deference because the district court had an opportunity to view, firsthand, the demeanor of the parties and evaluate them as custodians. *See id.*

We identify numerous factors to help determine which parent should serve as the primary caregiver. *See* Iowa Code § 598.41. Among these are the characteristics of the parents, as well as the capacity and desire of each parent to provide for the needs of the children. *Id.* Each factor, however, does not necessarily impact the decision with equal force. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App.

1997). To the contrary, some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *Id.*

After de novo review of the record, we determine it is in Dustin's best interests for Kirsch to be awarded primary physical care. Several factors have influenced our decision, including, the home environment provided by each of the parents and the comparative stability of the parties.

Sleep contends he was Dustin's primary caregiver prior to these proceedings; Kirsch contends she was. The parent who has been the primary caregiver of the children during the marriage will not necessarily be designated by the court to be primary caregiver at the time of the divorce. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). However, the role the primary caregiver has played in the life of a child is given consideration in custody disputes, and allowing a parent to continue as primary caregiver gives continuity to the lives of children. *In re Marriage of Burkle*, 525 N.W.2d 439, 441 (Iowa App. 1994).

Sleep's contention he was Dustin's primary caregiver prior to these proceedings is not supported by the record. While the record does show Sleep spent a considerable amount of time with Dustin while Kirsch was going to school and working nights, other evidence shows Kirsch played as much of a role in Dustin's care as Sleep. It was Kirsch who organized Dustin's medical care, arranged nutritious meals for him, monitored his personal hygiene, and made sure he had regular

bedtimes. We find the parties shared primary physical care of Dustin prior to these proceedings.

The comparative stability of the parties has become a central issue in these proceedings. Sleep argues Kirsch is unstable because she attempted to reconcile her relationship with him after being married to Michael Kirsch and then decided to stay with Kirsch after realizing she was pregnant with Kirsch's child. Put simply, Sleep contends Kirsch's infidelity shows a character flaw which should prevent her from having primary physical care of Dustin. Moral misconduct via extramarital affairs has been recognized as a factor in determining which parent should serve as the primary caregiver of the children in a divorce. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1996). Extramarital affairs may be given greater weight when they impact the children. *See In re Marriage of Grandinetti*, 342 N.W.2d 876, 879 (Iowa App. 1983) (extramarital affair was given greater weight when the affair occurred in front of the children). This is especially so when it demonstrates a parent's instability.

Although a legitimate factor of consideration, moral misconduct is not the only factor in a custody determination. *See Daniels,* at 57 (Sackett, J., dissenting, "no one negative behavior should be elevated to the point where it becomes the sole dispositive factor or it cleanses the other spouse of prior sins"). It is not the task of the judiciary to sort out the intricacies of extramarital affairs in its custodial decisions. There was nothing in the record stating Kirsch's short affair affected the child in any

way. Sleep also contends Kirsch had a drinking problem during their relationship. We find this allegation unsupported by the record.

Kirsch's moral transgression is outweighed by the stability of her life after that point and the stable lifestyle she can offer Dustin. Kirsch is married. The relationship has been strong enough to survive Kirsch's tumultuous relationship with her ex-boyfriend, the father of Dustin. Dustin's half-sibling was born into the family in 1998. At the time of trial, the Kirschs' were planning to move to Omaha where they would both be employed in the medical industry. Tammy Kirsch's starting wage was $18.00 per hour as an R.N. at an Omaha hospital. Her job is steady and dependable. She has medical insurance coverage for Dustin. Kirsch has extended family in Omaha; including her mother, grandmother, aunts, and cousins. She has excellent parenting skills and provides Dustin with good personal hygiene, nutritious meals, regular bedtimes, a concern with his education and development, discipline, and medical care.

Comparatively, Sleep's life is not stable; nor can he offer Dustin the stability Kirsch can. Sleep has had six jobs in the past six years. His locale has changed from Bellevue to Clarinda to Red Oak to Shenandoah to Gravity, Iowa. He is contemplating moving again, depending on this litigation, yet at the same time claims stability in his newly established auto shop business with his brother.

When with Sleep, Dustin has less stability. For example, Dustin's supervision while with Sleep is a point of concern. While Sleep works at the auto business,

Dustin has often been left in the care of his older cousins who are twelve and under years of age. The children freely roam around the auto body shop, the houses, and yards next to the shop. The grounds have vehicles up on jacks, junk vehicles, chemicals, tools, and traffic coming in and out of the shop. The houses have guns in them. Dustin has often returned from visitation with Sleep, even in the morning hours, unbathed, with dirty clothes. He has not always eaten nutritious meals.

In consideration of all the facts, we find it in Dustin's best interests that primary physical care be awarded to Kirsch. The trial court's rulings regarding custody is affirmed.

AFFIRMED.