IN THE COURT OF APPEALS OF IOWA

No. 6-276 / 95-1990

IN RE THE MARRIAGE OF NEIL BROOKS CUNNINGHAM AND KATHERINE GAIL CUNNINGHAM

Upon the Petition of
NEIL BROOKS CUNNINGHAM,

Petitioner-Appellant,

And Concerning
KATHERINE GAIL CUNNINGHAM,

Respondent-Appellee.

FILED
JUN 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Jefferson County, Robert Bates, Judge.

Neil Cunningham appeals from the decree dissolving his marriage to Katherine Cunningham. **AFFIRMED.**

Michael R. Brown and Scott E. Schroeder of Morrissey & Brown Law Firm, Fairfield, for appellant.

Timothy B. Kuiken and Myron L. Gookin of Foss, Kuiken & Gookin, P.C., Fairfield, for appellee.

Heard by Habhab, P.J., and Cady and Huitink, JJ.

HABHAB, P.J.

Neil and Katherine Cunningham were married on June 1, 1990. They met in Ottawa, Canada, and lived together for some time. They have one child, Anila Maya, born on June 27, 1989.

In July 1990, they moved to Fairfield, Iowa, along with Neil's mother, Marguerite. Neil and Katherine separated in 1994. Neil filed a petition for dissolution of marriage seeking temporary and permanent custody of Anila Maya. The parties ultimately exercised joint custody of Anila Maya during the pendency of the dissolution action pursuant to a stipulated schedule adopted by the court.

At the time of the dissolution hearing, Neil was fifty-six years old, Katherine was thirty-seven, and Anila Maya was six. Neil worked part-time at Express Shipping in Fairfield, earning about $15,000 per year. He has had an extensive education. Katherine had worked at Fairfield Printing earning $20,800 annually. She had recently resigned and had applied for a position at the Maharishi University. Neil remained in the marital home while Katherine moved out to a small apartment.

Following a hearing, the trial court entered its findings of fact, conclusions of law and decree. The court found the primary care issue to be extremely close. The court concluded Katherine was better able to meet Anila Maya's emotional needs. The court concluded Neil's relationship with the child was symbiotic, with Neil seeking emotional support from her to some extent. The court concluded Neil, on the other hand, had the greater capacity and interest to provide for Anila Maya's various

needs. The court gave Neil credit for having the closer relationship with Anila Maya. The court also relied on the home study prepared by Carol Barnes. Barnes recommended primary care be given to Katherine. The court awarded joint legal custody, but as noted previously, it gave primary care to Katherine.

Neil appeals.

I. ***Scope of Review.*** In this equity action, 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).

II. ***Primary Physical Care.*** The only issue for our consideration on appeal is the primary physical care of the couple's child, Anila Maya. Neil contends the district court erred in placing primary physical care with Katherine. In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are found in our statutes, as well as in prior cases. *See* Iowa Code § 598.41(3) (1995); *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983). These factors bear on what will be in the long-term best interests of the child. *In re Marriage of Vrban*, 359 N.W.2d 420,424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent

will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985).

Like the district court, we also believe the issue of primary physical care is close. However, when the record is examined, we conclude the district court properly placed the primary physical care of Anila Maya with Katherine.

Carol Barnes, a home study evaluator, recommended the child be placed with Katherine. Neil raises many concerns regarding Barnes's evaluation, the primary concern being the study was based on eight hours of interviewing both Neil and Katherine. The study, however, is very detailed and Barnes gives a fairly detailed analysis to support her recommendation and opinion on the custody issue.

Barnes's job was to make a recommendation regarding primary physical care. Barnes clearly stated she felt both parents were concerned, involved, and loving parents. However, when Barnes was forced to make a recommendation, she found Katherine should be given primary physical care. Several reasons were advanced in reaching this decision, which include: (1) Katherine is better able to provide more firmness and consistency; (2) Katherine is better able to withstand Anila Maya's demands and Anila Maya accepts Katherine's firmness; (3) Neil's profession makes single parenthood difficult due to time commitments and financial instability; and (4) Neil does not always see potential problems when the first warning signs appear.

Both parties cite a great deal of anecdotal evidence in their briefs to support their argument. In our de novo review of the record, we have carefully considered each piece of evidence, including the evaluation and recommendation made by Barnes. Although we certainly do not rely on the evaluation entirely in reaching our decision, we find it provides useful guidance in analyzing the issue of primary physical care in this case.

Both parents appear to be capable, willing, involved, and loving parents. Yet, when all of the evidence is considered, we conclude the scales tip slightly in favor of Kathĕrine. In our de novo review of the record, we agree with the district court that the primary physical care of Anila Maya should be placed with Katherine. We affirm the ruling of the district court.

AFFIRMED.