IN THE COURT OF APPEALS OF IOWA

No. 6-544 / 95-2155

FILED
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CLERK SUPREME COURT

JEFFREY ROY LANE,

Petitioner-Appellant,

vs.

LORETTA DUNN,

Respondent-Appellee.

Appeal from the Iowa District Court for Page County, Glenn M. McGee, Judge.

Jeffrey Lane appeals from a district court order on his petition for custody.

AFFIRMED.

David A. Poore, Council Bluffs, for appellant.

Loretta Dunn, Farragut, pro se, appellee.

Considered by Cady, P. J., and Huitink and Streit, JJ.

HUITINK, J.

Jeffrey Roy Lane appeals the order of the district court awarding primary physical custody to the respondent, Loretta Dunn. We affirm.

The record describes the parties' relationship as follows: Jeff and Loretta began cohabitating in 1988 and lived together off and on for about four years in Iowa, Nebraska, and Colorado. The couple never married. They had a child together, Misty, born on March 26, 1989. The parties permanently separated in January 1991 when Jeff moved to Pennsylvania and lived with another woman, Valerie. In September of 1993, he returned to Iowa and married Valerie. Since the separation, Misty has remained in Loretta's care except for a brief period in 1995 when she lived with Jeff while Loretta sought housing and schooling in Farragut, Iowa.

At the time of the custody hearing, Jeff was 27 years old and Loretta was 28 years old. Jeff quit school in the ninth grade and has his G.E.D. The record does not indicate Loretta's educational background. Both Jeff and Loretta work the 3:40 p.m. to midnight shift at Eaton Manufacturing in Shenandoah, Iowa. Loretta currently has a home in Farragut and Jeff and his wife live in Riverton.

Loretta was formerly involved in an abusive relationship with another man, K.J. Wheeler. Loretta and K.J. had a child together, Kendra. Loretta testified at the hearing that she has a restraining order against K.J. and that his parental rights have been

terminated. She has admitted to being involved in another relationship since her separation from Kendra's father.

When Jeff returned to Iowa, he set up regular visitation with Misty by way of an informal agreement with Loretta. However, he became concerned for the child's welfare and also felt that K.J. Wheeler was interfering with his visitation. Jeff's concerns led him to seek primary physical care of Misty.

A home study was completed by psychologist Elaine Hatcher in February 1995. Based on the interviews and the psychological evaluations of Jeff, Loretta, and Misty, Hatcher concluded that Jeff demonstrated more stability and maturity than Loretta. His wife Valerie was found to be a stable influence in his life. In contrast, Loretta was perceived as impulsive and self-centered and had a home life that could be characterized as "chaotic". Furthermore, Loretta had a history of abusive relationships. Hatcher also expressed concern that Loretta often left Misty in the care of a former boyfriend of Loretta's mother who had a history of violence and alcohol abuse. The evaluator described Misty as a "hypervigilant" and manipulative child who would benefit from a more structured environment. She felt that Loretta demonstrated little ability to control Misty, while in contrast, Jeff was more aware of Misty's emotional needs and had taken parenting classes. The psychologist also noted that Loretta tended to use visitation as a means of manipulation. She believed that visitation would not be difficult with Jeff as the primary custodian. Hatcher ultimately recommended that the

child be placed with Jeff. The report of the psychologist was admitted as an exhibit and the psychologist also testified at the hearing.

The district court rejected the home study finding that the evaluator lacked "insight, sensitivity, and understanding". Furthermore, the court found her recommendations to be irrelevant as "almost everything" had changed since the report was completed. The trial court determined that Jeff had not contributed "substantial" financial support to Misty. While the court acknowledged that Loretta had made poor relationship choices in the past, it was unable to find that her actions had seriously affected Misty or Kendra. The court found that Loretta had put her past behind her and had settled in her own home in Farragut. Accordingly, the court concluded that it was in Misty's best interest to remain with her sister Kendra and her mother.

Jeff appeals the district court's decision claiming that the court made its decision based on the perception that he has failed to financially support the child. He also claims that the court should have given greater weight to the testimony of the home study evaluator and the evidence of Loretta's past shortcomings and unstable relationships. Finally, he contends the court accorded Loretta a "biological advantage" by its decision not to separate Misty from her sister Kendra.

Loretta has not submitted a brief on appeal. The failure of an appellee to file a brief does not entitle the appellant to a reversal as a matter of right. *State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 209 (Iowa 1982); *In re Marriage of Okonkwo,*

525 N.W.2d 820, 871 (Iowa App. 1994); *Pierre v. Iowa Dept. Of Social Services*, 334 N.W.2d 359, 360 (Iowa App. 1982). Ordinarily, we will not search the record for a theory upon which to affirm the trial court. *Jefferson County v. Barton Douglas Contractors, Inc.*, 282 N.W.2d 155, 157 (Iowa 1979). We may confine our consideration to issues raised in the appellant's brief or treat the appellee's failure to file a brief as a concession of claims made by the appellant, depending on their apparent merit. *Id.* We limit our consideration to the issues Jeff has properly preserved.

Our review in this case is de novo. Iowa R. App. P. R.4. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). We give weight to the trial court's findings of fact, but we are not bound by them. Iowa R. App. P.14(f)(7).

The critical issue is not which parent possesses the greater right to the child, rather the controlling consideration must be the best interest of the child. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This decision requires selection of a custodial parent who can minister more effectively to the long range best interest of the child. The objective should always be to place the child in the environment most likely to bring that child to healthy physical, mental, and social maturity. *See In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974). The court should also consider the characteristics and needs of the child, the characteristics of the parents, the capacity and

desire of each parent to provide for the needs of the child, the relationship of the child with each parent, the nature of each proposed environment and the effect of continuing or changing an existing custodial status. *Id.*

After reviewing the record, we find the district court correctly determined that Loretta is the parent who can better serve Misty's long-term best interests. While we acknowledge that Loretta has exercised poor judgment in the past in her relationship choices and choices of caretakers, it is readily apparent from the record that she has made positive changes in her life. The most significant of these changes include the ending of her relationship with K.J. Wheeler and the purchase of her own home in a different community.

Jeff contends that the trial court erroneously gave no weight to the report and testimony of the custody evaluator. The final conclusions and testimony of an expert is certainly accorded weight but they are not binding on the trier of fact or the appellate courts. *Nicoulou v. Clements*, 516 N.W.2d 905, 909 (Iowa App. 1994). Accordingly, we find that the district court did not err in rejecting the findings of Elaine Hatcher.

Jeff also claims that the court made its decision in part based on the erroneous belief that he has failed to financially support the child. The record indicates that Jeff did not support Misty during the time he was attending trade schools in Des Moines and truck driving school. He asserts that he was unable to do so at that time because he had no source of income. Loretta testified that at one point she was forced to move

back in with her mother because she alone was providing for Misty. Jeff asserts that after he became employed, the State of Iowa withheld money from his paycheck at his request for Misty's support. His petition states that he currently is ordered to pay support under a separate URESA order. We find that the record is incomplete as to the amounts and time of payment. However, we note that the court determined that support did not begin until January 1991, nearly two years after Misty's birth. The trial court had the parties before it and was able to observe their demeanor and was in a better position than we are to evaluate Jeff's reasons justifying his failure to support Misty. *See in re Marriage of Engler,* 503 N.W.2d 623, 625 (Iowa App. 1993). Accordingly, we do not find that it was error for the trial court to consider this factor in awarding custody.

We reject Jeff's argument that Loretta has been accorded a "biological advantage" by virtue of her ability to produce a half-sibling to Misty. This argument is without merit. There is a strong presumption in favor of keeping siblings together. *See In re Marriage of Will,* 489 N.W.2d 394, 398 (Iowa 1992). This presumption not only applies to full-blooded relations, but also to half-siblings. *See Yarolem v. Ledford,* 529 N.W.2d 297, 298 (Iowa App. 1994). Loretta testified about the closeness Misty shares with her half-sister Kendra. We agree with the district court's finding that this is an important factor justifying the award of primary physical custody to Loretta.

Misty has been in Loretta's care her entire life except for a brief period when Loretta was making the transition to Farragut. We have held in the context of a modification of a dissolution decree that once custody has been fixed as part of the decree, it should be disturbed for only the most cogent reasons. *In re Marriage of Clifton*, 526 N.W.2d 574, 577 (Iowa App. 1994) (citations omitted). We believe that this principle applies in the context of this case where the parents have never been married and the child has been in care of one parent since birth. Accordingly, we affirm the district court's award of primary physical custody to Loretta.

AFFIRMED.