IN THE COURT OF APPEALS OF IOWA

No. 4-496 / 93-1558

FILED
JAN 23 1995
CLERK SUPREME COURT

IN RE THE MARRIAGE OF GREGORY L. LETVIN AND JANICE D. LETVIN

Upon the Petition of
GREGORY L. LETVIN,

Petitioner-Appellee/Cross-Appellant,

And Concerning
JANICE D. LETVIN,

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Jefferson County, Dan F. Morrison, Judge.

Janice Letvin appeals from the custody provisions of the decree of dissolution of marriage entered by the district court. **AFFIRMED IN PART; MODIFIED IN PART; REVERSED IN PART; AND REMANDED.**

Thomas M. Walter of Johnson, Hester & Walter, Ottumwa, for appellant.

Michael C. Vance of Vance Law Office, Mt. Pleasant, for appellee.

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

SACKETT, J.

Respondent Janice D. Letvin appeals and petitioner Gregory L. Letvin cross-appeals from the child custody provisions of their dissolution decree. The trial court awarded custody of Michael, born September 20, 1985, to Gregory and custody of Jessica, born September 7, 1988, to Janice. Janice contends the custody of the children should not have been split, and she is the superior parent. Gregory contends Jessica, too, should be in his care. He also challenges the award of attorney fees in the amount of $8000 to Janice. We affirm in part; modify in part; reverse in part; and remand.

Gregory, who was thirty-nine at time of trial, and Janice, who was thirty-eight, were married in April 1978. They stipulated they be awarded joint legal custody of the children. The trial court did not award joint custody but awarded sole custody of Michael to Gregory and of Jessica to Janice. The trial court directed alternate weekend visitation with the children being together for weekend visitation and ordered both Janice and Gregory to participate in visitations, counseling, and to submit proposals for additional visitation.

Both Janice and Gregory currently are employed full-time outside the home and have been during the course of the marriage. Gregory works for Deere & Company and is a territory manager working under the direction of the Kansas City office and covering fifteen counties in

southwest Iowa. He has held the position for twelve years. Janice is employed by the Theobald C.P.A. firm in Fairfield. Janice and Gregory are concerned and caring parents and either is well able to care for either or both of the children.

Janice contends the trial court should not have separated the children. There is considerable support for the proposition when parents divorce, siblings, including half siblings, should remain together. See In re Marriage of Orte, 389 N.W.2d 373, 374-75 (Iowa 1986). Although there are cases when their interests will be better served by placing them with different parents. The presumption for placing custody together comes from more traditional times when mothers generally received custody and would remain in the home to care for the child. We recognize this is not a traditional family, both parents are employed; and the time either parent can spend with the children is limited by their employment outside the home.

The trial court, in arriving at the custody arrangement, put considerable reliance on the testimony of a psychiatrist who spent four or five hours with the parties and the children. The psychiatrist recommended the split physical care and was of the opinion parents did a better job with children of their sex than they do with children of the opposite sex. He found the couple had considerable animosity toward each other and recommended split custody, feeling it would force the parents to work

together. The psychiatrist found both parents capable of caring for the children.

The evidence shows Michael and Jessica have a strong relationship. They are three years apart in age and will continue to share some of the same interests and activities through their middle and high school years.

Split custody deprives children of the benefit of constant association with each other which, as innocent victims, they should not lightly be subjected to. In re Marriage of Grandinetti, 342 N.W.2d 876, 879 (Iowa App. 1983). In attempting to foster children's best interests, the court ordinarily attempts to keep children of broken homes together. In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981); Grandinetti, 342 N.W.2d at 878. The Iowa law has long subscribed to the premise the custody of siblings should not be separated without good and compelling reasons. In re Marriage of Woodward, 228 N.W.2d 74, 75-76 (Iowa 1975). The rationale behind this premise is children who are innocent victims of a marital breakup should not have their relationship with each other also destroyed. See In re Marriage of Wahl, 246 N.W.2d 268, 270 (Iowa 1976).

We agree with Janice and find custody of the children should not have been split and modify the trial court's decision accordingly.

The next question, therefore, is which home can better serve Michael's and Jessica's needs or which parent can

more effectively care for the children. See In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983); In re Marriage of Sparks, 323 N.W.2d 264, 266 (Iowa App. 1982). In reviewing this issue, we consider all factors we are directed by statutory and case law to consider. See Iowa Code § 598.41; In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974); Neubauer v. Newcomb, 423 N.W.2d 26, 27 (Iowa App. 1988).

The children will be better served if we grant custody or physical care to the parent who the evidence shows will do a better job of raising the child. See Neubauer, 423 N.W.2d at 27. The gender of the parent seeking custody of the children is not relevant to our determination; and a mother and a father share the same burden in attempting to gain custody in a dissolution proceeding. See In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985). We give attention to the trial court's assessment of the truthfulness of witnesses and note the trial court specifically found, "the evidence establishes that respondent [Janice] has no difficulty in lying if she feels it is necessary to help her reach her goal. She professes the importance of the church in her life but her actions speak much louder than her professed religious idealism."

There has been considerable animosity in this dissolution. Janice's brief and Gregory's brief sound like they deal with two different family situations.

Janice contends she has assumed substantial responsibility for the children's care. We find, as did the trial court, some of Janice's testimony lacks credibility. We do not disagree with her argument she may have spent more hours with the children than Gregory did during the course of the marriage. The fact a parent was the primary caretaker prior to separation does not assure he or she will be the custodial parent. See In re Marriage of Toedter, 473 N.W.2d 233, 234 (Iowa App. 1991) (physical care with father affirmed despite mother's role as primary caretaker); Neubauer, 423 N.W.2d at 27-28 (custody of children who had been in mother's primary care for most of life awarded to father). However, consideration is given in any custody dispute to allowing the children to remain with a parent who has been a primary caretaker so as to enable children to have continuity in their lives. See In re Marriage of Moorhead, 224 N.W.2d 242, 244 (Iowa 1974); In re Marriage of Green, 417 N.W.2d 252, 253-54 (Iowa App. 1987).

Of major concern is Janice's course of conduct attempting to turn the children against their father. She suggested to the children Gregory was homosexual and asked a male friend of Gregory's in the children's presence if he were Gregory's lover. Janice sought to minimize Gregory's contact with the children and was able, on some occasions, to limit agreed visitation. Janice left the children with a friend rather than arranging for them to be with Gregory when she was out of town overnight.

Janice also has proceeded to make decisions about the children without contacting Gregory. She administered Ritalin to Michael and did not tell Gregory. Gregory recognized Michael had an attention deficit but he was of the opinion Michael should have had further testing before he was medicated. Janice also failed to send Gregory information from the school on the course that would be taken and only after an order from the supreme court did she complete information so Michael could be evaluated at the University of Iowa hospital for his attention deficit disorder.

Gregory appears to be better able to foster the relationship between the children and Janice than Janice does between Gregory and the children. See In re Marriage of Bolin, 336 N.W.2d 441, 447 (Iowa 1983). In determining custody, it is important to place the children with a parent who has shown an ability to cooperate with the other parent, and who does not try to interfere with the other parent's relationship with the children. In re Marriage of Downing, 432 N.W.2d 692, 694-95 (Iowa App. 1988). An award of custody should take into consideration which parent is better able to put their personal feelings aside to permit the parties' children to develop a relationship with the other parent. Bolin, 336 N.W.2d at 447. The court has a duty to place children where a satisfactory relationship between them and both parents will most likely be accomplished. Downing, 432 N.W.2d at 694. When a parent

attempts to isolate or alienate children from the other parent this is a factor that must be considered in making a custody award. See Downing, 432 N.W.2d at 694. We have long said children of a dissolution need to maintain relationships with both parents. In re Marriage of Hopkins, 453 N.W.2d 232, 235 (Iowa App. 1990).

The trial court's findings of Janice's lack of credibility are a flaw on her character and her inability to see things as they are may cause problems in the children's relationship with Gregory.

We modify to award Janice and Gregory joint custody and order Gregory be given physical care of the children. We remand to the trial court to establish a visitation schedule and provide the amount of child support Janice shall pay Michael.

Michael contends he should not have responsibility for $8000 of Janice's attorney fees plus $1900 in court costs. An award of attorney fees is not a matter of right but rest in the court's discretion considering the parties' financial positions. See In re Marriage of Dahl, 418 N.W.2d 358, 361 (Iowa App. 1987); In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). We affirm the award made. We award no further attorney fees to either party. See Dahl, 418 N.W.2d at 361. Costs on appeal are taxed one-fourth to Gregory and three-fourths to Janice.

We affirm in part; modify in part; reverse in part; and remand. We do not retain jurisdiction.

AFFIRMED IN PART; MODIFIED IN PART; REVERSED IN PART; AND REMANDED.