IN THE COURT OF APPEALS OF IOWA

No. 1999-410 (9-663) / 99-0185
Filed January 12, 2000

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CLERK SUPREME COURT

KARA RENEE O'HARA,
Petitioner-Appellant,

vs.

MARK JOSEPH LUKEMYRES,
Respondent-Appellee.

Appeal from the Iowa District Court for Cedar County, Mark J. Smith, Judge.

Mother appeals the district court's order awarding primary physical care of her son to the father. She contends she should have been awarded primary physical care.

AFFIRMED.

Brian T. Fairfield of Norton & Norton, Attorneys At Law, P.C., Lowden, for appellant.

L. Jeffrey Zearley, Tipton, for appellee.

Considered by Sackett, C.J., and Vogel and Hecht, JJ.

SACKETT, C.J.

Petitioner-Appellant Kara O'Hara appeals from the district court decision awarding primary physical care of her son Brandon, born in 1997, to his father, Respondent-Appellee Mark Lukemyres. Kara contends she, not Mark, should have been granted primary physical care. She further challenges the court's orders as to child support. We affirm.

Kara and Mark had a short-term relationship but never married. Kara has an older child, Brian. Mark has three other children who are not in his custodial care.

Mark, thirty-seven years old at the time of hearing, was employed by a construction company. He had a serious problem with substance abuse until December of 1997. At that time he began attending weekly AA meetings and following its twelve-step program. The district court found and the evidence supports the conclusion that since that time Mark has been sober and has been a supportive and loving parent.

Kara, twenty-two years old at the time of the hearing, was employed as a female oil wrestler and negligee model in a bar in Clinton. She lives with her parents and relies on her mother to care for the children. She admits her older son is closer to her mother than he is to her. The district court said of Kara, "From her demeanor in court and her testimony it is apparent to the Court that Kara is extremely immature and will continue her present lifestyle."

Brandon lived with both his parents until he was a little over two months old. Since that time Brandon and Kara have lived with Kara's parents. Mark has maintained his own apartment.

On September 16, 1997, Kara filed a petition to establish Brandon's paternity. She asked for Brandon's custody and for an injunction restraining Mark from having contact with her or Brandon. A temporary injunction issued. On November 7, 1997, on the basis of affidavits and testimony the district court awarded Kara temporary custody, established Mark's visitation, and ordered he pay child support. The court affirmed the previous injunctive relief with the exception that it provided for telephone calls between the parties concerning Brandon and his care. On December 17, 1997, the court ordered Mark to pay child support of $73 per week.

Kara contends she should have been named the primary care parent. She advances that she has been the parent having Brandon's primary care. She points to Mark's prior alcohol and drug use. She points out he has been arrested for driving under the influence on three occasions and his drivers license was revoked for six years. She argues conviction for drug possession and possession of a sawed off shotgun together with assault convictions render him a poor person to have custodial responsibility for a young child.

Mark admits his prior problems and makes no attempt to dismiss the seriousness of this behavior. He advances that he was awarded liberal visitation in the temporary order and he has exercised it all. He points to his attendance at AA

meetings and the fact he had not used alcohol or drugs in the year before the final hearing. He points out Kara has allowed her mother to assume substantial care of both of her children despite the fact her mother and father were investigated by the Department of Human Services for hitting her as a teenager. He also relies on the testimony of one of his former wives who is the mother of two of his children. She testified Mark exercises regular visitation with these children and she considers his skills as a parent appropriate.

This is an equity action and 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).

The fact a parent was the primary caretaker prior to separation does not assure he or she will be the custodial parent. *In re Marriage of Kunkel*, 546 N.W.2d 634, 635 (Iowa App. 1996); *see also 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 v. Newcomb*, 423 N.W.2d 26, 27-28 (Iowa App.1988) (custody of a child who had been in mother's primary care for most of life awarded to father).

The trial court made the decision on primary care, finding Mark the better parent. The critical issue is which parent will do the better job of raising the child over the long term. *Kunkel,* 546 N.W. 2d at 636; *see also In re Marriage of Weidner*,

338 N.W.2d 351, 359 (Iowa 1983); *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974); *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App.1985). The parent who has the ability to do the better job of raising the child during his minority is the parent who should be granted custody. *See Vrban*, 359 N.W.2d at 424.

The district court found in the time between the final and temporary custody hearings Mark had matured and become more responsible while Kara had become less responsible. The court expressed concern about the fact Kara did not spend a lot of time with her children relying instead on her parents to care for them. The district court noted that while she and her children lived with her parents, she spent five nights a week with a nineteen-year-old boyfriend.

This is a difficult case, as the profiles of both Kara and Mark give us concern as to their respective abilities to adequately care for Brandon. The district court viewed the parties and their witnesses and found Mark to be the better parent. While we recognize there have been serious problems in Mark's life, the district court seems convinced that he has turned his life around. Relying on this credibility assessment we affirm the decision of the district court on the custody issue.

Kara contends that the district court should have ordered Mark to pay future and back child support and an attorney's fee judgment. We have affirmed the custodial care award and consequently find no reason to order Mark to pay future child support. Kara advances that Mark is behind in paying the child support he was ordered to pay in the temporary custody order and that he has failed to pay fees he was

ordered to pay her attorney. We considered the fact Mark was behind in his child support obligation a factor against his receiving primary physical care. The temporary child support and attorney fee orders are final judgments. *In re Marriage of Denly*, 590 N.W.2d 48, 51 (Iowa 1999).

Kara requests attorney fees on appeal. She has not been successful in her appeal. Mark has a limited income and support obligations to four children. We deny Kara's request for attorney fees.

AFFIRMED.