IN THE COURT OF APPEALS OF IOWA

FILED
MAY 25 1993
CLERK SUPREME COURT

No. 3-197 / 92-1449

000105

Upon the Petition of

TERESA DUMER,
Petitioner-Appellant,

And Concerning

SCOTT SMITH and ESTHER SMITH,
Respondents-Appellees.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

The mother appeals from the district court decree that awarded primary physical custody of her two minor children to the father. **AFFIRMED.**

Mark D. Reed of Douglas V. Coonrad, P.C., Hudson, for appellant.

Donna Lesyshen of Tyler & Lesyshen, Waterloo, for appellees.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

SACKETT, J. 000106

Petitioner-appellant Teresa Dumer appeals from a decision awarding primary physical care of two minor children born to Teresa and respondent-appellee Scott Smith to Scott. She contends the trial court (1) should not have considered custody of both children, (2) did not correctly consider Iowa Code section 675.40, (3) should not have made the father physical custodian, and (4) should not have denied her motion for a new trial. We affirm.

Teresa and Scott lived together for some time. During the course of their cohabitation, Teresa gave birth to two children, Nathaniel born in January 1987, and Brandon born in November 1988.

In July 1991, Teresa took Brandon and lived for a month in a battered women's shelter. When she went to the shelter, Nathaniel was being cared for by Scott and respondent-appellee Esther Smith, Scott's mother, and Teresa did not take him with her.

Teresa contends she went to the shelter because Scott was abusive. Scott contends he never really knew why she left.

In August, Teresa left the shelter and moved in her parents' home with Brandon and a Mr. Miller. On August 9, 1991, Teresa filed an application to file in forma pauperis a petition for custody of Nathaniel. Her application was

granted and she filed the petition. A hearing on temporary custody was held and on October 10, 1991, the trial court entered an order approving an agreement that Teresa have custody of both children and Scott have visitation. In February 1992, a notice of civil trial scheduling conference was sent to the attorneys for the parties and on May 7, 1992, the matter was set for a non-jury trial of approximately one hour. On June 1, 1992, Scott made an application under this cause number for temporary custody of both children and an ex parte order was filed granting Scott temporary custody of both children. Then on June 5, 1992, Teresa made a motion to set aside the order. Then on June 15, 1992, the court set aside the ex parte order.

Teresa contends the custody, visitation and support of Brandon was not before the court. She also contends the only issue before the court was her right to have Nathaniel returned to her and the trial should have been limited to deciding that issue.

Our review is de novo. In re Marriage of Bergfeld, 465 N.W.2d 865, 868 (Iowa 1991).

The trial court has jurisdiction to determine the issues of paternity, child custody, and child support. A court in equity has the power to decide these issues. Bruce v. Sarver, 472 N.W.2d 631, 632 (Iowa App. 1991). Teresa's petition for custody alleges she and Scott are the parents of Nathaniel and Brandon even if her petition only asks for custody of one of them.

While the pleadings in this matter are not an example of clarity, the trial court had jurisdiction to determine the issues of custody to both children.

Teresa contends she has some special rights to custody by virtue of Iowa Code section 675.40. That section deals with the mother of a child born out of wedlock whose paternity has not been acknowledged. The problem with Teresa's argument is the father's paternity has been acknowledged and she herself acknowledges that fact in her petition. Teresa has admitted the paternity. Scott has acknowledged paternity and since birth shared physical custody with the mother. See In re B.L., 470 N.W.2d 343, 346 (Iowa 1991); In re J.R.H., 358 N.W.2d 311, 319 (Iowa 1984). The only issue is which parent is the better custodian. See Neubauer v. Newcomb, 423 N.W.2d 26, 27 (Iowa App. 1988).

The trial court found Scott the more stable of the parents. Scott has his own home and has secure employment. Scott has had a good relationship with the children and Scott's mother and his sister are close to the children and provide child care when he is working and not available to care for the children.

Teresa lives with another gentleman in her parents' home. There was evidence of injury the children suffered while in her care. Teresa and her male companion have been charged with trespass and third-degree theft.

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The trial court ordered child support in the amount of $5 per week per child. Scott contends this is not sufficient and there should be additional support. Scott did not cross-appeal. The issue of increased support is not before us.

We affirm.

AFFIRMED.