

IN THE COURT OF APPEALS OF IOWA

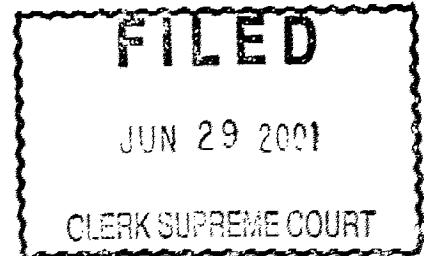
No. 1-284 / 00-1166

June 29, 2001

IN RE THE MARRIAGE OF NICOLE J. LEWIS
AND KENDALL A. LEWIS

Upon the Petition of
NICOLE J. LEWIS,
Petitioner-Appellee,

And Concerning
KENDALL A. LEWIS,
Respondent-Appellant.



Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

The respondent appeals the child custody provisions of the parties'
dissolution decree. **AFFIRMED.**

Craig C. Ament of Ament Law Firm, Waterloo, for appellant.

Kevin D. Engels of Correll, Sheerer, Benson, Engels, Galles & Demro,
Cedar Falls, for appellee.

Heard by Sackett, C.J., Huitink and Streit, JJ.

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SACKETT, C.J.

Respondent Appellant Kendall A. Lewis appeals from that portion of his dissolution decree awarding primary physical care of his two children to their mother Petitioner-Appellee Nicole J. Lewis. Kendall contends he should have primary physical care as the evidence shows he is the better custodian. We affirm.

A dissolution action is tried in equity and reviewed de novo on appeal. *In re Marriage of Anderson*, 509 N.W.2d 138, 142 (Iowa Ct. App. 1993); *In re Marriage of Whelchel*, 476 N.W.2d 104, 106 (Iowa Ct. App. 1991). In reviewing the evidence we, of course, give deference to the trial court's assessments of the credibility of the witnesses. See Iowa R. App. P. 14(f)(7). The trial court had the opportunity to have the parties and their witnesses before it. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). Yet, we are not bound by these determinations. *Id.*

Kendall and Nicole were married in June of 1989. At the time of trial Kendall was thirty-one years old and Nicole was twenty-nine years old. Kendall had three children from prior relationships. Kendall did not know of the oldest of the three until the child was four years old. Eric, the third of Kendall's children, lives with his mother. Kendall's second child, Jeremy, was two years old when he came to live with Kendall and Nicole near the time they were married. Jeremy has continued to reside in their home. Eric and Jeremy have the same mother.

The children subject to this appeal are a daughter, Jorden, born in 1991, and a son, Jarett, born in 1994. At the time of the dissolution hearing Jeremy

was twelve; Jorden was eight and Jarett was five years old. The children were basically healthy and happy.

Kendall and Nicole have both worked outside the home during the marriage and they each have assumed substantial care for the three children who lived in their home. They frequently have worked different hours and the one not working has assumed the childcare and household duties. From the time the dissolution petition was filed in April of 1999 until the time of the dissolution hearing a year later they both continued to reside in what had been their martial home and they arranged a schedule for child care. The schedule corresponded with the job responsibilities of each and maximized the time each parent spent with the children.

At the time of the dissolution hearing both parties were employed. The district court found they were both dependable workers. Nicole was employed as a team leader at Ryder Integrated Logistic. Her hours were from eight or eight thirty in the morning until four thirty or five o'clock in the afternoon. Kendall worked at Omega Cabinets. He worked an early shift and left home at three thirty in the morning. He was therefore available to the children after school.

The district court found both parties to be good parents and supportive of each other when in front of the children. Our review of the evidence causes us to reach the same conclusions.

The district court while indicating it had a moderate concern about Nicole's stability, awarded her primary physical care saying:

Both Nicole and Kendall are good parents, and care deeply for the children. However, Nicole is better suited to minister to the children's long-range best interests. Her disciplinary practices are more consistent and slightly more strict. She is more active in the

children's religious upbringing, which is particularly important since the parents agree that the children should be raised in the parochial school system. Kendall's work schedule makes it impossible for him to attend to the children's needs before school, and Kendall's proposed child care arrangement during that time is not as desirable as the arrangement proposed by Nicole. Kendall's father has severe health problems and, as earnest as his is in his desire to assist the children, would simply be unable to reliably meet the children's needs. Nicole has been very involved in the children's education. Fortunately Kendall is becoming more involved in their education. Nicole has demonstrated her willingness to assist with the children's educational needs, however, from the very time the children began school. In addition, it is apparent to the court that Nicole is more supportive to the children's relationship with Kendall than Kendall is supportive of the children's relationship with Nicole. The court has no doubt that Nicole will continue to support Kendall's relationship with the children, and facilitate extensive contact between Kendall and the children.

The district court, while awarding Nicole primary physical care, awarded Kendall substantial visitation including the right to have the children every night after school was out until five o'clock, and in the summer on weekdays from the time he finished work until five o'clock in the afternoon.

Kendall first contends that in making an award of primary physical care the district court did not correctly assess the issue of separating siblings. There is a presumption that siblings including half-siblings should remain in the same home. See *In re Marriage of Holcomb*, 471 N.W.2d 76 (Iowa Ct. App. 1991). 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). The underlying rationale is in separating siblings they are deprived of the benefit of constant association with each other. See *In re Marriage of Wahl*, 246 N.W.2d 268, 270 (Iowa 1976). This rule has been held to not be immutable, but may be departed from if there exist good and compelling

reasons. *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979); *In re Marriage of Grandinetti*, 342 N.W.2d 876, 879 (Iowa Ct. App. 1983).

There is conflicting evidence as to the relationship of the children with each other. There is evidence that the children have a strong bond, that the younger children look up to Jeremy and that they are close. Kendall criticizes the district court in relying on the fact Jeremy does not want the younger children in his room as a reason to separate Jeremy from his half siblings. Kendall argues this is normal for a boy of Jeremy's age. Nicole contends the district court's decision is correct. She points out that Jeremy fractured Jorden's arm pulling her out from under his bed five years earlier.

The district court found the best interest of the younger children required that they be placed in Nicole's care and separated from Jeremy. The district court discounted testimony from Kendall and his witnesses that Jeremy and Jorden have a good relationship and found it clear they do not. The district court found the testimony of Nicole and her mother that Jorden and Jeremy are in substantial conflict more credible. The district court found the conflict between the two children detrimental to Jorden's physical and emotional well-being. The court found Jeremy has injured Jorden and he belittles and teases her.

Kendall contends the district court in making this assessment relied too heavily on the testimony of Nicole's mother. He contends the testimony of persons including the mother of his other two children that Jeremy, Jorden and Jarett have a close relationship should have been given greater weight.

The evidence reveals that Nicole and her mother had a change of attitude towards Jeremy about the time the marriage started to fall apart. We fail to see

Jeremy's wish the younger child stay out of his room, his teasing of them, and the fact that he and the younger children have disagreement as other than normal behavior. We recognize Jorden's arm was fractured when Jeremy pulled her from under his bed five years earlier. Jeremy expressed remorse it happened. We note too, as Kendall argues, that while the district court was of the opinion Jeremy and Jorden should be separated, the visitation schedule the district court established putting the children together after school would indicate the district court did not find the need for separating the two children that compelling. Having said this, we give some deference to the district court's conclusion the children should be separated in addressing Kendall's next argument that he should have primary physical care because he is the better parent.

.. The question in an initial custody determination is always which parent will do the better job of raising the children. *In re Marriage of Rodgers*, 470 N.W.2d 43, 44 (Iowa Ct. App.1991). We look to the factors set forth in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). We are dealing with the lives of the children, not their parents. We base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). The interests of these children are the primary consideration. *In re Marriage of Crotty*, 584 N.W.2d 714, 717 (Iowa Ct. App. 1998); See also *In re Marriage of Vrbanc*, 359 N.W.2d 420, 424 (Iowa 1984); *Neubauer v. Newcomb*, 423 N.W.2d 26, 27 (Iowa Ct. App. 1988). We give consideration to each parent's role in child raising prior to a separation in fixing primary physical care. See *In re Marriage of Love*, 511 N.W.2d 648, 650 (Iowa

Ct. App. 1993); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). Though we do not award custody based on hours of service for past care, we attempt to determine which parent will in the future provide an environment where the child is most likely to thrive. *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993).

Both parties have attempted to put the other in a bad light. We give little consideration to the negative evidence as we are convinced that both parents have done their best to serve the needs of their children and to perform necessary household tasks. Either parent will serve as an adequate caretaker.

Kendall argues that his relation with Lori Nisius, the mother of Eric and Jeremy, is evidence that he will cooperate with Nicole. Lori testified that Kendall is a good father and that Jeremy is a well-behaved young man. She further said that she and Kendall have no problems with visitation, resolving school issues and assuring that the children spend time together.

We disagree with the district court's consideration of several factors it used in making the primary care determination. Kendall should not be put at a disadvantage because his work shift starts early in the morning. While the district court questions his suggestion that his father could be with the children in the morning Kendall has shown substantial concern for the children's safety and we are assured that if the situation with his father did not work out that he would make other arrangements. We note that while the district court found Nicole's work schedule more attuned to the children's schedules the visitation provisions of the decree put the difficult after school supervision of the children, which Nicole's job precludes her from doing, with Kendall.

Giving the required deference to the district court, we find no reason to disagree with its custody decision on this issue. See *In re Marriage of Anderson*, 509 N.W.2d 138, 142 (Iowa Ct. App. 1993).

Nicole has requested appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa Ct. App. 1994). In determining whether to award appellate attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the decision of the trial court on appeal. *Id.* Kendall contends he should not be ordered to pay a portion of her fees and if any attorney fees are awarded, they should be awarded to him. He advances that with the child support he has been ordered to pay that Nicole will have about \$2000 a month for a house hold of three while he will have less than a thousand dollars a month available for him and Jeremy. We considered this factor, the fact that the custodial decision was very close, that Kendall is providing substantial care for these children in addition to generally recognized visitation, and that he supports Jeremy and provides for Eric during visitation periods. Given the circumstances present in this action, we find equity does not warrant an award of appellate attorney fees. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997).

AFFIRMED.

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