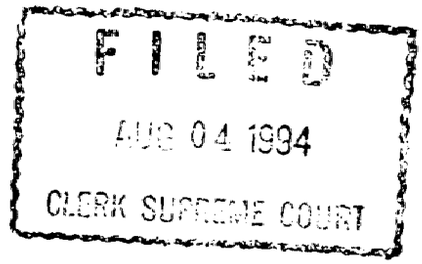
IN THE COURT OF APPEALS OF IOWA

No. 4-085 / 93-1262



MICHAEL D. SMITH,

Appellant,

vs.

LONNA WEAVER,

Appellee.

Appeal from the Iowa District Court for Jefferson County, Robert Bates, Judge.

Plaintiff filed a petition to establish custody of his son. Following a hearing, the district court issued an order granting primary care to the defendant. Plaintiff appeals, contending the district court erred in failing to grant primary care to him. **REVERSED AND REMANDED.**

Michael R. Brown of Morrissey & Brown Law Firm, Fairfield, for appellant.

No appearance by appellee.

Heard by Donielson, P.J., Sackett, J., and Peterson, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

PETERSON, S.J.

Michael D. Smith and Lonna Weaver are the unmarried parents of Patrick Smith, born September 9, 1990. Michael is thirty years of age, and Lonna is thirty-six years of age. Michael works on a production line at Iowa Malleable Iron Company and earns a net income of $1,100 per month. Lonna is unemployed and receives ADC in the amount of $426 per month. Lonna also has a ten-year old daughter and was pregnant at the time of the hearing. Michael is not the father of this child.

In June 1992, Michael filed a petition to establish custody of Patrick. Lonna filed her answer, pro se, requesting custody and child support. The court awarded primary care to Lonna and ordered Michael to pay $283.80 per month in child support.

Michael appeals. He contends the long-range best interests of Patrick will be best served by placing physical care with him, that application of the Winter criteria for determination of custody would result in primary care being placed with him, and that good and compelling reasons exist for separating custody of Patrick from his half-sister. Lonna did not file a brief.

Michael David Smith was born on May 5, 1964, and presently lives alone at 301 East Jefferson Street in Fairfield, Iowa. This is a rented home that has a living room, dining room, a den, and three bedrooms. It has one-half a basement and contains a bath and a half-bath.

He is employed at Iowa Malleable Iron and receives $9.02 per hour. This gives him a gross income of $1,500 per month, with a net income of $1,100 per month. He has worked there since December 1989. He works the day shift from 6:30 a.m. to 3:00 p.m. and works between four to six hours on Saturdays.

He graduated from high school in Killeen, Texas, where he was active in the speech club, Thespians, band, and track and field. He attended Central Texas Junior College at Killeen, Texas, and Southwest Texas University at San Marcos, Texas. He was majoring in theater arts and has a total of eighty-three credits. It would take him approximately a year and one-half to complete a college degree. He indicated he would like to continue his college education.

After graduating from high school, he spent two years with the United States Army. Prior to working at Iowa Malleable Iron Company, he worked for approximately seven months at McDonald's in Fairfield, Iowa, as a crew member. Prior to that, he worked for approximately a year and one-half as a waiter and bartender at the Killeen Hilton at Killeen, Texas. He worked there during the time he was attending junior college. Prior to that, he worked for approximately five months as a telemarketer for Parkway Studios.

At the time of the trial, Lonna Weaver was living at the Ranch Trailer Court, Lot No. 21, in Fairfield, Iowa.

The trailer where she was living in Fairfield, Iowa, contained two bedrooms, a living room, and a kitchen. She had lived there for approximately one year.

Lonna graduated from high school in Fairfield, Iowa, but has not secured any additional education. She was receiving ADC in the amount of $426 per month and had been generally unemployed since the birth of her child, Lisa, who was ten years of age at the time of the hearing. She had a part-time job at the Subway restaurant and worked there for approximately one month. She, however, lost that job when she had to spend two days in jail. She has done housecleaning in the past; however, she lost those jobs when she was accused of stealing clothes from her employers. She has also had baby-sitting jobs and had a part-time job for a man who bought trailers that needed to be cleaned. She did not describe this employment as being steady or ongoing and described it as random calls. She acknowledged she had not had any steady employment since the birth of Lisa.

At the time of the hearing, she was pregnant and about to give birth. The father of that child is Bobby Lee, who lives in Cedar Rapids, Iowa. She indicated that they intended to be married and that she would move to Cedar Rapids where Bobby Lee is employed, and would look for work. The record does not contain any additional information about Bobby Lee.

Lonna and Michael met in May of 1989, in Fairfield, Iowa, through some mutual friends. Their friendship developed into a relationship and Lonna became pregnant with Patrick. Approximately three weeks after Patrick was born, Lonna, Patrick, and Lisa moved in with Michael, who was then living at 708 North Eighth Street in Fairfield, Iowa. This was a trailer, and the parties lived there for approximately two months. They then moved to 403 West Adams and lived there for approximately three months. This was a house; however, apparently the electrical bills were substantial and they moved to 301 East Jefferson where Michael is now living alone.

The relationship between Michael and Lonna was stormy, and it appears there were numerous arguments. Two of these arguments resulted in domestic abuse charges being filed against Lonna. One was dismissed; however, she pled guilty to the other one and was sentenced to and did serve two days in the county jail. As a part of that sentence, an order was entered restraining her from having any contact with Michael or coming upon Michael's residence at 301 East Jefferson in Fairfield, Iowa. She acknowledged that she had slapped Michael during arguments. This led to their separation on March 29, 1992, when Lonna moved out of 301 East Jefferson with Lisa and Patrick.

As a result of one of the arguments during the time the parties lived together, Michael became intoxicated and took some tranquilizers. This required some medical advice and

some monitoring of Michael for a few hours by Lonna. On another occasion, as a result of an argument, Lonna threatened to take an overdose of some pills.

During the time the parties lived together, Lonna performed household chores for Tina Levitt and Sue Bowerman. They came to Michael's place of employment at the direction of a member of the sheriff's department to talk to him and accused Lonna of stealing things from their homes during the time she was performing her duties. He left work and took them to the house where they identified their things and retrieved some of them. Lonna denied taking them at first; however, ultimately she admitted she had taken these things. Some of the items were taken when Lisa was with her. One of the items that was stolen was a Seiko watch, which Lonna contended she had gotten from her mother. However, Lisa told Michael that Lonna had stolen the watch also. She mainly took clothing, however, there were some toys that were also taken which she gave to Lisa and Patrick. She was not prosecuted for these thefts and did work off some of the cost of the loss by subsequently working for one of the individuals.

At the hearing, Michael described his relationship with Lisa as a good relationship. She does participate in the visitations that Michael has with Patrick at her discretion. Initially, the relationship between Michael and Lisa was strained; however, after a period of time it improved substantially to the point at which Lisa asked

Michael if she could consider him her father. The initial difficulties to some degree were caused by Michael's belief that Lisa had not been disciplined satisfactorily by Lonna.

Michael's means of discipline at this time include the use of the "time out" approach, although in the past he has swatted Patrick. Michael contends Lonna does not discipline the children, only threatens to do so. He contends she threatens to hit them with a spoon, although he has never seen her in fact hit the children with a spoon. On one occasion, she threatened to put Lisa out of the house and, in fact, removed her clothes from the house and put her outside for a period of time. This occurred only on one occasion. However, Michael contends that Lonna has threatened to do this on other occasions.

During the time the parties lived together, they shared the household chores with apparent equal ability. This included cooking, housecleaning, and caring for the children's physical needs as well as their medical needs. Patrick apparently has a physical problem which a doctor indicated could be exacerbated by cigarette smoke. When this was determined, Michael stopped smoking; however, Lonna did not, although during the time they lived together, she attempted to smoke outside the presence of Patrick.

Lonna introduced into evidence a log pertaining to the visitation that Michael exercised with Patrick and Lisa. A review of that log would indicate that Michael and Lonna

got along quite well with respect to visitation. It is true that the log indicates, on at least two occasions, an argument between the two of them. As has been indicated, however, the log generally indicates very little difficulty with respect to visitation. It should be noted that at times Michael was not as punctual as he could have been with respect to the visitations; however, some of the problems with respect to visitation occurred at the time he was active in a play. For approximately one month after the parties split up, visitation was not exercised. Visitation began when Michael stopped by Lonna's home in order to take care of some Girl Scout matters with respect to Lisa and visitation arrangements were agreed to. At this time, Michael agreed the restraining order should not be considered as in force.

During the time the parties were separated, Michael has not made any support payments to Lonna on behalf of Patrick. He contends he contacted the Child Support Recovery Office and was advised that it was not necessary. He has, however, purchased clothing and toys for Patrick and Lisa. This includes a ten-speed bicycle for Lisa and a tricycle for Patrick.

On an occasion when Lonna was visiting Bobby Lee in Cedar Rapids at his place of residence, Patrick discovered and handled a pistol. Lonna and Michael disagree as to whether the pistol was loaded at the time Patrick found it; however, they agree that he did discover the gun and handle it. Michael does not have any firearms in his home.

Mona Wolfbrandt and Angela testified on behalf of Lonna. The former indicated Michael had told her that he wanted a surrogate mother for a child, and Angela indicated that Michael told her he was going to attempt to find Lonna mentally unstable to secure custody of Patrick. Lonna also presented the testimony of James Barlow, who used to be a friend of Michael's. He indicated he no longer was a friend and it appeared that the problem between the two of them was a result of the purchase of an automobile and a stove. James contends that Michael agreed to purchase it for a given amount of money; however, he refused to pay that amount because of the condition of the purchases. James was not clear as to the amount of the initial purchase or the amount of money Michael finally paid him.

Lonna said she thought Michael was a good father, and she didn't see anything wrong with his parenting skills or his abilities. She also indicated she did not have anything negative to say about what Michael does or how he takes care of Patrick other than to comment that he might do things differently in raising Patrick than she does, but that is in two different environments. Neither Lonna nor Michael had been previously married.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on 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 credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

In this case, Lonna acted on a pro se basis and did not file a brief on appeal. The trial court commented that "it was completely unrealistic to expect to her [Lonna] to be able to proceed with any degree to proficiency in the task at hand. Her educational attainment is not included in the above findings and the Court does not believe it was ever put in the record. The Court does not have the benefit of her direct testimony nor the cross-examination of her.

When parties elect to represent themselves in matters before the courts, they are expected to act with equal competence with those who are trained in the law. Burgs v. Sissel, 745 F.2d 526, 528 (8th Cir. 1984). If laypersons choose to proceed pro se, they do so at their own risk. Simmons v. Brenton Nat'l Bank of Perry, 390 N.W.2d 143, 145 (Iowa App. 1986). Consequently, appellate courts will review the issues without regard as to whether the party did or did not employ legal representation. Metropolitan Jacobson Dev. Venture v. Board of Review of Des Moines, 476 N.W.2d 726, 729 (Iowa App. 1991).

When the issue of custody arises from the competing claims of unwed parents, the controlling consideration must be the interests of the child. Heyer v. Peterson, 307 N.W.2d 1, 7 (Iowa 1981). The objective is always to place the child in the environment most likely to bring the child to healthy physical, mental, and social maturity. Iowa R.

App. P. 14(f)(15). In making this determination, we are guided by the criteria for child custody adjudication delineated in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). These are the criteria which are to be weighed together in reaching a custody decision.

Before we turn to a review of the principles set forth in Winter, we would note that the trial court, in reviewing these principles, made reference to information contained in affidavits which apparently were filed in connection with the temporary matters. Those affidavits were not made part of the appendix and consequently any information contained in them is not available to us.

There is little information in the record concerning the characteristics of Patrick. He does have some type of physical ailment which the doctor has determined smoking is detrimental to. Michael has stopped smoking, indicating that it was because of this problem; however, Lonna still smokes, hopefully not in his presence.

In this situation Patrick will live either with his father as a single parent or with his mother and half-siblings. The record indicates Lonna intended to marry Bobby Lee, and the record is completely silent as to any information concerning this individual.

Michael's background would indicate he places more emphasis on additional education than Lonna. The physical and mental health of Michael and Lonna appear to be approximately the same. Lonna at one time threatened to

take an overdose of tranquilizers, and Michael, on an occasion, took an overdose of pills after becoming intoxicated. Lonna has been convicted of domestic abuse, although apparently not a serious assault, and did spend two days in the county jail. Further, she stole items from her employers and, at least on one occasion, did this in the presence of her daughter and initially denied she had done this when confronted about it. Michael's employment has been consistent since the time he graduated from high school, and at the present time he has been employed by the same organization for a period of time. Lonna, on the other hand, has had very spotty employment and has been substantially unemployed and receiving welfare benefits since the birth of Lisa. Both parties appear to have a temper which is shown by the arguments they have engaged in.

Michael's background indicates he places a higher regard for the educational needs of children. Michael's continued employment would indicate he has a greater ability to provide for the material needs of Patrick. Lonna has admitted she stole merchandise from her employers and at least on one occasion did so in the presence of her daughter. Nothing of that nature appears in the record concerning Michael, which would indicate he would provide a more healthful, moral atmosphere for Patrick. Michael's present discipline practices include a time out situation. The record does not indicate Lonna's discipline practices;

however, we note that at least on one occasion she disciplined Lisa by placing her clothes outside and indicating to her that she should also go outside. This is not an appropriate means of discipline.

The record does not contain a great deal of information concerning interpersonal relationships between Patrick and Lisa other than they appear to get along.

There is little information concerning the effect on Patrick of continuing or disrupting his existing custodial status. The record is silent as to any information concerning Bobby Lee, and we cannot determine whether he is living with Lonna or not. Consequently, we cannot measure the environment Patrick lives in at this time with the environment he would be in if living with Michael. We can only say that the environment if he were living with Michael would be satisfactory.

The record does not contain any information to allow us to consider other Winter criteria. We believe that when considering the foregoing, the best interests of Patrick require that his custody be placed with Michael. There is a presumption that siblings should not be separated, but we believe in this situation this presumption has been rebutted. We acknowledge there is a controversy over raising an Afro-American child in a caucasian household, but we prefer not to take a position on this issue and that did not enter into this decision.

We, therefore, reverse the trial court and remand this matter for a decree awarding custody of Patrick to Michael and setting forth appropriate visitation rights and child support to be paid by Lonna, if any, and a date on which custody of Patrick shall be given to Michael, which shall be not less than twenty days after the issue of the procedendo in this case.

REVERSED AND REMANDED.