

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF BILLIE LORIE CARPENTER
AND KEITH LEA CARPENTER

FILED

DEC 17 1987

CLERK SUPREME COURT

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Upon the Petition of	)	
BILLIE LORIE CARPENTER,	)	Filed December 17, 1987
Petitioner-Appellant,	)	
And Concerning	)	
KEITH LEA CARPENTER,	)	$\frac{7-346}{86-1811}$
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Hamilton County (No. D.M.
1064) - Dale E Ruigh, Judge.

The petitioner appeals from the decree of dissolution granted in the
trial court **AFFIRMED**.

Terry W Guinan, Fort Dodge, for petitioner-appellant.

Patrick B Chambers, Webster City, for respondent-appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Petitioner, Billie Carpenter, appeals the award of physical custody of her three children to the Respondent, Keith Carpenter, in the decree of dissolution granted by the trial court. She asserts the trial court erred in transferring custody of the oldest child from his natural mother to his stepfather. She also asserts it was error to transfer custody of the other two children to Keith. If she is granted custody of the children by this court, she contends she should receive the house and furniture, and Keith should be ordered to pay child support. Both parties apply for appellate attorney fees. We affirm.

Our scope of review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

Billie and Keith were married June 4, 1977. Their oldest child, Greg, was born May 19, 1977. Greg has always known Keith as his father, and Keith has always considered Greg his son, although Keith suspected otherwise. During these dissolution proceedings, Keith requested that blood tests be performed to determine the paternity of Greg and the parties' youngest child. Although these blood tests were not admitted by either party as evidence, the parties stipulated Keith was not Greg's biological father.

On appeal, Billie asserts the trial court misapplied cases granting non-parents custody since no compelling circumstances were shown to take custody away from her, the natural parent. In fact, the trial court found neither Billie nor Keith to be unfit or morally bankrupt. Billie contends, therefore, the presumption of parental preference as to child custody, see Thompson v. Collins, 391 N.W.2d 267, 268 (Iowa App. 1986), was not rebutted.

Generally, nonparents vying for custody have the burden to prove the unsuitability of the parent as a custodian. In re Marriage of Reschly, 334 N.W.2d

720, 721 (Iowa 1983). The reason for this rule is so the courts do not remove children from their parents merely because another home offers more advantages. See In re Guardianship of Burney, 259 N.W.2d 322, 324 (Iowa 1977). The first and governing consideration in child custody cases is still, however, the best interest of the child. Iowa R. App. P. 14(f)(15); In re Marriage of Smith, 269 N.W.2d 406, 407 (Iowa 1978).

The trial court concluded it was in Greg's best interest he be put in the physical care of Keith. Our review of the record leads us to the same conclusion. This is not the ordinary case where custody is granted to a nonparent. Keith is not Greg's grandfather, uncle, or foster father; he has been, for all intents and purposes, Greg's father for Greg's entire life. It has only been recently, as a consequence of these proceedings, evidence contrary to paternity has arisen. It is our conclusion interests of the two younger children are best served by being in Keith's physical care. This is important since there is a strong interest in keeping children of broken homes together. In re Marriage of Orte, 389 N.W.2d 373, 374 (Iowa 1986); In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981).

We therefore reject Billie's assertion the presumption of parental preference was not rebutted. The trial court's grant of physical care of the two younger children to Keith was in their best interests. And the grant of physical care of Greg to Keith furthered their interests by keeping the children together. We conclude the furtherance of these interests and the best interest of Greg serve to rebut the presumption Billie should be granted custody of Greg because she is his natural mother.

We have concluded the trial court's physical care determinations were correct, we also uphold its decisions regarding child support and ownership of the house and furniture. It was not disputed the parties have no equity

in the house and that its ownership should be determined by which party was granted physical care of the children

Both parties request appellate attorney's fees. The primary considerations in awarding attorney's fees are the needs of the requesting party and the ability of the other party to pay. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Factors to consider in determining the amount of the award include the complexity of the case and the extent of the work performed by the attorney. See In re Marriage of Jennerjohn, 203 N.W.2d 237, 245 (Iowa 1972). We conclude the parties should pay their own attorney's fees.

AFFIRMED

Schlegel, J., concurs, Oxberger, C.J., dissents.

I would grant custody of the three children to the appellant.