FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

125

BRANDY NICOLE SCHUYLER By Her Next Friend **MARILYN ANN RUSSELL**,

Plaintiff-Appellant,

vs.

DEBRA K. SCHUYLER, EDDIE T. SCHUYLER, and **SANDY G. SCHUYLER,**

Defendants-Appellees.

Filed April 23, 1986

5-680
85-1154

Appeal from the Iowa District Court for Polk County (No. CL 061-35924) - Michael J. Streit, Judge.

The appellant contests the court's award of custody of the minor child to the stepmother. **AFFIRMED.**

Barbara G. Barrett, of Dickinson, Throckmorton, Parker, Mannheimer & Raife, Des Moines, Iowa, for plaintiff-appellant.

Tom Whitney, Des Moines, Iowa, for defendant-appellee.

Heard by Oxberger, P.J., Donielson and Hayden, JJ., but considered en banc.

HAYDEN, J.

This case involves a difficult determination of the custody of a young girl. This child has spent the last four years of her six years in the custody of her father and stepmother. The father recently died and this custody dispute arose. The mother wishes custody to be returned to her, while the stepmother claims it is in the child's best interests that the girl remain in her care. We must weigh the competing interests of the mother in having the care and custody of her child and the child's best interests. After a thorough review of the record presented on appeal and the pertinent authorities, we affirm the trial court's award of custody to the stepmother.

The appellant, Marilyn Russell, married Edward "Buzz" Schuyler in 1974, when she was 16 years old. They were living in Georgia when their daughter, Brandy Nicole Schuyler, was born April 27, 1980. According to Marilyn, the marriage was difficult. She stated that Buzz beat her and used drugs and alcohol frequently. Marilyn testified she left him several times but came back to him. In May 1981, she claims Buzz told her he would give her a divorce only if she gave him custody of Brandy. Marilyn says she had led a sheltered life and was not aware she did not need her husband's permission to divorce. It was under this duress, she claims, that she signed an agreement which released the child to the care of Buzz. One month after she signed the agreement, they received their divorce. Buzz obtained a discharge from the military so that he could care for the child. He moved to Des Moines where his parents lived. Marilyn also left Georgia and moved to North Carolina. During the latter part of the marriage, she had developed a relationship with a man named Tom Russell. She married him in October, 1981. They had a child born in February 1982, began living with Debra Schuyler, the appellee in this action. They married in May 1982.

During May 1982, Marilyn traveled to Des Moines to visit Brandy. The parties dispute what happened at this time. Marilyn claims she was staying with a relative of Buzz while visiting Brandy and was allowed to see the girl for four days. At the end of that four days, she contends Buzz, for no apparent reason, would not let her see Brandy any longer. Marilyn stated she stayed for another two weeks, but could not see the child. She then returned to her home in North Carolina.

Debra testified that Buzz told her that he cut the visit short because Marilyn had talked to him about getting back together and was displaying pictures to people of a baby she said was Buzz's son. Marilyn denied this. In December of 1982, Buzz and Debra had a daughter, Erica. After this visit, Marilyn had another difficult pregnancy resulting in a miscarriage. She was not allowed to travel for two months.

Marilyn returned to Des Moines to visit Brandy in spring of 1983. She contends she was again prevented from visiting Brandy longer than four days. Debra testified she did not know when Marilyn left Des Moines and did not take part in planning the visits with Brandy.

Marilyn and Tom had another child born in January 1984. Her husband is with the Special Forces in the Army and received orders soon after the child's birth to go to Okinawa, Japan. Marilyn phoned Buzz to tell him she was going overseas. She has been there with her family for a year and a half. The overseas duty will end in April 1987, and they will return to the United States.

Aside from these visits, Marilyn says she tried to call once a month in 1983, and sent cards and presents on Christmas and Brandy's birthday. Presents were also sent in April and Christmas in 1984. The other contact in 1984 was a phone call. Marilyn sent a card to the child in 1985.

Shortly after Buzz's death in April 1985, Marilyn sought Brandy's custody by filing the present habeas corpus action against Debra and Edward's parents. The trial court denied Marilyn's request and instead placed Brandy in Debra Schuyler's custody. Marilyn has appealed this decision. She contends evidence was not sufficient to overcome the presumption in favor of placing a child with the natural parent.

We review the facts anew in an appeal from a decision in equity. Iowa R. App. P. 4. Yet, we are directed to give weight to the trial court findings of fact, especially where those findings involve a determination of the credibility of witnesses. Iowa R. App. P. 14(f)(7). As the supreme court recently stated, "We pay close attention to the credibility findings of the trial court because it had the opportunity to observe and listen to the parties and other witnesses, including the minor child." In re Guardianship of Stewart, 369 N.W.2d at 824.

It is presumed under Iowa law that when a custodial parent dies and the other biological parent survives, the living parent shall be awarded custody "unless the court finds that such an award is not in the child's best interests." § 598.41(6), Code of Iowa (1985). Those best interests are the primary consideration and the right of the living biological parent to the child is not absolute. McCalester v. Hillcrest Services to Children and Youth, 232 N.W.2d 1, 2 (Iowa 1975). The child's vital welfare, present and future, is not to be sacrificed to the parents claim. Joiner v. Knieriem, 243 Iowa 470, 480-81, 52 N.W.2d 21, 26 (Iowa 1952).

In the present case, the trial court determined that Marilyn lost the preference of the biological parent through her own inactivity; that Brandy has a close loving relationship with her Iowa family which should not be disturbed; and that Brandy identifies with her stepmother and half-sister and has no real relationship with Marilyn. We find that these determinations are supported by the record and warrant an award of custody to Debra.

In signing the paper which relinquished custody of Brandy, Marilyn contends that she acted under duress. She claims that her husband was abusive and that he made her give up the child to get a divorce. The record supports the conclusion that Marilyn was struck by Buzz. Several factors, however, detract from a finding that she was somehow forced into the agreement.

After Marilyn signed the divorce agreement in July 1981, Buzz took Brandy to Des Moines and left her with his parents. Over thirty days passed between this and when the divorce was finalized. As the trial court indicated:

> By then she knew or should have known that there was going to be a geographic separation. She was aware that she was not going to enjoy a close relationship with the child. She did not stop this arrangement and went through with the divorce. She knowingly, and with opportunity for reflection, agreed to the custody provision.

Furthermore, following the divorce Marilyn took no action to ensure that she was able to exercise any meaningful visitation. She sought legal advice, but did not pursue any course of action. During the four years since the divorce she has made only two trips to Iowa to see her daughter. There were difficulties with these limited visits because Buzz and his parents were concerned she might leave the jurisdiction with the child. She has not had the child overnight since she was fourteen months old.

It is apparent that problems with distance and Marilyn's pregnancies contributed, in part, to the difficulties with visitation. These factors have occurred through no fault of Marilyn's. However, it is equally apparent that other forms of contact have been minimal. Buzz's parents and Debra testified that Marilyn made few if any phone calls to the child, and sent cards and gifts only at Christmas and birthdays.

In contrast, the record demonstrates Brandy has a close family relationship with Debra, her half-sister Erica, and her paternal grandparents. Evidence also

indicates that Brandy could face considerable stress and trauma if removed from this environment.

Dr. Janet McDonough, a clinical psychologist who talked with Brandy, testified that the child considered Debra to be her mother and did not want to live with Marilyn. McDonough indicated that the child might feel she was being punished if custody was changed. She also stated that the loss of her mother, grandparents, and sister, combined with the recent loss of her father, was a "great many losses for a youngster."

Dr. John Tedesco, chief psychologist at the Des Moines Child Guidance Center, expressed similar views. He testified that Brandy views Debra as the "psychological parent" and Erica as her sister. She has no view regarding Marilyn. He also stated that the child was grieving for her father and there was a considerable risk in removing her from a supportive environment while she was adjusting to the loss.

Based on this evidence we conclude, as the trial court did, that the statutory preference in favor of the biological parent is defeated. Our decision today is not reached lightly. We recognize that there is conflicting evidence concerning the events that transpired. The trial court, however, is in the best position to assess the credibility of witnesses. We are not inclined to interfere with its determination in this regard. Furthermore, the potential trauma associated with removing Brandy from what appears to be a secure and stable environment is a factor which cannot be ignored. The child's best interests require that we refrain from unnecessarily exposing her to this risk. Marilyn may very well possess the qualities to be a good parent. Yet this fact alone does not justify a transfer of custody. As in all cases of this type, our overriding concern is for the well-being of the child. It is this consideration that convinces us that the trial court's decision should be affirmed.

AFFIRMED.

Donielson and Snell, JJ., concur; Oxberger, C.J., and Schlegel, J., dissent;

OXBERGER, C.J., (dissenting).

I respectfully dissent.

In my judgment the majority does not give due consideration to the constitutional principles set forth in Stanley v. Illinois, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972).

There Justice White noted the frequent emphasis the court has given to the "importance of the family." The right to raise one's children has been termed "essential," Meyer v. Nebraska, 262 U.S. 390, 399, 67 L. Ed. 1042, 1045, 43 S. Ct. 625, 29 A.L.R. 1446 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541, 86 L. Ed. 1655, 1660, 62 S. Ct. 1110 (1942), and "[r]ights far more precious. . . than property rights, May v. Anderson, 345 U.S. 528, 533, 97 L. Ed. 1221, 1226, 73 S. Ct. 840 (1953).

It is clear that in a custody dispute such as the one before the court here, we should give weight to the claim of Debra Schuyler who has had actual custody for a substantial time. The record does indicate that Brandy has become an integral member of her current family unit. But the degree of integration is not sufficient to neutralize a strong presumption that Brandy's welfare will be served best in the care and control of her natural mother. Risting v. Sparboe, 179 Iowa 1193, 1136-37; 162 N.W. 592, 594 (1917). The trial court found Marilyn, the natural mother, was a fit parent. There is no evidence to dispute the trial court's finding.

There is no evidence in the record as to whether Brandy will suffer any long-term stress in a transfer to Marilyn's custody and control. Dr. John Garfield said he did not have enough information to determine whether the child Brandy would face difficulties resulting from a change in custody.

Dr. Janet McDonough said because she had not interviewed Marilyn nor her husband she could not comment on them. Although she felt transfer of Brandy

from her step-mother to her natural mother would be stressful, she did not opine that such transfer would have a long-term, detrimental effect on Brandy.

John Tedesco, a psychologist, testfied:

> It's a complicated question because you're dealing with short-term effects, you know—I have no question—there is no question in my mind but that it would add more grief and more difficulty to her life at this point. The long term effects I really don't know. For that kind of thing, I think one would need a lot more information than I have.

The trial court concluded, "the long-term effects are unknown."

The trial court in its legal conclusions finds "Marilyn by her own inaction has lost the preference inherent in her as a mother." However, the trial court in its findings of fact found that Marilyn was struck by the natural father Buzz. The trial court also found that, "Although Marilyn claims that she was terrorized out of her marriage she took no action to insure that she was able to exercise any meaningful visitation with her daughter. She sought legal advice but did nothing. The court attaches no fault to this conflict but does find that this has resulted in no mother-child relationship ever developing between Marilyn and Brandy."

I find it difficult to reconcile the statements of the trial court. On the one hand, the court said, "The Court attaches no fault to this conduct. . . and on the other hand concludes that, "Marilyn by her own inaction has lost the preference inherent in her as a mother.

Dr. John Garfield testified that it was probable that Marilyn suffered from a battered wife syndrome and that her relinquishment of custody was not voluntary but rather obtained through physical and psychological cohersion.

I believe the physical and psychological abuse inflicted on Marilyn by Buzz explains the limited involvement by Marilyn in Brandy's life. I would not find as the trial court found that "Marilyn by her own inaction has lost the preference inherent in her as a mother. I would find that the statutory preference for the

natural mother has not been overcome. I would reverse the trial court and award custody of Brandy to Marilyn.

Schlegel, J., joins in this dissent.

SACKETT, J. (specially concurring)

I agree with the majority and the trial court that Brandy should remain with Debra.

The trial court determined:

> In the four year period since the divorce, Marilyn has made two trips to Iowa to visit Brandy. Her contact with the child during those visits was short in duration and limited in nature. She has not had the child overnight alone since the child was 14 months old. Problems of geography and Marilyn's pregnancies have prevented any extensive contact between Marilyn and the child.
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> Marilyn claims that her agreeing to this custody arrangement was a product of her suffering from battered-wife syndrome, i.e., she agreed to custody being placed with Buzz so she could extricate herself from a terror filled marriage in which this was the only key to escape. The Court finds that Marilyn was struck by Buzz but that the divorce agreement was voluntarily entered into. When she signed the divorce agreement in July 1981 Buzz took Brandy to Iowa and left her with his parents. Over thirty days passed between this and when the divorce was proven up by Marilyn in court in Georgia. By then she knew or should have known that there was going to be a geographic separation. She was aware that she was not going to enjoy a close relationship with the child. She did not stop this arrangement and went through with the divorce. She knowingly, and with opportunity for reflection, agreed to the custody provision.
>
> Although Marilyn claims that she was terrorized out of her marriage, she took no action to insure that she was able to exercise any meaningful visitation with her daughter. She sought legal advice but did nothing. The Court attaches no fault to this conduct but does find that this has resulted in no mother-child relationship ever developing between Marilyn and Brandy.
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> The relationship between the child and her birth-mother is not close. Although Marilyn was the primary-care parent during her marriage to Buzz, her contact with Brandy since then has been minimal. Brandy has not had any regular or meaningful contact with Marilyn for almost 80% of her life. She does not identify Marilyn as her mother. She does not have any significant attachment to Marilyn. Except for the recent contact, she has met her stepfather Tom Russell only once. She has never met her half-siblings born to Marilyn and Tom.

> Brandy has a close family relationship with her stepmother Debra and half-sister Erica. Brandy considers Debra her mother. Debra is the "psychological parent" of Brandy. The natural attachment and affection between mother and daughter has developed between them. Brandy considers Erica, age two-and-one-half years, to be her sister and has a close relationship with her. The Schulyer home is a family unit.
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> The paternal grandparents Eddie T. and Sandy G. Schulyer have had a close and involved relationship with Brandy. They have been caretakers for short periods of time after Buzz and Marilyn's divorce and during Buzz's marriage to Debra. It cannot be said however that they were the primary caretakers of Brandy for any extended period.
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> . . . [I]f a person having lawful care of a child has properly provided for a child's social, moral and educational needs for a substantial period of time and the child has become attached to that environment and those responsible for his welfare and happiness, a court is not justified in transferring that custody to another except for the most cogent reasons.

Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511, 517-18 (Iowa 1976).

Marilyn claims and testifies she got the divorce because her husband was abusive, she gave up her child because her husband made her give the child up to get the divorce, the Georgia attorney who handled the divorce did not protect her rights, when she came to Iowa she was prevented by others from seeing her child, other people prevented her from talking to her child on the telephone, and she did not pursue visitation because an unnamed Iowa lawyer gave her no encouragement and so did an unnamed Georgia attorney.

A large part of Marilyn's testimony is based on statements allegedly made by Buzz (now deceased) or three lawyers, two of whom are unidentified, the other of whom did not testify.

In determining the credibility of Marilyn's testimony, I look at the record as a whole and in doing so I find the divorce action from Buzz in Georgia was

brought by Marilyn as plaintiff. She was the one who presented evidence to finalize the matter. It appears from the pleadings the attorney was her's.

Despite the fact she contended she was sheltered and Buzz completely controlled her, she was seeing her current husband after the separation and by the time the divorce was finalized, she was pregnant with her current husband's child.

Brandy resided with Buzz's parents in Des Moines during the 30-day period before the divorce was finalized. During that period, Marilyn made no contact with the child and refused the offers of Buzz's parents to have the couple come to Des Moines where they could help. Buzz's parents and Debra testified Marilyn made few if any phone calls to the child, sent cards and gifts only at Christmas and birthdays, and when she came to Des Moines for visitation she generated difficulty by contending Buzz was the father of her second husband's child, and caused concern with Buzz and his parents that she might leave the jurisdiction with the child.

Marilyn was unemployed when she and Buzz were divorced. She was not ordered to pay child support. The record clearly shows she made no financial contribution to Brandy except some birthday and Christmas gifts which are not described. The record further indicates Buzz's financial situation was not good and his parents and Debra helped with support. The record also reflects Marilyn had knowledge of this fact.

I recognize Marilyn also has been unable to maintain a close relationship with Brandy in part because of great distance and difficult pregnancies. These factors have occurred because of no fault of Marilyn's.

Marilyn argues the evidence does not show any long-range risks to Brandy if custody is transferred.[1] However, I cannot ignore the trauma the change will cause this six-year-old today. Since Brandy was 14 months of age, she has known Marilyn only as a very occasional visitor. She only met Marilyn's husband once before the hearing. She does not know Marilyn's two children who are her half-siblings.

Brandy came to Des Moines to live with her paternal grandparents when she was 14-months-old. Shortly thereafter, she moved in with Buzz and Debra. Debra is the person she identifies as mother and they enjoy a close relationship. Brandy has suffered the trauma of the death of her natural father with whom she was very close. Brandy has an extremely close relationship with her paternal grandparents and their children. Brandy has a younger half-sister, Debra's child who has grown up with Brandy.

This six-year-old has been forced to endure the death of her natural father. I refuse to force her to endure the trauma of severing her relationship with the woman she considers mother, a half-sister she has grown up with, and paternal grandparents and their family who have supplied a supportive and extended family. To do otherwise would totally ignore the best interest of this child.

I agree the trial court should be affirmed.

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[1] By eroding the security needed to form trusting relationships, multiple placements of a young child may also result in shallow, indiscriminate emotional relationships in later years. Note, In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings, 51 N.Y.U.L. Rev. 446, 451 (1976). "If an infant or young child is uprooted from adoptive parents with whom he or she has formed a parental attachment and is returned to a biological parent whom the child now regards as a stranger, permanent psychological damage may result." Supra at 456.