

IN THE COURT OF APPEALS OF IOWA
IN RE THE MARRIAGE OF PAMELA KAY GARNER
AND DAVID PAUL GARNER

FILED

FEB 23 1989

CLERK SUPREME COURT

Upon the Petition of)

PAMELA KAY GARNER,)

Petitioner-Appellant,)

And Concerning)

DAVID PAUL GARNER,)

Respondent-Appellee.)

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8-661
88-841

Appeal from the Iowa District Court for Dubuque County
(DM6061), Alan L. Pearson, Judge.

Petitioner appeals the decree of dissolution entered
for the parties in district court which awarded physical
care of the parties' three children to respondent.
AFFIRMED.

Mark S. Beckman of Pfeiler & Beckman Law Offices,
Dubuque, for petitioner-appellant.

Mary Browne McCuskey of Clemens, King & McCuskey,
Dubuque, for respondent-appellee.

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

SCHLEGEL, P.J

Petitioner-wife appeals the decree of dissolution entered for the parties in district court which awarded physical care of the parties' three children to respondent husband. Petitioner claims the court erred by placing physical custody of the minor children with the respondent.

Petitioner Pamela Garner and respondent David Garner were married on September 7, 1974, and are the parents of three minor children: Cory Len Garner, born August 26, 1976; Heather Marie Garner, born March 27, 1979; and Jared James Garner, born April 27, 1984. Pamela is employed part-time as a school bus driver and has a net income of approximately \$5,700 per year. David works for Georgia-Pacific and has a net income of about \$22,800 per year.

The decree of dissolution, filed on June 1, 1988, awarded Pamela and David joint custody of their three children, and granted David primary physical care subject to "reasonable and liberal" visitation rights in Pamela. Pamela was directed to pay \$20 per week support. The court awarded primary physical care to David because it found that Pamela was not capable of providing care for Cory because he was too alienated from her to permit her to effectively parent him and the court saw no reason to separate the children. The court further stated:

In making this placement, we recognize that David's home care and child care skills are presently lower than Pamela's. However, they are

more than what is minimally necessary to care for the children and he is learning rapidly. Moreover, the potential harm to the children from David messing up on the laundry or meals is far less than the potential harm from an ongoing conflict between Pamela and Cory.

Our review in this custody dispute is de novo. Iowa R. App. P. 4. When considering the credibility of witnesses, we give weight to the trial court's findings but are not bound by them. Iowa R. App. P. 14(f)(7). Precedent is of little value in cases such as these, and we must base our decision largely upon the particular circumstances of the parties in this case. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

In child custody cases, the best interests of the child is the first and governing consideration. Iowa R. App. P. 14(f)(15). The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors listed bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the children. Iowa R. App. P. 14(f)(15); In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant and "neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding." In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App.

1985) (citing In re Marriage of Bowen, 219 N.W.2d 683, 689 (Iowa 1974)).

Pamela argues that the physical care of the children should have been placed with her, and that the court merely determined that she and Cory could not get along as a basis for its award of custody to David. She claims that, with time, she and Cory will be able to get along. She further claims that she has always been the children's primary caretaker, and that David does not have the stability as a parent that she does.

The trial court relied, to some extent, on Cory's desire to live with David. In an interview with Judge Pearson, Cory told the trial judge that his mom "does a lot of stuff to me . . . she is always lying . . . her boyfriend is always calling me names and all her friends are." He told the court that his mother's boyfriend, also named David, had called him a bad name. Cory stated that he wanted to live with his father and that he hopes "Dad just gets us all."

In In re Marriage of Ellerbroeck, 377 N.W.2d 257, 258 (Iowa App. 1985), we stated:

The Iowa Courts have long recognized that deciding custody is far more complicated than asking children what parent they want to live with. See In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981). . . . Preferences of minor children while not controlling are relevant and cannot be ignored. In re Marriage of Burham, 283 N.W.2d 269, 276 (Iowa 1979). . . . Iowa Code section 598.41(3)(f) provides that in considering what custody arrangement is in the best interests of the minor child, the court

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shall consider whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.

In Ellerbroeck, the court considered the child's age and educational level, strength of preference, intellectual and emotional make-up, relationship with family members, reason for decision, and other factors. Id. at 258-59. Upon our review of the record, we agree with the trial court that substantial weight should be given to Cory's preference.

The record indicates that Cory, an eleven-year-old fifth grader, enjoys a normal father-son relationship with his father, although he appears somewhat anxious to please him. On the other hand, Cory harbors strong hostile feelings towards Pamela and there is evidence that Pamela is unable to control Cory. Brenna Healy, a licensed psychologist and counselor for the children from the Dubuque Jackson County Mental Health Center, testified that if Cory were to be placed with his mother, he would be very angry and he would attempt to "sabotage" the situation. When asked her opinion as to whether Cory should be placed with Pamela, Ms. Healy responded that she "didn't feel very comfortable with saying it could be worked out. I think there is certainly a chance, but I see an awful lot of obstacles."

Although Pamela has been the children's primary caretaker, David has shown that he is quite capable of

providing for their welfare. Moreover, despite the concern that he may make some mistakes along the way, we agree with the trial court that "the potential harm to the children from David messing up is far less than the potential harm from an ongoing conflict between Pamela and Cory."

Pamela also claims that Davis is not a stable enough individual to handle all three children. She points to psychological evidence finding that he has a history of hostility and aggressiveness and that he abused alcohol in the past. She claims the evidence indicates that David will take his anger out on the children.

While the evidence does indicate David has some emotional problems, our review indicates that Pamela also suffers from emotional problems. Brenna Healy testified that Pamela's MMPI indicated that she was "very passive and dependent," "had an inordinate demand for affection," and that "her dependency on men is usually of a rather hostile type." Ms. Healy stated that women like this "are suspicious of men and don't get along with other women" and "are generally hostile, irritable, easily hurt, extra punitive and do not give up anger." The record thus indicates that neither party is the picture of mental health. However, in the absence of any evidence that David has harmed or even threatened to harm the children, we see no reason to disturb the trial court's physical placement of the children with David. We note that the trial court

is in a better position than we are to observe the conduct of all witnesses, including the parties hereto, and determine the credibility of their testimony. See Dunaway v. Dunaway, 189 N.W.2d 480, 482 (Iowa 1971).

In the alternative, Pamela asks that Heather and Jared be allowed to live with her. In attempting to foster the children's best interests, the court ordinarily attempts to keep children of broken homes together. "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 Grandinetti, 342 N.W.2d 876, 879 (Iowa App. 1983). We see no reason to separate these children. We therefore deny Pamela's request.

Upon consideration of all of the relevant factors, we affirm the custody determination made by the trial court.

AFFIRMED.