IN THE COURT OF APPEALS OF IOWA

No. 0-488 / 99-1561
Filed January 24, 2001

FILED
JAN 24 2001
CLERK SUPREME COURT

Upon the Petition of
TAMARA S. MASSEY,
Petitioner-Appellant,

And Concerning
KRIS BOESEN,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Thomas Bower, Judge.

Tamara Massey appeals from the district court's custody order and its denial of her Iowa Rule of Civil Procedure 179(b) motion and her motion to modify or vacate judgment. **REVERSED AND REMANDED.**

Kellyann M. Lekar of Roberts, Stevens & Lekar, P.L.C., Waterloo, Iowa, for appellant.

Timothy J. Luce of Anfinson & Luce. P.L.C., Waterloo, Iowa, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

HECHT, J.

Tamara Massey appeals from the district court's custody order and its denial of her Iowa Rule of Civil Procedure 179(b) motion and her motion to modify or vacate judgment. She contends the district court erred in awarding primary physical care of the parties' son to his father, Kris Boesen. We reverse and remand to the district court for proceedings consistent with this opinion.

I. Factual Background and Proceedings. Tamara Massey ("Tami") and Kris Boesen are the parents of Seth, who was born on April 29, 1997. Tami was thirty-six years old at the time of trial and employed full-time as an administrative assistant to the vice president of GMAC. Tami was married at the age of sixteen and then divorced three years later. During this marriage, she gave birth to her oldest son, Dan, who was twenty years old at the time of trial in the case now before the court. She married again several years later but no children resulted from that marriage. She subsequently had several serious relationships, one of which resulted in the birth of her middle son, Matthew, who was nine years old at the time of trial. Tami has been the primary caregiver for both Dan and Matthew for their entire lives.

Kris is employed full-time as an electrician for the Waterloo school system. At the time of trial, he had been married once before. The marriage ended in divorce in 1991 after approximately ten years. Kris and his ex-wife did not have children together, although she had custody of two children from a previous marriage who lived with them. The record indicates Kris has not had contact with his ex-wife's children since the divorce. Kris was seeing a woman named Kelly

at the time of trial and the record indicates he married her shortly after trial. Kelly was pregnant at the time of the marriage, but later had a miscarriage. She has a nine-year-old daughter from a previous relationship who lives with her and Kris.

Tami and Kris never married but lived together in Kris's house for approximately eighteen months between August of 1995 and September of 1997. Tami's two older sons, Dan and Matthew, also resided in the home. The relationship was a tumultuous one and Tami moved out of the home in September of 1997 with Matthew and Seth. On November 4, 1997, Tami filed a petition for temporary and permanent custody with respect to Seth and requested the district court to establish a visitation schedule and order child support. Following a hearing, the district court granted temporary custody of Seth to Tami and granted Kris liberal visitation rights, including alternate weekends and daily visitation from the end of Kris's workday until the end of Tami's, approximately a four hour time period.

The district court held a hearing to establish permanent custody on December 30 and 31, 1998. In its order dated January 11, 1999, the court granted the parties joint legal custody, with Kris having primary physical and Tami exercising liberal visitation. Tami appeals.

II. Standard of Review. This case was tried in equity and therefore our review is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown,* 487 N.W.2d 331, 332 (Iowa 1992). The controlling

consideration in child custody cases is always what is in the best interests of the child. *Heyer v. Peterson,* 307 N.W.2d 1, 7 (Iowa 1981).

III. Merits. The criteria governing custody decisions are the same regardless of whether the parties are dissolving their marriage or are unwed. *Yarolem v. Ledford,* 529 N.W.2d 297, 298 (Iowa App. 1994). The court's objective is to place the child "in the environment most likely to bring her to healthy physical, mental, and social maturity." *In re Marriage of Murphy,* 592 N.W.2d 681, 683 (Iowa 1999); *Phillips v. Davis-Spurling,* 541 N.W.2d 846, 847 (Iowa 1995). The court determines placement according to which parent can minister more effectively to the child's long-range best interests. *In re Marriage of Buttrey,* 538 N.W.2d 322, 324 (Iowa App. 1995). 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 should. *In re Marriage of Courtade,* 560 N.W.2d 36, 38 (Iowa App. 1996).

Numerous factors help determine which parent should serve as the primary caretaker of the child. Iowa Code § 598.41 (1997); *In re Marriage of Daniels,* 568 N.W.2d 51, 54 (Iowa App. 1997). Some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *In re Marriage of Williams,* 589 N.W.2d 759, 761 (Iowa App. 1998). Factors that are relevant to this case include: (1) the characteristics of each parent, including age, character, stability, mental and physical health; (2) the interpersonal relationship between the child and each

parent; (3) the interpersonal relationship between the child and its siblings; (4) the effect on the child of continuing or disrupting an existing custodial status, considering which parent has been the child's primary caregiver; and (5) the nature of each proposed environment, including its stability and wholesomeness. *In re Marriage of Winter,* 223 N.W.2d 165, 166-67 (Iowa 1974); *In re Marriage of Crotty,* 594 N.W.2d 714, 717 (Iowa App. 1998). We will consider each element in turn.

(1) The Characteristics of Each Parent. Both Tami and Kris appear to be good parents and care for Seth a great deal. The district court placed emphasis on Tami's "colorful background" when determining Kris should have physical care of Seth. We acknowledge Tami's background was less than stable in her teens and early twenties, but there is no evidence she continues to lead an unstable life. She has been employed full-time for more than eight years with the same employer. After leaving Kris's home with Matthew and Seth, she found a permanent home with room for all three of her children to stay with her. She has taken appropriate steps to ensure Matthew and Seth have a constant, reliable caregiver when she is at work. She has successfully raised two older boys who appear to be doing well. Dan testified at trial he thought his mother had been a good mother. While Matthew did not testify, reports from his teachers and from Tami indicate he is doing well in school, behaves appropriately, and is progressing normally. The character of Tami's older sons speaks volumes about her ability to parent even when experiencing difficulties in other areas of her life.

Although she recently had back surgery, Tami does not have any serious health problems. She and Kris both smoke cigarettes but state they do not smoke around Seth. Both Tami and Kris admitted to using marijuana before and during their relationship but they both stated they no longer do so. Tami provided the results of a hair strand test to the district court that indicated she is no longer using any illicit drugs. Otherwise, Tami is in good mental and physical health.

By all accounts, Kris has been a good father to Seth. He exercised extensive, often daily, visitation with his son and is genuinely concerned about Seth's health and day-to-day needs. He maintains a stable home and has been employed full-time with the Waterloo school district for more than eighteen years. However, Kris's tendency to be less than honest with the court about his life troubles us. At trial, Kris testified he was currently seeing a woman who had a nine-year-old daughter. When asked whether the relationship was serious, he responded, "Well, I guess that's always a possibility. I believe it could turn into something serious, yeah." Two weeks after the district court entered its order, approximately a month after the trial, Kris married his girlfriend. She is now Seth's primary caretaker during the day when Kris is at work. We also are concerned about Kris's health problems. He suffered "sudden cardiac death" soon after trial in this matter. Although he denies the seriousness of the situation, he spent three days in the hospital and was off from work for six months.

(2) The Relationship between the Parents and the Child. Seth was only five months old when his parents stopped living together. At the time of trial, he

was eighteen months old. Although he had some health problems, he was generally a happy, healthy little boy. He apparently has a good relationship with both parents, his paternal grandmother, and his maternal grandparents. The record indicates both Tami and Kris are willing and able to meet all of Seth's emotional, social, moral, material, and educational needs at this time.

(3) The Relationship between the Child and His Siblings. Due to Seth's young age, it is difficult to determine the type of relationships he has with his two older brothers. Dan is establishing his own life as a young adult and, consequently, does not spend much time with Seth because of the large difference in their ages. On the other hand, Tami testified Matthew and Seth enjoy a close relationship and Matthew has assisted in caring for Seth on occasion. Siblings should be separated only for good and compelling reasons. *In re Marriage of Blume,* 473 N.W.2d 629, 631 (Iowa App.1991). In attempting to foster the best interests of the children, we ordinarily attempt to keep together children of a broken home. *In re Marriage of Sires,* 506 N.W.2d 813, 815 (Iowa App. 1993). In order to depart from the preference for keeping siblings together, "it must appear that separation may better promote the long-range interests of children." *In re Marriage of Riddle,* 500 N.W.2d 718, 720 (Iowa App. 1993). The same principles apply when half siblings are involved. *In re Marriage of Orte,* 389 N.W.2d 373, 374 (Iowa 1986). Seth has lived with Matthew all of his life. Even if they are not close because of the age difference, we must recognize the bond that exists between them and separating them does not promote their long range best interests.

(4) The Effect of Disrupting Custodial Status. At the time of trial, Tami had been Seth's primary caregiver for his entire life. After he was born, she took three months off from work to stay at home with him. During this time, Kris was unable to take time off work because he was not married to the mother of the child and actually worked a significant amount of overtime. In addition, since the time Seth was five months old, he has only lived with Tami. Although Kris exercised significant visitation with Seth, Tami has performed most of the daily care for him including taking him to the doctor, getting him up and ready in the morning, taking him to day care, and putting him to bed at night. We disagree with the district court's determination to remove Seth from his mother's primary care, particularly given his young age at the time of trial.

(5) The Nature of the Proposed Environments. Both Tami and Kris offer adequate environments to provide care for Seth. The district court placed great emphasis on Tami's relationships with the fathers of her older sons and concluded Tami actively restricted access to the children and prevented visitation with the fathers. Dan, Dan's father, James Staver, and Matthew's father, Jeff Grover, testified at trial. Dan stated he does not have a good relationship with his father but he does not feel Tami is at fault. He said it was his father's decision not to see him for many years after Tami and James got divorced and then it was only upon Tami's insistence he started visiting his father. He further testified Tami encourages his relationship with his father but his dad is often too busy to see him. He also testified he has not wanted to have a relationship with his father although Tami has been supportive of any visitation between them.

James testified he had no contact with Dan for ten years after he and Tami divorced. His explanation for this was the visitation portion of the divorce decree was not upheld but he did not indicate whether he or Tami was at fault. He testified, after about ten years, Tami brought Dan to his house and stated Dan wanted to know who his father was. He said he tried to find Dan a few times in those years, but explained the reasons he did not see Dan were he was too young and did not have very much money. He stated after reestablishing contact with Dan, Tami has never done anything to obstruct his contact with him.

Tami and Matthew's father, Jeff, were never married. He did testify he had to petition the court in order to get visitation with Matthew when he and Tami first separated. However, he places the blame equally on both of them saying he was not paying child support and, as a result, Tami was not allowing visitation. After the initial difficulties, there have been no problems between Jeff and Tami. Jeff testified Tami keeps him informed about what is going on in Matthew's life and she is very flexible regarding visitation. He further testified he did have concerns about Tami's stability when Matthew was younger, but she has become more stable. Based on this testimony, we find Tami is not likely to interfere with Kris's visitation or access to Seth. She has managed to keep both her older sons' fathers in contact with them and indicates she will be more than willing to do so with Seth. During the time the temporary visitation schedule was in place before trial, Tami was very flexible regarding visitation with Kris and allowed him to make up visitation time when the regular time was missed. In contrast, at the hearing on Tami's 179(b) motion, after Kris had been Seth's primary caregiver for

a short time, both parties testified they were having difficulties communicating about visitation. After his heart attack, Kris spent three days in the hospital and six months away from work. During this time, Kris did not contact Tami to care for Seth when he was unable to even though the custody decree stated when one party was unable to care for Seth because of illness, the other party should be notified and asked to assume care.

We are also concerned about some of the behaviors Kris engaged in immediately after Tami moved out of his house. He was frequently seen in possession of a shotgun, in the presence of Tami, her friend, and the children. He entered the apartment Tami, Matthew, and Seth were staying in the early morning, stood above them when they were sleeping, and made threatening remarks to her and the boys. Kris also repeatedly called Tami's place of employment in a harassing manner. The district court described Kris as a very controlling individual "who likes to make decisions and be in control." The court also noted Kris made decisions for Tami without her input during their relationship.

In conclusion, we find Tami is the more appropriate primary caregiver for Seth. At the time of trial, Tami had been Seth's primary caregiver for his entire life. Due to his young age, he and his mother were certainly strongly bonded. In addition, Tami has done well raising her older two sons and has shown the ability to compromise with their fathers in order to encourage positive relationships between them. Matthew's father testified Tami always keeps him informed of Matthew's activities and needs and Dan's father testified Tami has never

interfered with his ability to spend time with his son. Moreover, we are concerned about Kris's dishonesty about the seriousness of his relationship with his current wife. When directly asked about his relationship with her, Kris was not forthcoming with information about the person who would ultimately assume partial care for Seth. After careful review of the record, we reverse the decision of the district court granting physical care to Kris and remand for entering of an order establishing physical care with Tami and setting a visitation schedule between Kris and Seth. Costs are taxed equally to both parties.

REVERSED AND REMANDED.