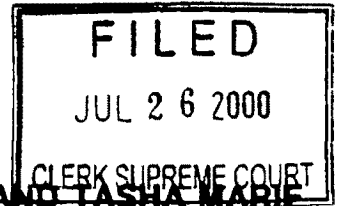


IN THE COURT OF APPEALS OF IOWA

No. 0-364 / 00-77
Filed July 26, 2000



IN RE THE MARRIAGE OF JASON ROGER CHISHOLM AND TASHA MARIE CHISHOLM

Upon the petition of
JASON ROGER CHISHOLM,
Petitioner-Appellee,

And Concerning
TASHA MARIE CHISHOLM,
Respondent-Appellant.

Appeal from the Iowa District Court for Crawford County, Richard J. Vipond, Judge.

The respondent appeals the child custody provision of the parties' dissolution decree. **AFFIRMED.**

Robert L. Brink of Eller, Brink & Sextro, Denison, for appellant.

Reed H. Reitz of Reimer, Lohman, Reitz & Niblock, Denison, for appellee.

Heard by Streit, P.J., and Vogel and Hecht, JJ.

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VOGEL, J.

Tasha Chisholm, appeals the child custody provision of the parties' dissolution decree, granting physical care of the parties' two daughters to Jason Chisholm. Although Tasha was the primary caregiver to the girls during the marriage, she engaged in dangerous behavior by inviting strangers she had only met on the Internet into the family home. This fact, along with our strong deference to the trial court's assessment of the credibility of the witnesses, leads us to affirm the placement of the children in Jason's primary care.

Background facts. Jason and Tasha were married in October 1992. They had two children during this marriage; Kelsey, born March 12, 1993, and Emily, born May 27, 1995. During the marriage, the couple brought a computer into their home. Both Jason and Tasha began to spend a large amount of time on the Internet, developing intimate relationships with other people online. Tasha invited two men she met through the Internet into the family home, where she had a sexual relationship with one of these men. Having confessed her affair to Jason, she sought marital counseling to repair the relationship. Jason, initially participated, then filed for dissolution of the marriage. The marriage was dissolved on December 13, 1999. The trial court granted joint legal custody of the children with physical care to Jason. Tasha now appeals.

Scope of review. Our review of a custody order is de novo and our primary consideration is the best interests of the children. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995); *In re Guardianship of Knell*, 537 N.W.2d 778, 780 (Iowa 1995). In assessing a custody order, we give considerable weight to the judgment of the district court, which has had the

benefit of hearing and observing the parties first-hand. *Kleist*, 538 N.W.2d at 278.

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 re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). In determining which parent serves the child's best interests, the objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and social maturity. *In re Marriage of Harris*, 499 N.W.2d 329, 332 (Iowa App. 1993). The issue is ultimately decided by determining under the whole record which parent can minister more effectively to the long-range best interests of the children. *In re Winter's Marriage*, 223 N.W.2d 165, 166 (Iowa 1974).

The parent who has been the primary caretaker of the children during the marriage will not necessarily be designated the primary caretaker at the time of a divorce. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). The role of primary caretaker is, however, critical in the development of children, and careful consideration is given in custody disputes to allowing children to remain with the parent who has been the primary caregiver. *Id.*

Physical care. Tasha contends the district court erred in granting physical care of Kelsey and Emily to Jason. Specifically, she asserts Jason was a distant parent during the marriage due to his excessive work schedule and time spent on his personal hobbies, including hunting, fishing, and archery. Tasha also alleges Jason is uncommunicative and withdrawn regarding parental decisions about their daughters. Further, she claims he has played a very

minimal role in parenting these children up to this point and is not familiar with their schedules, medical histories, or activities.

Jason, although he concedes he was not the primary caregiver during the marriage, asserts he has cut back his long work hours and has always maintained a close relationship with his daughters. Jason intends to retain the family home, allowing Kelsey and Emily to remain in the only home they have known. He testified that he feared for the safety of his daughters if left in the care of their mother due to Tasha's invitation of strangers into the family home while Kelsey and Emily were present. Tasha claims she was the primary caregiver to the children during the marriage, operating a daycare facility from her home to allow her to care for the children full-time. She maintains she was not only the primary physical caregiver for the girls, but also the parent who provided for their emotional needs as well. Tasha claims she attempted to communicate with Jason, following the breakdown of the marriage including posting a calendar to apprise him of the girls daily schedule but he would not reciprocate with open communication.

Jason contends Tasha is lacking in appropriate caregiver skills, often yelling or swearing at their daughters when she becomes frustrated. Some of this behavior was revealed to Jason after he covertly taped Tasha's phone conversations. Further, he alleges Tasha was carrying on inappropriate Internet communications during the day rather than providing adequate care, not only to their daughters, but to the other children under her supervision as well. His main concern, however, is in the fact that she demonstrated dangerously poor

judgment by inviting two different men into their family home that she had met only through sexually explicit Internet chat rooms.

The trial court determined, and we agree, that both parents are able to adequately parent the children. However, the parties both demonstrated behavior that was troubling to the court. Much of the testimony was directed to both Jason and Tasha's use of the internet and the attendant problems.

The use of the internet opens new horizons to people around the world, including those in small-town Iowa. It can be a tremendous resource of both information and linking people together, yet it is fraught with unknown risks to unsuspecting users. It is easy to make acquaintances in chat rooms on virtually any subject people wish to discuss. Both Jason and Tasha were attracted to adult chat rooms and pornography. While Tasha engaged in sexually explicit online conversation, Jason exchanged photos with a woman he met in a chat room and briefly subscribed to a pornographic site. Both Jason and Tasha used the internet for adult entertainment and we will not pass moral judgment on this type of "entertainment" by characterizing one use as more negative than the other. It is, however, appropriate and necessary to examine how each parent's use of the internet affected the children.

Jason acknowledged sending and receiving "dirty jokes" over the internet, sending a photo to a woman and utilizing a one-month subscription to a pornographic site. There was no evidence the children were in any way exposed to or affected by this conduct. Tasha admitted to communicating with men on the internet and making up what she called "fictional stories," usually of a sexual nature. Again, there is no evidence the children were adversely affected by any

of this conduct. The critical difference between Jason and Tasha's use of the internet is Tasha's personal rendezvous with her electronically introduced acquaintances. Without ever having met these people in person, she invited two of the men, on separate occasions, into the family home. These invitations put the children at great risk of harm, as strangers were given the family's address and brought into the home. Tasha claims their daughters were not home when the men were there, although she admits she had an infant in her care at the time she had sexual relations with one of the men in the home. Tasha also admits Emily came home from school before her internet acquaintance had left. To her credit, Tasha admits she used very poor judgment and sought marital counseling. Jason participated initially with the counseling, but later discontinued.

At a temporary hearing, Tasha was questioned about her sexual tryst with one of her internet acquaintances. Jason's attorney, however, used the wrong name when he questioned Tasha about whether she had engaged in extra-marital sexual relations. Tasha answered the question as asked and denied the relationship, relying on the attorney's use of the wrong name. She could honestly deny having engaged in sexual relations with "Dan" because she had actually shared physical intimacy with "Don". At trial, Tasha reluctantly admitted her intention was to mislead the judge at the temporary hearing, taking advantage of the wrong name being used in the questioning. This dodging of the issue and deceiving the court reinforces the trial court's assessment of Tasha's character.

We have carefully reviewed the trial court's findings, read in conjunction with the transcript of the trial proceedings. The trial court found Jason "very credible" and Tasha "singularly lacking in credibility." We give strong deference to the assessment of the witnesses by the trial court. Our Supreme Court has stated:

There is good reason for us to pay very close attention to the trial court's assessment of the credibility of witnesses. A trial court deciding dissolution cases "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." *In re Marriage of Callahan*, 214 N.W.2d 133, 136 (Iowa 1974). In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented. See *Lehmkuhl v. Lehmkuhl*, 259 Iowa 686, 692, 145 N.W.2d 456, 460 (1966).

In re Marriage of Urban, 359 N.W.2d 420, 423 (Iowa 1984).

In affirming the trial court, we do not underestimate Tasha's solid history as primary caregiver to the children. She was undisputedly the parent that was intricately involved in every aspect of the children's care. Nonetheless, Tasha's role as primary caregiver does not guarantee her physical care in a contested matter. *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa App. 1998).

There is no indication in the record that Jason is not capable of stepping into the role of primary caregiver. Although he has not been as involved with the details of the girls' lives, he has made some effort since the separation, including providing full-time care on alternate weekends, taking the girls fishing and camping, becoming involved in the girls' school activities, taking care of their laundry, playing games and reading to them. Tasha testified that since their marriage, they have shared cooking duties on an alternating basis for the evening meal.

To further the best interests of Kelsey and Emily, Jason must cooperate with Tasha to facilitate, at a minimum, the visitation ordered by the trial court. Further, he must not impede Tasha's contact or relationship with the girls, as the record clearly demonstrates the close bond that exists between Tasha, Kelsey and Emily. Noncompliance by Jason in either of these essential areas would be detrimental to the children.

We find strong support in the record for the trial court's ruling and, particularly, the difficult decision of physical care. On our de novo review, we affirm.

AFFIRMED.