

IN THE COURT OF APPEALS OF IOWA

No. 8-466 / 97-1229
Filed November 30, 1998

**IN RE THE MARRIAGE OF BRIAN LAVERN
KESSLER AND KIMBERLY ROSE KESSLER**

Upon the Petition of
BRIAN LAVERN KESSLER,
Appellee,

And Concerning
KIMBERLY ROSE KESSLER,
Appellant.

Appeal from the Iowa District Court for Howard County, James L. Beeghly,
Judge.

Kimberly Kessler appeals from the custodial provisions of the decree
dissolving her marriage to Brian Kessler. **AFFIRMED.**

Judith O'Donohoe of Elwood, O'Donohoe, O'Connor & Stochl, Charles City,
for appellant.

Todd Kowalke and Kevin E. Schoeberl of Story, Schoeberl & Kowalke Law
Firm, Cresco, for appellee.

Heard by Sackett, C.J., and Huitink and Vogel, JJ.

HUITINK, J.

I. Background Facts and Proceedings.

Brian and Kimberly Kessler were married on July 18, 1992. They have one child, Kerry, born May 13, 1993. Brian was thirty-two years of age at the time of trial, and Kimberly was thirty. Kimberly has two children from an earlier marriage who reside with their father.

Brian is a high school graduate and is currently employed at the Donaldson Company in Cresco, Iowa. Kimberly is also a high school graduate and obtained a teaching degree from Buena Vista College. In 1997, after a period of unemployment and a number of job changes, Kimberly obtained employment at Frances Lauer Youth Services.

The parties separated in September 1995. At that time, Kimberly left the family home with Kerry and moved in with a male friend. Brian was not informed of Kimberly's intentions and was not told of Kerry's whereabouts for at least two weeks after Kimberly left. Brian initiated this action in October 1995. The parties agreed to temporarily share primary care of Kerry. This arrangement was approved by the district court in a subsequent temporary custody order.

At trial, the parties' main contention concerned custody and physical care of Kerry. Brian's custodial case was premised on his claims of greater stability and preference to maintain Kerry in his familiar environment. He also cited Kimberly's instability and history of failed relationships with other men.

Kimberly cited her primary care experience, experience as a teacher, and close relationship with Kerry as her distinguishing parental attributes. She claimed Brian was immature, impulsive, and ill-tempered. Kimberly also cited Brian's poor relationship with her two children from a previous marriage.

The district court determined Kerry's best interests required placement of his physical care with Brian. In reaching this conclusion, the court stated:

Kim and Brian are nurturing and caring parents. They love Kerry dearly and would not intentionally allow any harm to come to their child.

While both of the parents have their faults, overall they are generally respectable people who will provide a positive role-model for Kerry, in most respects.

On balance, the court believes that Brian will be a more appropriate parent for primary physical care, since he presents the more favorable role-model in most respects, and is less distracted from his parenting responsibilities by tumultuous and frequently broken personal relationships.

On appeal, Kimberly argues the district court should have awarded her physical care of Kerry. Brian argues the district court correctly concluded that he, as the more stable parent, was better suited to Kerry's physical care. Kimberly alternatively requests more extensive visitation.

II. Standard of Review.

Our review in cases such as these 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. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. *Id.* Prior cases have little precedential value, and we must

base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. Physical Care.

In child custody cases, our first and governing consideration is the best interests of the children. The critical issue is not which parent possesses the greater right to the child, rather the controlling consideration must be the best interests of the child. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the child. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). Prior cases have little precedential value with respect to custodial issues, and each case must be decided based upon its own unique facts. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa 1995). The objective should always be to place the child in the environment most likely to bring that child to healthy physical, mental, and social maturity. *See In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974). The court should also consider the characteristics and needs of the child, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the child, the relationship of the child with each parent, the nature of each proposed environment, and the effect of continuing or changing an existing custodial status. *Id.*

There is no presumption in favor of the mother or the father. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). Greater primary care

experience is one of many factors the court considers but it does not ensure an award of physical care. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa 1995). Insofar as is reasonable and in the best interests of the child, the court should make an award of custody which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents and which will encourage the parents to share the rights and responsibilities of raising the child. *See* Iowa Code § 598.41(1) (1997). To effectuate that policy the court must consider the willingness of each party to allow the child access to the other party. *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979).

We share the district court's opinion that each parent has the capacity and interest to provide for Kerry's emotional, social, moral, material, and educational needs. Although Kimberly has more primary care experience, her dominant role has diminished following her return to full-time employment. There is evidence Brian has substantial primary care experience and has successfully attended to Kerry's needs. There is also evidence each parent enjoys a close and nurturing interpersonal relationship with Kerry. None of these considerations distinguish either parent as Kerry's preferred physical care provider.

The record concerning the parties' character, stability, and nature of the custodial environment each offers Kerry is, however, more distinct. Kimberly has moved six times since the parties separated necessitating Kerry's repeated adjustment to a new environment. Kimberly's cohabitation and violent relationships with male

companions raise serious doubts about her judgment and the wholesomeness of the environment she offers Kerry. We also note similar concerns for Kimberly's stability resulted in placement of her older children with their father.

In contrast, Brian has a history of stable employment and long-term residence in Cresco. He intends to remain in the family home and offers Kerry the security and comfort of a familiar environment. Moreover, Kimberly's claim that Brian is immature and impulsive is irreconcilable with substantial evidence of his good character and personal stability disclosed by the record.

We conclude Brian's character, stability, and custodial environment distinguish him as Kerry's preferred physical care provider. We affirm on this issue.

IV. Visitation.

Kimberly was awarded visitation on alternating weekends, holidays, and six weeks during the children's summer vacation. There is sufficient time within this schedule to accommodate Kerry's relationship with Kimberly's older children. We do not find the terms unduly restrictive or inadequate. We also affirm on this issue.

AFFIRMED.