IN THE COURT OF APPEALS OF IOWA

No. 4-399 / 94-429

JOSEPH E. PROPST,

Plaintiff-Appellee,

vs.

SHERRY ANN LETZ,

Defendant,

and

JODIE LETZ,
Intervenor-Appellant.

FILED
DEC 14 1994
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Ross A. Walters, Judge.

Intervenor appeals from a judgment of the district court awarding permanent custody of intervenor's grandchild to his natural father. **AFFIRMED.**

Jill S. Rolek, Des Moines, for appellant.

Harlan M. Hockett and Joseph G. Bertogli, Des Moines, for appellee.

Considered by Donielson, C.J., and Cady and Huitink, JJ.

CADY, J.

Intervenor, Jodie Letz, appeals from the district court judgment awarding permanent custody of her grandchild, Christopher, to his natural father, Joe Propst. Upon reviewing the record, we affirm the district court's judgment.

Joe Propst and Sherry Letz are the parents of Christopher, born February 28, 1992. Joe and Sherry were not married but cohabitated together. Sherry is also the mother of another child, Eric, born October 21, 1988. The relationship between Joe and Sherry was intermittently abusive. Shortly after Sherry became pregnant with Christopher, Joe left. After Christopher's birth, Joe and Sherry moved back in together, but Joe moved out permanently in November 1992.

Sherry's pre-natal and delivery expenses were paid by the state of Iowa, and Sherry received ADC payments. After the State began collection proceedings against him, Joe filed a petition seeking to establish paternity and custody of Christopher. From late 1992 until the time of trial, Christopher and Eric spent much of their time with Sherry's mother, Jodie Letz. Jodie was the primary caretaker of the children while Joe and Sherry worked.

After paternity had been established, Joe filed an application requesting temporary custody. On April 19, 1993, the district court entered a temporary order granting Sherry physical custody of Christopher. For the first

time, regular visitation was established for Joe. On May 27, 1993, Sherry was killed in a helicopter crash while she was being flown to a hospital after an automobile accident. That same day, Joe filed an application for an emergency order stating that Sherry had been killed and that he should be awarded temporary custody of Christopher. The district court granted the ex parte order the same day.

On June 10, 1993, Jodie filed an application to set aside the temporary order. Jodie was designated an intervenor. The district court affirmed the temporary custody with Joe, but granted Jodie liberal visitation rights. This consisted of weekday child care of Christopher while Joe worked. The court also ordered a custody investigation. Trial on the issue of custody was held on February 1 and 2, 1994. At trial, Jodie testified she feared that Christopher would suffer physical abuse in the hands of Joe. Jodie also noted that Sherry had signed an affidavit before her death expressing her wish that Jodie take care of the children. Joe noted that Jodie has consistently attempted to prevent him from visiting Christopher. The district court determined that although both parties had faults, it was in the best interests of Christopher that he be placed with Joe. The court specifically noted that Jodie had failed to foster any close relationship between Christopher and Joe. Jodie was granted liberal visitation. The court declined to order

visitation or custody regarding Eric, since Eric's natural father had initiated other proceedings. Jodie has appealed.

Jodie maintains Christopher should have been placed with her because her home is the only one Christopher has known. Jodie argues she was the primary care giver after Christopher's birth. She contends that although her house is unkempt, it is because she and her husband are remodeling. Jodie also notes that Joe was physically abusive to Sherry in the past, and there is a real fear that he may be abusive to the child. Jodie additionally argues that Christopher and Eric have developed a close bond and should not be separated.

We review this equity action de novo. Iowa R. App. 4. We give weight to the factual findings of the trial court, especially when considering the credibility of the witnesses, but we are not bound by them. Iowa R. App. 14(f)(7); In re Interest of Rohde, 503 N.W.2d 881, 882 (Iowa 1993). Accordingly, we review both the facts and the law and adjudicate right's of the parties anew. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981).

In child custody cases the best interest of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) (1993); In re Marriage of Weidner, 338 N.W.2d 351, 355-56 (Iowa 1983). All factors bare on the "first and governing consideration" -- the court's

determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 421 (Iowa 1984). These factors apply whether the parties are dissolving their marriage or are unwed. Jacobson v. Gradin, 490 N.W.2d 79, 80 (Iowa App. 1992).

When the parent awarded custody of the child cannot act as custodian because the parent had died the court shall award custody including physical care to the surviving parent unless the award is not in the child's best interest. Iowa Code § 598.41(6) (1993); Thompson v. Collins, 391 N.W.2d 267, 268 (Iowa App. 1986). Moreover, there is a presumptive preference for parental custody and only when neither parent is a suitable custodian should an alternative be considered. In re Marriage of Reschley, 334 N.W.2d 720, 721 (Iowa 1983). The presumption of parental preference may be rebutted upon proof by the non-parent seeking custody that the parent is not a suitable custodian for the child. Id. Courts will not take children from their parents simply because another home offers more advantages. Id. (citing In re Burney, 259 N.W.2d 322, 324 (Iowa 1977)).

In determining the best interests of the child, it is appropriate to evaluate the characteristics and qualifications of both parties available to take custody of Christopher. See Reschley, 334 N.W.2d at 721. Jodie is thirty-eight years old and has been married to her thrid husband, David Letz for ten years. David is employed as a

plant operator at the Veterans Administration Hospital in Des Moines. Jodie is employed on an occasional basis as a clown at a local restaurant. Jodie and David live in a two-story home in Des Moines with Eric and Jodie's father. Christopher shares a bedroom with his half-brother Eric. There is also a large extended family near the Letz' home.

Jodie's physical health is good, however, she has a history of mental health problems associated with traumatic incidents in her life. She was abused as a child, had various marital difficulties, had difficulty raising Sherry, and most recently was the victim of improper sexual contact by a minister who was counseling her. She has previously been diagnosed with adjustment disorder, depression, and post-traumatic stress disorder. She sought treatment for these problems and has improved to the point where she no longer needs therapy. We agree with the trial court that Jodie's recognition of her problems is a positive factor and her mental health is not a substantial factor in the custody determination.

Jodie cared for Christopher the majority of his life prior to trial and during the pendency of the action Jodie provided daycare for Christopher while Joe worked. Expert testimony indicated she is Christopher's "psychological parent." The custody investigator stated Jodie and Christopher have "good quality" interaction. Finally, Jodie is currently the guardian of Christopher's half-brother Eric. Allowing her to retain custody of

Christopher upholds the "strong interest" in keeping children of broken homes together. See In re Marriage of Orte, 389 N.W.2d 373, 374 (Iowa 1986).

Joe is twenty-one years old. He currently works for Eco Tec Contractors as an office manager. He has held this position for approximately two years. Joe currently lives in Des Moines with his mother and step-father, Mike and Anita Heilman. He testified, however, that he plans to move out of the Heilman home as soon as he can.

With respect to his current relationship with Christopher, Joe has completed two parenting classes and was participating in a third at the time of trial. The child custody investigator, testified Joe interacts well with Christopher and recommended custody be placed with Joe. Joe also expressed a desire to maintain and foster Christopher's relationship with Eric and the Letz family. Since implementation of the temporary custody order, he has not interfered with Jodie's visitation with Christopher.

Joe, however, has not always been this stable. He previously had a pattern of short-term residences and was unable to maintain steady employment. During the time he and Sherry lived together, they frequently lacked money for groceries, diapers, and laundry. Joe was also arrested for domestic abuse of Sherry four months after Christopher's birth. Finally, Joe provided no financial support to Sherry and Christopher after he permanently moved out.

We are concerned about Joe's belated interest in Christopher and the abusive nature of his relationship with Sherry. Notwithstanding, we believe his behavior over the past year and a half demonstrates the development of maturity and stability. The temporary custodial arrangement has worked reasonably well despite the unfounded child abuse reports initiated by both parties. Christopher is healthy, well adjusted, and adequately cared for. Joe has participated in the day-to-day care of Christopher, including meal preparation, laundry, and discipline. Additionally, Joe has demonstrated the desire and capability to improve his parenting skills. No evidence was presented that Christopher is in any danger or that Joe is not meeting his current needs.

We conclude, Jodie has failed to show Joe is an unsuitable custodian for Christopher. Although, this means Eric and Christopher will be separated, we believe it is in Christopher's long-term best interest to be in his father's custody. See In re Marriage of Smith, 269 N.W.2d 406, 407 (Iowa 1978) (holding presumption exists that child's parents will most likely fulfill the child's best interests); Iowa Code § 633.559 (1993). We affirm the trial court's order granting Joe custody of Christopher subject to Jodie's visitation rights.

On appeal, Joe requests the Court to order Jodie to pay a reasonable amount of his attorney fees. An award of attorney fees is not a matter of right, but rests with the

court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We decline to award Joe attorney fees on appeal.

AFFIRMED.