

IN THE COURT OF APPEALS OF IOWA

No. 8-735 / 98-751

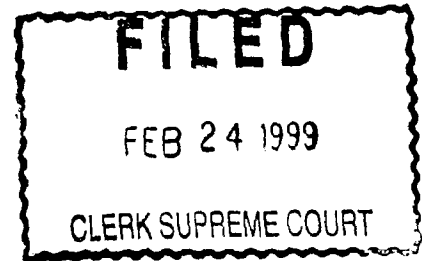
**IN RE THE MARRIAGE OF KIMBERLY SUE STICKLER
AND TIMOTHY DALE STICKLER**

Upon the Petition of
KIMBERLY SUE STICKLER,

Appellee,

And Concerning
TIMOTHY DALE STICKLER,

Appellant.



Appeal from the Iowa District Court for Clinton County, David H. Sivright,
Jr., Judge.

Timothy Dale Stickler appeals the custody provisions of the parties' dissolution decree contending the trial court erred in granting petitioner sole legal custody and permanent physical care of their child. **AFFIRMED.**

Daniel L. Bray and Chad A. Kepros of Bray & Klockau, P.L.C., Iowa City, for
appellant.

M. Leanne Tyler of Soper & Tyler, P.C., Davenport, for appellee.

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

ZIMMER, J.

Timothy Stickler appeals the custodial and visitation provisions of the decree dissolving his marriage to Kimberly Stickler. He also contends the trial court erred in failing to grant his motion for new trial. We affirm.

Background Facts

Timothy and Kimberly Stickler were married in December 1988. Their only child, Dale Charles Stickler, was born November 8, 1995.

Timothy has a bachelor of science degree in mechanical engineering which he completed during the parties' first year of marriage. Kimberly has a degree from a two-year college. When the parties married, she was employed full time as a manager of a deli restaurant.

The parties lived in South Carolina until May of 1995 when they moved to Clinton, Iowa, where Timothy had been transferred. At the time of trial, Timothy was employed as an engineer by a chemical company in Clinton. By mutual decision of the parties, Kimberly had not worked outside the home since 1989.

In 1996, Kimberly took Dale and moved to North Carolina to stay with her parents after being physically abused by Timothy. Kimberly filed a petition for dissolution of marriage in January of 1997 and returned to Iowa in March 1997 to be present for the dissolution proceedings. Trial commenced September 23, 1997.

The district court entered a decree which granted Kimberly sole legal and physical custody of Dale subject to Timothy's right to visitation. The trial court found Timothy was controlling and abusive during the marriage. The court denied

Timothy's motion for a new trial based on allegedly newly discovered evidence. Timothy now appeals.

Scope of Review

In this equity action, our review is de novo. See Iowa R. Civ. P. 4; *In re Marriage of Liebich*, 547 N.W.2d 844, 847 (Iowa App. 1996). We have a duty to examine the entire record and adjudicate anew the rights on the issues properly presented. See *In re Marriage of Steenhoek*, 305 N.W.2d 448, 453 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. See Iowa R. App. P. 14(f) (7).

Custody

In assessing an issue of child custody, the controlling consideration is the best interest of the children. See *Petition of Purscell*, 544 N.W.2d 466, 468 (Iowa App. 1995). The court determines placement according to which parent can minister more effectively to the children's long range best interest. See *In re Marriage of Buttrey*, 538 N.W.2d 322, 324 (Iowa App. 1995) (citing *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984)). The court's objective is to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. See *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). 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. See *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa App. 1996).

We identify numerous factors to help determine which parent should serve as a primary caretaker of the children in a divorce. *See In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997) (citation omitted); Iowa Code § 598.41 (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. *See In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

Our statutes express a preference for joint custody over other custodial arrangements. *See In re Marriage of Miller*, 390 N.W.2d 596, 598–99 (Iowa 1986). To deny joint custody, there must be clear and convincing evidence joint custody is unreasonable and not in the best interests of the child. *See* Iowa Code § 598.41(2); *Miller*, 390 N.W.2d at 599.

Pursuant to Iowa Code section 598.41 and prior case law, domestic abuse is a factor in determining the custodial parent. *See Daniels*, 568 N.W.2d at 54; *In re Marriage of Brainard*, 523 N.W.2d 611, 614–15 (Iowa App. 1994). Domestic abuse is, in every respect, dramatically opposed to a child's best interest. *See Daniels*, 568 N.W.2d at 55. The Iowa legislature has created a presumption against an award of joint custody upon a finding of a history of domestic abuse. *See* Iowa Code § 598.41 (1)(b). The presumption created by section 598.41 (1)(b) is rebuttable. *See In re Marriage of Ford*, 563 N.W.2d 629, 632 (Iowa 1997).

Timothy contends the trial court's decision to award sole custody to Kimberly is not in the best interests of Dale and is not supported by the evidence. We disagree. The record in this case provides ample support for the trial court's finding of a history

of long term psychological and recent physical domestic abuse by Timothy. Kimberly's accounts of abusive behavior are corroborated by other credible evidence including letters written by Timothy to Kimberly acknowledging abusive behavior. The record makes clear the trial court gave careful consideration to the domestic abuse issue before concluding that the history of domestic abuse had been established. Although Timothy has been abusive to Kimberly, it should be noted Timothy has never harmed Dale nor dealt with him in an abusive manner.

The trial court found that Timothy did not overcome the presumption created by section 598.41(1)(d) against awarding joint custody upon a finding of a history of domestic abuse. Once again we agree with the trial court's conclusion. Substantial evidence was presented that Timothy has been a controlling, dominating, and demanding person who attaches a high priority to his own needs. We conclude there is a high risk of further abusive behavior by Timothy if the parties are required to maintain a close relationship. Awarding joint custody to Timothy and forcing the parties to make joint decisions may place Kimberly's safety in jeopardy when the parties disagree. This is a factor in determining whether joint custody is appropriate. *See Iowa Code § 598.41(2)* We conclude from the evidence that the presumption created by section 598.41 (1)(b) has not been rebutted.

We agree with the trial court that Kimberly is better able to provide an environment likely to bring Dale to healthy physical, mental, and social maturity. Placing Dale in his mother's sole custody and physical care is in his long term best interest. Although Timothy is an intelligent, successful engineer who loves his son

very much, we share the trial court's view that Timothy's desire for custody of his son is, to some extent, rooted in the fulfillment of his own needs rather than in Dale's best interests. We believe Kimberly is more likely to provide a nurturing environment where Dale's needs are in a primary position and Timothy's place in his life is respected.

Timothy contends the visitation schedule established by the trial court is inadequate. We conclude the visitation schedule is reasonable after considering the factual circumstances of this case.

Motion for New Trial

Following trial, Timothy moved for a new trial pursuant to Iowa Rule of Civil Procedure 244. He based his motion on two considerations: (1) newly discovered evidence of the severity of Dale's speech problem; and (2) a newly discovered letter which, according to Timothy, demonstrated Kimberly's allegations of domestic abuse were false. The trial court denied Timothy's motion for new trial following hearing.

The trial court has broad but not unlimited discretion in ruling on a motion for a new trial. *See Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 13 (Iowa 1990). Motions for a new trial based on newly discovered evidence are not favored. *See In re D.W.*, 385 N.W.2d 570, 583 (Iowa 1986). We will not disturb the trial court's ruling unless the evidence clearly shows the court has abused its discretion. *See Iowa-Illinois Gas & Elec. Co.*, 497 N.W.2d at 821, 828 (Iowa 1993); *Kinear*, 463 N.W.2d at 13. We will only find an abuse of discretion if the trial court clearly exercised its discretion on untenable grounds or acted unreasonably. *See Kinear*, 463 N.W.2d at 13.

Iowa Rule of Civil Procedure 244(g) allows the parties to seek a new trial on the grounds material evidence was discovered that could not with reasonable diligence have been discovered and produced at trial. A party seeking a new trial on such grounds must demonstrate 3 things: (1) the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial; (2) the evidence is material and not merely cumulative or impeaching; and (3) the evidence would probably change the result if a new trial was granted. *See In re D.W.*, 385 N.W.2d at 583. Under Iowa law, “newly discovered evidence” sufficient to merit a new trial is evidence that existed at the time of trial, but which, for excusable reasons, the party was unable to produce at the time. *Id.*

After examining all of the evidence de novo, including the trial record and the affidavits attached to the post trial motions, we conclude the newly discovered evidence on which Timothy relies is cumulative, impeaching in nature, and unlikely to change the result if a new trial is granted. The trial court did not abuse its discretion in denying respondent’s motion for a new trial.

Having considered all arguments properly before us on appeal, we affirm the district court’s decree.

AFFIRMED.